Georgia State University Law Review

Volume 27
Issue 3 *Spring 2011*

Article 7

3-1-2011

Work Product Privilege: The Future of Tax Accrual Work Paper Discovery in the Eleventh Circuit After Textron

Tracy Hamilton

Follow this and additional works at: http://digitalarchive.gsu.edu/gsulr

Part of the Law Commons

Recommended Citation
Hamilton, Tracy (2010) "Work Product Privilege: The Future of Tax Accrual Work Paper Discovery in the Eleventh Circuit After Textron," *Georgia State University Law Review*: Vol. 27: Iss. 3, Article 7.
Available at: http://digitalarchive.gsu.edu/gsulr/vol27/iss3/7

This Article is brought to you for free and open access by the College of Law Publications at Digital Archive @ GSU. It has been accepted for inclusion in Georgia State University Law Review by an authorized administrator of Digital Archive @ GSU. For more information, please contact digitalarchive@gsu.edu.

WORK PRODUCT PRIVILEGE: THE FUTURE OF TAX ACCRUAL WORK PAPER DISCOVERY IN THE ELEVENTH CIRCUIT AFTER *TEXTRON*

Tracy Hamilton*

INTRODUCTION

The struggle between the Internal Revenue Service (IRS) and business taxpayers regarding the discovery of tax accrual work papers is not a new battle.[1] The IRS, seeking a road map of the corporation's vulnerable tax positions, argues that tax accrual work papers are prepared for ordinary business purposes and are not subject to the protection of the work product privilege as established in *Hickman v. Taylor* and codified in Federal Rule of Civil Procedure 26(b)(3).[2] Corporate taxpayers, desperate to keep the IRS from discovering work papers containing the probability of success analysis of vulnerable tax positions (not to mention potential tolerance for settlement), argue that tax accrual work papers are prepared in anticipation of potential litigation with the IRS, contain

* J.D. Candidate, 2011, Georgia State University College of Law.

1. Tax accrual work papers typically consist of a listing of vulnerable tax positions and the company's assessment of likelihood of success on each position if the IRS challenges it. *See* discussion *infra* Part I.A. *See generally* United States v. Arthur Young & Co., 465 U.S. 805 (1984) (IRS challenge of a judgment holding that tax work papers are privileged); United States v. Adlman, 134 F.3d 1194 (2d Cir. 1998) (appeal of enforcement of IRS summons seeking taxpayer's internal memo regarding tax consequences of proposed business transaction); United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982) (appeal of enforcement of IRS summons seeking taxpayer's tax accrual work papers); I.R.S. Announcement 2002-63 (July 8, 2002) (IRS expands internal policy on seeking tax accrual work papers).

2. *See* Hickman v. Taylor, 329 U.S. 495, 510–11 (1947) ("[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he . . . prepare his legal theories and plan his strategy without undue and needless interference."); United States v. Textron Inc., 507 F. Supp. 2d 138, 150 (D.R.I. 2007) ("The IRS asserts that the workpapers were prepared in the ordinary course of business and in order to satisfy the requirements of the securities laws that financial statements filed by publicly traded companies comply with GAAP . . . ."); FED. R. CIV. P. 26(b)(3) ("[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial . . . .").

mental impressions and strategy related to the potential litigation, and are subject to protection under the work product privilege doctrine.[3]

The Supreme Court has not addressed whether tax accrual work papers, created both for financial reporting purposes and to aid in potential disputes with the IRS, fall under the protection of the work product privilege as material created "in anticipation of litigation."[4] Circuit courts, faced with the question of whether tax accrual work papers were created in anticipation of litigation, have developed two distinct tests for analyzing the material: the "primary motivating purpose" test and the "because of" litigation test.[5] A third test was added on August 13, 2009, when the First Circuit, in *United States v. Textron Inc.*, overturned the district court's application of the because of litigation test and established a new, narrow "for use" test.[6]

The Eleventh Circuit has not addressed whether tax accrual work papers are protected by the work product privilege, nor has it formally adopted a test for determining whether material meets the in anticipation of litigation requirement for work product protection.[7]

---

3. *See Textron*, 507 F. Supp. 2d at 150 ("Textron asserts that its tax accrual workpapers were prepared because it anticipated the possibility of litigation with the IRS regarding various items on its return and it points to the hazards of litigation percentages as evidence that the possibility of such litigation was the reason for preparing the workpapers.").

4. *See* United States v. Textron Inc., 577 F.3d 21, 26 (1st Cir. 2009) ("[T]he Supreme Court has not ruled on the issue before us, namely, one in which a document is not in any way prepared 'for' litigation but relates to a subject that might or might not occasion litigation."); *id.* at 43 (Torruella, J., dissenting) ("The time is ripe for the Supreme Court to intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country."); Regions Fin. Corp. v. United States, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *3 (N.D. Ala. May 8, 2008) ("The Supreme Court has not provided a controlling standard, and a split has developed between the various courts of appeal.").

5. *See El Paso*, 682 F.2d at 542 ("Litigation need not be imminent . . . as long as the *primary motivating purpose* behind the creation of the document was to aid in possible future litigation." (emphasis added) (quoting United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981))); *Adlman*, 134 F.3d at 1195 ("We hold that a document created *because of* anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision . . . ." (emphasis added)).

6. *See Textron*, 577 F.3d at 29 (3-2 decision) ("From the outset, the focus of work product protection has been on materials prepared *for use* in litigation, whether the litigation was underway or merely anticipated." (emphasis added)); *id.* at 32 (Torruella, J., dissenting) ("The majority purports to follow this [*because of* litigation] test, but never even cites it. Rather, in its place, the majority imposes a 'prepared for' test, asking if the documents were 'prepared for use in possible litigation.'").

7. *See* discussion *infra* Part II.A; *Regions*, 2008 WL 2139008, at *5 (noting that the Eleventh Circuit had not adopted a test, and it was not necessary to decide which test should be adopted in this case because the material at issue would be protected under either the because of or primary motivating

Part I of this Note discusses the various tests adopted for determining whether material is prepared in anticipation of litigation, including the recent creation of a new test by the First Circuit Court's decision in *Textron*.[8] Part II analyzes the existing primary motivating purpose and because of tests, the history of the Eleventh Circuit's decisions regarding material prepared in anticipation of litigation, and the potential impact on the Eleventh Circuit of the new for use test established by the First Circuit in *Textron*.[9] Part III proposes that the Eleventh Circuit formally adopt the because of litigation test based on the merits of this test and the weaknesses of the primary motivating purpose and the new for use tests.[10]

I. BACKGROUND

A. The Purpose of Tax Accrual Work Papers

The tax accrual work papers of interest to the IRS[11]—and litigated in the courts—typically consist of schedules and other material prepared by the corporation's lawyers and tax department.[12] The schedules list the tax positions reported on the corporation's tax return that could be vulnerable to attack by the IRS.[13]

Publicly traded corporations are required by law to have their financial statements audited by independent public accountants to ensure compliance with Generally Accepted Accounting Principles

---

factor test); *see also* Michelle M. Henkel, Textron*: The Debate Continues as to Whether Auditor Transparency Waives the Work Product Privilege*, 50 TAX MGMT. MEMORANDUM 251, 253 n.22 (2009) (listing the circuits adopting one of the two main tests and noting that the Tenth and Eleventh Circuits have yet to adopt tests).

8. *See* discussion *infra* Part I.

9. *See* discussion *infra* Part II.

10. *See* discussion *infra* Part III.

11. The term "tax accrual work papers" is a general term used to indicate work papers that analyze potential tax liabilities that could arise due to a dispute with a taxing authority. These work papers are also known as "tax pool analysis work papers," "FIN 48 work papers," or "tax reserve work papers." *See, e.g.*, United States v. El Paso Co., 682 F.2d 530, 533 (5th Cir. 1982) ("This appeal is centrally concerned with documents known to the accounting profession under various names—the noncurrent tax account, the tax accrual work papers, and the tax pool analysis.").

12. *See* United States v. Arthur Young & Co., 465 U.S. 805, 812–13 (1984); United States v. Textron Inc., 577 F.3d 21, 23 (1st Cir. 2009); *El Paso*, 682 F.2d at 532–34.

13. *See Arthur Young*, 465 U.S. at 812–13; *Textron*, 577 F.3d at 23; *El Paso*, 682 F.2d at 532–34.

(GAAP).[14] As part of this process, GAAP requires that the corporation have adequate liabilities recorded for uncertain tax benefits (tax reserves).[15] The process requires that the corporation identify vulnerable tax positions and quantify the ultimate potential liability.[16] First, the entity must determine if it is more likely than not that a specific tax position will be sustained on examination based on its technical merits.[17] If the position is more likely than not to be sustained, the entity must measure the position at "the largest amount . . . greater than 50 percent likely of being realized upon ultimate settlement with a taxing authority."[18] The resulting tax reserve is recorded on the entity's financial statements.[19] In essence, these tax accrual work papers evaluate the likelihood of success in a dispute with the IRS and calculate the potential liability related to the specific tax position if disputed.[20] The tax accrual work papers serve

14. 15 U.S.C. § 78(l) (2006) (outlining registration application procedure with the Securities and Exchange Commission requiring balance sheets certified by a registered public accounting firm); 15 U.S.C. § 78(m) (2006) (outlining annual reporting requirement of publically registered entities requiring quarterly and annual reports certified by a registered public accounting firm).

15. *See* ACCOUNTING FOR UNCERTAINTY IN INCOME TAXES, Interpretation No. 48, ¶ 17 (Fin. Accounting Standards Bd. 2006) (codified at FASB CODIFICATION § 740-10-25-16 (Fin. Accounting Standards Bd. 2009) (on file with author) [hereinafter FASB Interpretation No. 48] (requiring establishment of liability for uncertain tax positions). The Financial Accounting Standards Board (FASB) is the organization that establishes and issues standards governing financial reporting by nongovernmental entities. Facts about FASB, FINANCIAL ACCOUNTING STANDARDS BOARD, http://www.fasb.org/jsp/FASB/Page/SectionPage&cid=1176154526495. The FASB issues literature that makes up part of the body of financial accounting guidance known as Generally Accepted Accounting Principles (GAAP). *See* Generally Accepted Accounting Principles, FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD, http://www.fasab.gov/accepted.html. This literature includes Statements of Financial Accounting Standards (FAS) and Interpretations (FIN). *See id.* On July 1, 2009, the FASB released its Accounting Standards Codification (FASB Codification), which was the culmination of an effort by the FASB to combine and organize the existing GAAP literature. *See* Accounting Standards Codification: Notice to Constituents (v 4.1) About the Codification (Apr. 30, 2010), http://asc.fasb.org/imageRoot/18/6896518.pdf.

16. *See* FASB Interpretation No. 48, *supra* note 15, at ¶¶ 5–8 (discussing recognition and measurement steps).

17. *See id.* at ¶ 6 (outlining first step of whether or not to recognize a tax benefit created by a particular tax position).

18. *See id.* at ¶ 8 (outlining second step of calculating the amount to reserve related to the recognized tax position).

19. The tax reserve amount that is established on the company's financial statements is the difference between the full benefit of the tax position and the most likely settlement scenario. *See id.* at ¶ 17.

20. *Id.*; United States v. Textron Inc., 577 F.3d 21, 23 (1st Cir. 2009) ("The final spreadsheets list each debatable item, including in each instance the dollar amount subject to possible dispute and a percentage estimate of the IRS' chances of success.").

a dual-purpose—they are prepared to comply with current financial reporting requirements, and they aid in business decisions regarding whether to litigate a particular issue or possible settlement scenarios.[21] Courts have not agreed on whether dual-purpose material properly fits under the definition of prepared in anticipation of litigation.[22] The result has been the development of various tests to analyze material under the in anticipation of litigation requirement of Rule 26(b)(3).[23]

B. Work Product Privilege and the in Anticipation of Litigation Requirement

Hickman v. Taylor is the leading case for the principle of the work product privilege.[24] In *Hickman*, the Supreme Court held that certain documents and other tangible things prepared during litigation, when not protected by another privilege (such as the attorney-client privilege), are nonetheless protected from discovery by opponents because they contain the attorney's thoughts, ideas, and strategy.[25] This principle was codified by Federal Rule of Civil Procedure 26(b)(3), which sets forth the requirement for protection as "prepared

21. *See* 15 U.S.C. § 781(l) (2006) (requiring financial statements be certified by a registered public accounting firm); 15 U.S.C. § 78(m) (2006) (requiring annual reports certified by independent public accountants). For discussion by courts of dual-purpose documents, see, for example, *United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998); *Textron*, 577 F.3d at 33 (Torruella, J., dissenting).

22. *See Adlman*, 134 F.3d at 1195 (holding that material created because of anticipated litigation does not lose work product protection simply because it has a dual business purpose). *But see Textron*, 577 F.3d at 26 (utilizing new for use in litigation test and holding dual-purpose documents not protected because not prepared for use in possible litigation); United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982) (utilizing primary motivating purpose test and holding dual-purpose documents not protected).

23. *See* discussion *infra* Part I.B.

24. Hickman v. Taylor, 329 U.S. 495 (1947); *see, e.g.*, *Textron*, 577 F.3d at 25 (noting that the work product privilege is derived from *Hickman v. Taylor*); United States v. Roxworthy, 457 F.3d 590, 593 (6th Cir. 2006) ("The 'work product privilege' was first recognized by the Supreme Court in *Hickman v. Taylor* . . . ."); EDNA SELAN EPSTEIN & MICHAEL M. MARTIN, AM BAR ASS'N, SECTION OF LITIG., THE ATTORNEY–CLIENT PRIVILEGE AND THE WORK–PRODUCT DOCTRINE 100 (1989) (1982) ("Discussion of the work-product doctrine must begin with the Supreme Court's seminal decision in *Hickman v. Taylor* . . . .").

25. *Hickman*, 329 U.S. at 510–11.

in anticipation of litigation or for trial."[26] Clearly, work product containing the attorney's thoughts and strategy that are prepared *for trial* are protected,[27] but how far should the work product protection extend? Should material that contains the attorney's thoughts, ideas, and strategies but that is *not* prepared for trial be discoverable?[28]

The Supreme Court has not established a test for determining whether material is prepared in anticipation of litigation.[29] Circuit courts have struggled to apply the prepared in anticipation of litigation requirement, and various tests have evolved for analyzing material that is not prepared for trial but nonetheless may be protected work product.[30] The Second Circuit has adopted a because of litigation test, holding that work product privilege protection extends to tax accrual work papers which would not be prepared "but for" the potential for litigation, despite the dual-purpose of the work papers.[31] The Fifth Circuit adopted a more narrow primary motivating purpose test, holding that tax accrual work papers are not protected by the work product privilege because the immediate and primary purpose of the work papers is to comply with relevant accounting standards, resulting in a clean audit opinion of the company's financial statements, despite the use of the work papers in potential litigation.[32] The First Circuit, in its recent decision in *United States v. Textron, Inc.*, seemed to ignore the adopted because of litigation test and created a new for use in litigation test, significantly

26. FED. R. CIV. P. 26(b)(3) ("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 . . . .").

27. *Id.*

28. *See Textron*, 577 F.3d at 26 ("[T]he Supreme Court has not ruled on the issue before us, namely, one in which a document is not in any way prepared 'for' litigation but relates to a subject that might or might not occasion litigation.").

29. *See id.*; *id.* at 43 (Torruella, J., dissenting); Regions Fin. Corp. v. United States, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *3 (N.D. Ala. May 8, 2008).

30. *See* United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982) (primary motivating purpose test); United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998) (because of litigation test); *Textron*, 577 F.3d at 26 (new for use in litigation test).

31. *Adlman*, 134 F.3d at 1195.

32. *See El Paso*, 682 F.2d at 542.

narrowing the scope of protection historically provided to tax accrual work papers in the First Circuit.[33]

1. Because of Litigation Test

The Second Circuit first applied the because of litigation test in *United States v. Adlman*.[34] The court vacated and remanded the district court's decision enforcing an IRS summons, the subject of which was a memorandum evaluating the tax consequences of possible litigation with the IRS around a proposed corporate reorganization.[35] The court of appeals held that material "created because of anticipated litigation" that contains the "mental impressions, conclusions, opinions or theories" of the attorney does not lose protection just because the material has a dual-purpose.[36] The court further stated that "[w]here a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3)."[37] This standard allows material, which is created in anticipation of litigation but happens to have a dual-purpose of assisting in business decisions, protection as work product.[38] The because of litigation test has been widely adopted and is the most prevalent test utilized by circuit courts to analyze material under the in anticipation of litigation requirement for work product privilege.[39] This test views the underlying premise of the work

33. *See Textron*, 577 F.3d at 32 (Torruella, J., dissenting) (noting that while the majority purports to follow the because of test, it instead applies a new for use test that "is an even narrower variant of the widely rejected 'primary motivating purpose' test . . . specifically repudiated by this court").

34. *Adlman*, 134 F.3d at 1195.

35. *Id.* at 1197. This was a case of first impression for the Second Circuit. The court performed a thorough analysis of the possible tests it could use to determine whether a litigation analysis prepared to assist the company in making a business decision could be protected by the work product doctrine. *Id.*

36. *Id.* at 1195.

37. *Id.*

38. *Id.* (holding that dual-purpose document containing legal analysis of outcome of potential litigation was not denied protection simply because it aided in business decision of whether to pursue the transaction).

39. Regions Fin. Corp. v. United States, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *5 (N.D. Ala. May 8, 2008) ("[T]he court concludes that the Eleventh Circuit would align itself with the majority of the other courts of appeal and adopt the 'because of litigation' test."). For other courts adopting the because of test, see Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992); Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987); Senate of P.R. v. U.S. Dep't of

product privilege as that of protecting the attorney's mental impressions and strategy and accepts as a possibility that some material created in the ordinary course of business will be protected.[40]

2. *Primary Motivating Purpose Test*

The Fifth Circuit articulated the primary motivating purpose test in *United States v. El Paso, Co.*[41] Here, the Fifth Circuit affirmed the district court's enforcement of an IRS summons for certain tax accrual work papers and held that the work product privilege extended to material prepared in anticipation of litigation only when "the primary motivating purpose behind the creation of the document was to aid in possible future litigation."[42] The court interpreted the advisory committee notes to Federal Rule of Civil Procedure 26(b)(3) to exclude any material that is assembled in the ordinary course of business even if that material may have been prepared because of potential litigation.[43] Therefore, under this test, any material that is prepared in the ordinary course of business or because of public requirements, despite containing the mental impressions or theories of attorneys, can be denied work product protection.[44] This test is

---

Justice, 823 F.2d 574, 587 n.42 (D.C. Cir. 1987); Binks Mfg. Co. v. Nat'l Presto Indus., Inc., 709 F.2d 1109, 1118–19 (7th Cir. 1983); *In re* Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979).

40. *Adlman*, 134 F.3d at 1195 (noting that a business document does not necessarily "lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation").

41. *See* United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982) ("Litigation need not be imminent . . . as long as the *primary motivating purpose* behind the creation of the document was to aid in possible future litigation." (emphasis added) (quoting United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981))).

42. *Id.* at 542 (quoting United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981)).

43. *Id.* ("Excluded from work product materials, as the advisory committee notes to Rule 26(b)(3) make clear, are 'materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation . . . .'"). However, the advisory committee's notes go on to explain this statement as reiterating the holding in *Hickman v. Taylor* that relevant facts are always discoverable, even if those facts are in a document not otherwise discoverable. Fed. R. Civ. P. 26(b) advisory committee's note (1970), *reprinted in* Judicial Conference of the United States, *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 501 (70) [hereinafter *1970 Amendments*].

44. *El Paso*, 682 F.2d at 542–43 ("Even assuming that El Paso's tax pool analysis otherwise qualifies for work product protection, we hold the doctrine unavailable here because the tax pool analysis is not prepared 'in anticipation of litigation.'").

more narrow than the because of litigation test because the primary motivating purpose test will deny protection to work papers containing the mental impressions of attorneys with respect to possible litigation simply because there is a business use.[45] The primary motivating purpose test has been rejected by many courts,[46] criticized as being too narrow and inconsistent with the purpose of the work product privilege, which is to protect the mental impressions and strategies of attorneys in preparing for potential litigation.[47]

3. *The For Use in Litigation Test*

In 2008, the United States District Court for the District of Rhode Island, applying the because of litigation test adopted by the First Circuit in *Maine v. U.S. Department of the Interior*,[48] rejected an IRS summons seeking tax accrual work papers.[49] Despite the taxpayer's need to create these work papers to obtain a clean audit opinion, the court held that because these work papers were prepared because of

45. *Id.*

46. *See* United States v. Adlman, 134 F.3d 1194, 1199 (2d Cir. 1998) ("Framing the inquiry as whether the primary or exclusive purpose of the document was to assist in litigation threatens to deny protection to documents that implicate key concerns underlying the work-product doctrine."); Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 68 (1st Cir. 2002) (adopting the because of test and noting the rejection of the primary motivating purpose test by the *Adlman* court); Evergreen Trading, LLC *ex rel.* Nussdorf v. United States, 80 Fed. Cl. 122, 132–33 (2007) (holding that the because of test is preferable to the primary motivating purpose test because "such an approach could unreasonably deny the protection to 'dual-purpose' documents generated in making the decision whether to enter into a transaction based upon tax litigation concerns, even though such documents could reveal an attorney's litigating strategies and assessment of legal vulnerabilities—precisely the type of discovery that the Supreme Court refused to permit in *Hickman*").

47. *Adlman*, 134 F.3d at 1198 ("[A] requirement that documents be produced primarily . . . to assist in litigation . . . is at odds with the text and the policies of the Rule. Nowhere does Rule 26(b)(3) state that a document must have been prepared to aid in the conduct of litigation in order to constitute work product . . . ."); *see also Maine*, 298 F.3d at 68; *Evergreen Trading*, 80 Fed. Cl. at 133.

48. The because of litigation test was adopted by the First Circuit in *Maine v. U.S. Dep't of the Interior*. 298 F.3d at 68. The First Circuit reversed the district court's enforcement of a summons related to work papers and explicitly rejected the Fifth Circuit's primary motivating purpose test, formally adopting the because of litigation test and citing the Second Circuit's decision in *United States v. Adlman*. *Id*.

49. United States v. Textron, Inc., 507 F. Supp. 2d 138, 141 (D.R.I. 2007).

anticipated litigation, they were protected work product.[50] A panel of the First Circuit upheld the district court's decision.[51]

The First Circuit granted the government's petition for rehearing en banc and, on August 13, 2009, in its decision in *United States v. Textron, Inc.*, vacated and remanded the district court's finding, holding that Textron's work papers were not protected by the work product privilege.[52] The circuit court abandoned the because of test adopted in *Maine* and instead created a completely new test for analyzing the in anticipation of litigation requirement of Rule 26(b)(3).[53] The new (and very narrow)[54] test—the for use in litigation test—requires that material be prepared for use in possible litigation, allowing discovery of documents where there was no implication that they would actually be used at trial.[55] The *Textron* court's view that the work product privilege is aimed at protecting work done for litigation and not for preparing financial statements is evidenced by the court's statement: "'[P]repared in anticipation of litigation or for trial' did not . . . mean prepared for some purpose other than litigation: it meant only that the work might be done *for* litigation but *in advance of* its institution."[56]

C. The Eleventh Circuit

The Eleventh Circuit has not addressed whether tax accrual work papers may be protected by the work product privilege, nor has it formally adopted a test for determining whether material meets the in

---

50. *Id.* at 150 ("Moreover, even if the workpapers were needed to satisfy E & Y that Textron's reserves complied with GAAP, that would not alter the fact that the workpapers were prepared 'because of' anticipated litigation with the IRS.").

51. United States v. Textron Inc., 577 F.3d 21, 26 (1st Cir. 2009).

52. *Id.*

53. *Id.* at 32 (Torruella, J., dissenting) ("The majority purports to follow this [because of litigation] test, but never even cites it. Rather, in its place, the majority imposes a 'prepared for' test, asking if the documents were 'prepared for use in possible litigation.'").

54. *Id.* (Torruella, J., dissenting) (noting that this newly created for use test is even narrower than the primary motivating purpose test which was previously rejected by the First Circuit).

55. *Id.* at 30 ("There is no evidence in this case that the work papers . . . would in fact serve any useful purpose for Textron in conducting litigation . . . .").

56. *Id.* at 29. The court continued, "[T]he work product privilege is aimed at protecting work done for litigation, not in preparing financial statements." *Id.* at 31.

anticipation of litigation requirement for work product protection.[57] In *Regions Financial Corporation v. United States*, the United States District Court for the Northern District of Alabama stated that if it had to determine which test the Eleventh Circuit would adopt, it would select the because of litigation test.[58] The district court's ruling in *Regions* rested heavily on the District of Rhode Island's decision in *Textron*, the same reasoning rejected by the First Circuit in its review of the lower court's *Textron* decision.[59]

The Supreme Court has not imposed a test for determining whether material is created in anticipation of litigation, though the dissent in *Textron* noted: "The time is ripe for the Supreme Court to intervene and set the circuits straight on this issue which is essential to the daily practice of litigators across the country."[60] Until the Supreme Court addresses this issue, circuit courts are left to determine the appropriate method for analyzing potentially protected material. A thorough analysis of the case history of the Eleventh Circuit is the first step in determining the appropriate test the courts in the Eleventh Circuit should apply. Additionally, analysis of the text and underlying policy of Rule 26(b)(3), along with analysis of the three existing tests, should guide the Eleventh Circuit in its determination of the proper method to evaluate material for potential work product protection.

---

57. Regions Fin. Corp. v. United States, No. 2:06-CV-00895-RDP, 2008 WL 2139008, *5 (N.D. Ala. May 8, 2008) ("[T]he parties have called upon the court to decide how the Eleventh Circuit would resolve this issue. If it were forced to decide the question, the court concludes that the Eleventh Circuit would align itself with the majority of the other courts of appeal and adopt the 'because of litigation' test. However, it is not necessary to determine which test applies here because the result in this case is the same regardless of which test the court applies.").

58. *Id.* The *Regions* court first determined that the Eleventh Circuit had not explicitly adopted a test for determining whether material was prepared in anticipation of litigation before going on to conclude which test it thought the Eleventh Circuit would adopt.

59. *Id.* at *6 (relying heavily on the district court's "but for" analysis, stating that "there would have been no need to create a reserve in the first place, if Textron had not anticipated a dispute with the IRS that was likely to result in litigation or some other adversarial proceeding" (quoting United States v. Textron, Inc., 507 F. Supp. 2d 138, 150 (D.R.I. 2007))); *Textron*, 577 F.3d at 26 (holding that the work papers at issue were not prepared in anticipation of litigation).

60. *Textron*, 577 F.3d at 43 (Torruella, J., dissenting).

II. CIRCUIT SPLIT ANALYSIS

A. The Eleventh Circuit Has Not Adopted a Test for Analyzing in Anticipation of Litigation

The first step in determining the test the Eleventh Circuit should apply to the question of whether material was prepared in anticipation of litigation, for purposes of Rule 26(b)(3), is an analysis of the previous Fifth and Eleventh Circuit Court decisions.[61] The Eleventh Circuit is bound by the decisions of the Fifth Circuit handed down before October 1, 1981.[62] This specific question—whether the Fifth Circuit had formally adopted a test for analyzing work product under the in anticipation of litigation requirement prior to the creation of the Eleventh Circuit—was addressed directly by the District Court of Northern Alabama in *Regions Financial v. United States*.[63] The court performed a thorough analysis of the Fifth and Eleventh Circuit decisions and concluded that no binding test had been previously adopted.[64] Further, the court did not apply one of the two existing tests—the because of or primary motivating purpose tests—in

61. This Note addresses what test the Eleventh Circuit should adopt, so if a review of the previous decisions of the Eleventh Circuit shows that a test has previously been adopted, the analysis ends. Additionally, if a test had been adopted by the Fifth Circuit prior to the creation of the Eleventh Circuit, it would be binding unless the Eleventh Circuit, sitting en banc, overturns the previous decision. *See infra* note 62.

62. *Regions*, 2008 WL 2139008, at *4 n.6 (citing *Bonner* and noting that a review of Fifth Circuit decisions was required to determine if a binding test had been adopted); Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (holding that all Fifth Circuit decisions handed down before the close of business on September 30, 1981, are binding on the Eleventh Circuit). This does not mean that if a test were adopted by the Fifth Circuit it could not be overturned, but it would require the Eleventh Circuit en banc court to overturn prior precedent of the Fifth Circuit handed down before the creation of the Eleventh Circuit. Cohen v. Office Depot, Inc. 204 F.3d 1069, 1076 (11th Cir. 2000).

63. *Regions*, 2008 WL 2139008, at *3–5. Although the court's discussion is dictum because the court determined it did not need to apply a test in this case, the court performed a thorough analysis of three previous Eleventh and Fifth Circuit decisions and concluded that no binding test had been adopted. *Id.*

64. *Id.* Here, the court analyzed three previous decisions: *In re Newton*, 718 F.2d 1015, 1016 (11th Cir. 1983), *Hoover v. U.S. Dep't. of the Interior*, 611 F.2d 1132 (5th Cir. 1980), and *United States v. Davis*, 636 F.2d 1028 (5th Cir. 1981). The court held that *Newton* was not binding because it did not address the attorney work product privilege; rather, *Newton* dealt with an *accountant* work product privilege, similar to that addressed in *United States v. Arthur Young*, 465 U.S. 805, 817 (1984). *Regions*, 2008 WL 2139008, at *3–5. The court held that *Hoover* was not binding because the court did not articulate a test. *Id.* at *4. Finally, the court held that *Davis* was not binding because the *Davis* court's discussion of a possible test was dictum. *Id.* at *5; *see also* discussion *infra* Part.II.B.2.

Regions because it determined that under the facts of the case the material in question would be protected under either currently existing test.[65] No cases addressing this issue have been presented in the Eleventh Circuit since *Regions*, so the Eleventh Circuit is free to formally adopt the most appropriate test for analyzing material under the in anticipation of litigation requirement of Rule 26(b)(3).[66]

B. Possible Tests the Eleventh Circuit Could Adopt

1. The Because of Litigation Test

The primary goal of the because of litigation test is protection of material that contains the mental impressions, conclusions, and opinions of the attorney, and it allows protection of material that may have a business purpose but nonetheless was created because of anticipated litigation.[67] The because of litigation test does not conflict with the plain language of Rule 26(b)(3), which protects documents prepared in anticipation of litigation.[68] Further, the because of litigation test does not conflict with the underlying policy of the work product doctrine, which is to protect the attorney's assessment of the issue in light of potential litigation.[69]

Rule 26(b)(3) reads: "Ordinarily, a party may not discover . . . things that are prepared in anticipation of litigation or for trial."[70] The

---

65. *Regions*, 2008 WL 2139008, at *5–6. The court found that the work papers at issue were created because of litigation—there would have been no need for a tax reserve if Regions did not anticipate litigation with the IRS. *Id.* Further, the court found that Regions was primarily motivated by litigation because the company was soliciting legal opinions on the outcome of litigation, which meets the primary motivating purpose test. *Id.*

66. *Regions Financial* was decided on May 8, 2008, and a Westlaw search revealed that no further decisions requiring the Eleventh Circuit to answer the question of whether dual-purpose material was prepared in anticipation of litigation have been reported.

67. United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998). This test stems from the Wright & Miller treatise which articulates the appropriate test as "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 (2009). The treatise emphasizes that "'[d]ual purpose' documents created because of the prospect of litigation are protected even though they were also prepared for a business purpose." *Id.*

68. FED. R. CIV. P. 26(b)(3); *see infra* note 148.

69. *See* discussion *infra* Part III.B.

70. FED. R. CIV. P. 26(b)(3).

text of the Rule states that material other than only that prepared "for trial" is protected.[71] Specifically, material prepared in anticipation of litigation is also protected.[72] The because of litigation test applies this language literally, providing protection to documents created because of anticipated litigation and not limiting protection to documents created only for litigation.[73] Additionally, the because of litigation test protects the mental impression and opinions of the attorney, complying with the underlying policy of work product protection as stated by the Supreme Court.[74] Finally, the because of litigation test allows protection of dual-purpose documents, which is not at odds with the intent of the drafters of the Rule.[75]

Because this test is firmly grounded in both the plain language and underlying policy of the work product doctrine, it has been embraced by many courts, making it the most widely adopted test applied in analyzing material under the in anticipation of litigation requirement for work product protection.[76]

2. *The Primary Motivating Purpose Test*

The primary motivating purpose test has been expressly adopted by only one circuit.[77] This test protects material only when the *primary* purpose of the material is to assist in litigation.[78] In *United States v. El Paso*, the court applied the test articulated in *United States v. Davis* and held that the dual-purpose work papers at issue were not protected because the primary purpose of the work papers

---

71. *Id.*

72. *Id.*

73. *See* United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998) ("Where a document was created because of anticipated litigation . . . it falls within Rule 26(b)(3).").

74. *See* United States v. Nobles, 422 U.S. 225, 236 (1975) (reiterating the strong public policy considerations outlined in *Hickman v. Taylor*.); Hickman v. Taylor, 329 U.S. 495, 510–11 (1947).

75. *See* discussion *infra* Part III.C.1.

76. *See* cases cited *supra* note 39.

77. United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982); *see also* Henkel, *supra* note 7, at 253 n.22 (noting that only the Fifth Circuit applies the primary motivating purpose test).

78. *El Paso*, 682 F.2d at 542–43. This test was based on an earlier decision of the Fifth Circuit in *United States v. Davis*. 636 F.2d 1028. The *Davis* court stated: "We conclude that litigation need not necessarily be imminent . . . as long as the *primary motivating purpose* behind the creation of the document was to aid in possible future litigation." *Id.* at 1040 (emphasis added).

was to obtain a clean audit opinion.[79] However, in relying on *Davis*, the *El Paso* court overlooks a key difference in the facts of the two cases.[80] *Davis* dealt with tax *return* work papers,[81] but *El Paso* dealt with tax *accrual* work papers.[82]

Tax return work papers are prepared simply to support amounts reported on the tax return.[83] They are prepared in the ordinary course of business and are prepared regardless of whether there is a possibility of litigation.[84] They do not support tax reserves, and they do not contain material that has historically been protected as the opinion or mental impressions of attorneys—they are accounting records that support the numbers on the tax return.[85] Thus, the court in *Davis* correctly found that these tax return work papers were not prepared in anticipation of litigation because the *only* purpose for preparing them was a business purpose—to support a business tax filing required by law.[86] There was no need for the *Davis* court to apply a test because there was no question that these work papers were not prepared "in anticipation of [any] litigation."[87]

Tax accrual work papers are not prepared to support tax return filings; they are prepared to calculate (and properly reserve) the possible outcome of litigation with the IRS.[88] It is this possibility of

---

79. *El Paso*, 682 F.2d at 543–44.

80. *Compare Davis*, 636 F.2d at 1032 (addressing tax *return* work papers), *with El Paso*, 682 F.2d at 533 (addressing tax *accrual* work papers).

81. *Davis*, 636 F.2d at 1032 (The material at issue consisted of "workpapers . . . generated in the course of preparing . . . tax returns.").

82. *El Paso*, 682 F.2d at 533 (Here, the court was "concerned with documents known to the accounting profession [as] tax accrual work papers.").

83. *Davis*, 636 F.2d at 1032.

84. United States v. Textron Inc., 507 F. Supp. 2d 138, 146 (D.R.I. 2007) ("[T]he mere preparation of a tax return is viewed as accounting work and a taxpayer may not cloak the documents generated in that process with a privilege simply 'by hiring a lawyer to do the work that an accountant . . . normally would do.'" (quoting United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999))).

85. *See Davis*, 636 F.2d at 1032.

86. *Id.* at 1039–40 ("[I]t is plain here that none of the summoned documents were 'materials prepared by an attorney "acting for his client in anticipation of litigation."'" (quoting United States v. Nobles, 422 U.S. 225, 237–38 (1975))).

87. Prior to the conclusion of the *Davis* court that a primary motivating purpose should be the test, the court clearly stated that it was "plain" in this case that the documents were not prepared in anticipation of litigation—making it unnecessary (and thus dictum) to articulate a test to determine whether the material was created in anticipation of litigation. *Davis*, 636 F.2d at 1039–40.

88. FASB Interpretation No. 48, *supra* note 15, at ¶¶ 5–8 (outlining two step process for identifying and measuring uncertain tax positions).

litigation aspect of the tax accrual work paper that requires the application of a test to determine if the material is protected work product.[89] The Fifth Circuit, in *El Paso*, was free to create a test requiring a primary motivating purpose requirement, but it did not perform any analysis of the merits of the appropriate test; instead, it relied on the *Davis* language as precedent.[90] Because *Davis* dealt with tax return work papers, the court did not need to apply a test to determine if the material at issue was prepared in anticipation of litigation, and the court in *El Paso* should have treated the language in *Davis* as dictum.[91] The court in *Regions Financial* recognized this fact in determining that the language in *Davis* did not create binding precedent for the Eleventh Circuit.[92]

As applied by the Fifth Circuit, the primary motivating purpose test ignores the actual language of Rule 26(b)(3) and fails to consider the underlying policy behind the protection of work product.[93] Because of this, several courts have criticized the Fifth Circuit's primary motivating purpose test as inconsistent with the language and goals of the work product privilege.[94]

---

89. Regions Fin. Corp. v. United States, No. 2:06-CV-00895-RDP, 2008 WL 2139008, *4 (N.D. Ala. May 8, 2008) (noting the difference between ordinary tax return work papers and work papers that analyze tax positions).

90. United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982) ("In *United States v. Davis* we phrased the test in the following terms: 'Litigation need not be imminent . . . as long as the primary motivating purpose . . . was to aid in possible future litigation.'" (quoting United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981))).

91. United States v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998) (The court discusses *Davis* and finds that because there was no evidence of anticipated litigation in *Davis*, the court's language could be characterized as dictum.).

92. *See* discussion *supra* Part II.A discussing the impact of Fifth Circuit decisions on the Eleventh Circuit. *Regions*, 2008 WL 2139008, at *4 ("[T]he Second Circuit has opined that because 'there was no showing whatsoever of anticipation of litigation,' the *Davis* language 'might be characterized as dictum'. . . . Even without viewing *Davis* language as dicta, the factual differences between *Davis* and the present case make *Davis* wholly distinguishable.").

93. *See infra* note 94.

94. Maine v. U.S. Dep't of the Interior, 298 F.3d 60, 68 (1st Cir. 2002) (adopting the because of test and noting the rejection of the primary motivating purpose test by the *Adlman* court); *Adlman*, 134 F.3d at 1198 (holding that a requirement of primary purpose is at odds with the Rule); Evergreen Trading, LLC *ex rel*. Nussdorf v. United States, 80 Fed. Cl. 122, 132 (2007) (holding that the because of test is preferable to the primary motivating purpose test). In *Evergreen Trading*, the court rationalized that the primary motivating purpose test "could unreasonably deny the protection to 'dual-purpose' documents generated in making the decision whether to enter into a transaction based upon tax litigation concerns, even though such documents could reveal an attorney's litigating strategies and assessment of legal

The Second Circuit, in *United States v. Adlman*, stated that a requirement of primary purpose is at odds with the language of Rule 26(b)(3), which on its face allows protection of documents prepared both for trial and in anticipation of litigation.[95] The court noted that nowhere in Rule 26(b)(3) is there a requirement that a document be created primarily to aid in litigation, and if the drafters had intended such a requirement, they would have simply used "prepared . . . for trial" and not added language that documents prepared in anticipation of litigation were protected work product.[96] The U.S. Court of Federal Claims, in *Evergreen Trading v. United States*, likewise held that the primary motivating purpose test did not comport to the plain language of the Rule.[97]

Applying the primary motivating purpose test in the way the Fifth Circuit has applied it ignores the underlying policy of work product protection. The Second Circuit stated it very well in *Adlman*:

> Where the Rule has explicitly established a special level of protection against disclosure for documents revealing an attorney's . . . opinion and legal theories concerning litigation, it would oddly undermine its purposes if such documents were excluded from protection merely because they were prepared to assist in the making of a business decision expected to result in the litigation.[98]

The Supreme Court has held that there is a strong public policy underlying the work product privilege, emphasizing the importance

---

vulnerabilities—precisely the type of discovery that the Supreme Court refused to permit in *Hickman*." *Id.*

95. *Adlman*, 134 F.3d at 1198 ("We believe that a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text and the policies of the Rule. . . . Preparing a document 'in anticipation of litigation' is sufficient.").

96. *Id.* ("If the drafters . . . intended to limit its protection to documents made to assist in preparation for litigation, this would have been adequately conveyed by the phrase 'prepared . . . for trial.'").

97. *See Evergreen Trading*, 80 Fed. Cl. at 132–33. In determining which test was appropriate to apply, the court analyzed both the because of and the primary motivating purpose tests. *Id.* The court stated that the because of test "more closely tracks the language of the rule, which says nothing of whether a document is produced 'primarily' for litigation, but rather is triggered so long as anticipating litigation was one of the purposes for which the document was prepared." *Id.*

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

of protecting documents that tend to reveal the attorney's "mental [process]."[99] In *Adlman*, the court illustrated the problems that would arise by applying the primary motivating purpose test.[100] For example, a memorandum prepared in expectation of litigation that analyzed the legal outcomes of a proposed business transaction would be discoverable simply because the memorandum's primary purpose was to assist the company in deciding whether to undertake the transaction.[101] The result is discovery of critical opinions and impressions of the attorney preparing the memorandum in anticipation of litigation—the very essence of what the work product privilege is designed to protect.[102]

However, even if the primary motivating purpose test is adopted, when this test is applied correctly, tax accrual work papers analyzing the various outcomes of possible litigation with the IRS are protected. In *Regions Financial v. United States*, the court held that the tax accrual work papers at issue would be protected under either of the two tests available: the because of or the primary motivating purpose test.[103] The court went on to say that although there was a business purpose, the work papers "would not have been created were Regions not *primarily concerned* with litigating with the IRS concerning the Transaction."[104] The *Regions* court was careful to isolate and identify the motivation behind the creation of the work papers, and the court did not confuse the purpose of the work papers with their resulting benefit.[105] The *purpose* of the entire process of creating tax accrual work papers is to set aside sufficient funds in the event liability arises

99. United States v. Nobles, 422 U.S. 225, 236 (1975) (reiterating the strong public policy considerations outlined in *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947)).

100. *Adlman*, 134 F.3d at 1199–1200 (giving several examples of the problems that result from applying the primary motivating purpose test).

101. *Id.* at 1199.

102. *Id.* ("Framing the inquiry as whether the primary . . . purpose . . . was to assist in litigation threatens to deny protection to documents that implicate key concerns underlying the work-product doctrine.").

103. Regions Fin. Corp. v. United States, No. 2:06-CV-00895-RDP, 2008 WL 2139008, *7 (N.D. Ala. May 8, 2008) ("[T]he court finds that Regions has . . . show[n] that the contested documents were created in anticipation of litigation regardless of whether this court applies the 'because of litigation' or 'primary motivating purpose' test.").

104. *Regions*, 2008 WL 2139008, at *7.

105. *See id.* at *6.

from its tax positions.[106] The company is attempting to forecast (and reserve) the most likely impact of potential litigation with the IRS.[107] The *benefit* derived from that purpose is that the company is not misleading its investors (i.e., the company is properly reserved and can obtain a clean audit opinion of its financial statements).[108] If the formulation of the test as articulated by the *Regions* court was applied in *El Paso*, the work papers would have been protected. In *El Paso*, the court found that the primary purpose of the tax accrual work papers at issue was to adequately reserve the impact of possible litigation with the IRS.[109] The *El Paso* court seems to confuse the resulting benefit of the work papers with the purpose for creating the work papers.[110] The immediate purpose was to adequately reserve the impact of litigation on the company's financial statements, but the primary purpose was to calculate the potential scenarios of litigation with the IRS—El Paso would not have prepared the work papers had they not anticipated a dispute with the IRS.

3. The For Use Test

The for use test, recently created by the First Circuit in *Textron v. United States*, protects material only if prepared for use in litigation.[111] This court's view is that the work product privilege is aimed at protecting work done for litigation and not for preparing financial statements.[112] The court stated: "'[P]repared in anticipation

---

106. WEST'S TAX LAW DICTIONARY 1052 (2009) (defining tax accrual work papers as "[w]ork papers and related documents prepared by accountants in evaluating a taxpayer's *contingent liability*" (emphasis added)). The purpose of tax reserves is to anticipate and establish a liability on the financial statements before disagreement with the IRS. *See* FASB Interpretation No. 48, *supra* note 15, at ¶ 17. The tax positions reserved are called uncertain tax positions precisely because the company does not yet know if they will win or lose on the tax position until the IRS audits the tax return. *See Id.* at ¶¶ 6, 17.

107. *See* FASB Interpretation No. 48, *supra* note 15, at ¶ 17.

108. *See id.* The purpose of FASB Interpretation No. 48 is to identify and measure uncertain tax positions that are anticipated to be contested by the IRS. *See id.* at ¶¶ 6–8. By identifying and measuring its tax uncertainties, the company will properly reserve the potential liability on its financial statements, and the readers of the financial statements will not be misled. *See id.* at ¶ 17.

109. United States v. El Paso, 682 F.2d 530, 543 (5th Cir. 1982).

110. *See supra* note 108.

111. United States v. Textron Inc., 577 F.3d 21, 31 (1st Cir. 2009).

112. *Id.* ("[T]he work product privilege is aimed at protecting work done for litigation, not in preparing financial statements.").

of litigation or for trial' did not . . . mean prepared for some purpose other than litigation: it meant only that the work might be done *for* litigation but *in advance of* its institution."[113] To support its proposition, the court cited the advisory committee notes to Rule 26(b)(3), which state that material created simply for normal or routine business purposes is not protected.[114]

The *Textron* court seems to interpret the advisory committee notes to mean that any business purpose defeats the work product protection.[115] Based on this interpretation, the court analyzes the work papers, finds an ordinary business purpose, and determines that work product protection is not available.[116] However, this is not what the advisory committee notes say. Instead, they state that material is not protected if it is prepared for a business or public requirement purpose *unrelated to litigation* and imply that material having *both* a business and litigation purpose *can* be protected, and only material that is created *regardless* of potential litigation would be denied protection.[117]

III. PROPOSAL

A. The Court Should First Analyze its Prior Precedent

The Eleventh Circuit has not formally adopted a test for analyzing material under the work product privilege.[118] The District Court of Northern Alabama, in *Regions Financial v. United States*,[119]

113. *Id.* at 29.

114. *1970 Amendments*, *supra* note 43, at 501("Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity . . . .").

115. *Textron*, 577 F.3d at 30 (stating that "[e]ven if prepared by lawyers and reflecting legal thinking," the work papers are not protected if created in the ordinary course of business). Further, the court dismissed the fact that the work papers had any relation to possible litigation with the IRS and simply stated that "[n]o one with experience of law suits would talk about tax accrual work papers in those terms." *Id.*

116. *See id.* at 29–30.

117. *1970 Amendments*, *supra* note 43, at 501.

118. *See* discussion *supra* Part II.A.

119. Regions Fin. Corp. v. United States, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at *3–5 (N.D. Ala. May 8, 2008) (analyzing previous Eleventh and Fifth Circuit decisions and concluding that no binding test had been adopted).

performed a thorough analysis of the Fifth and Eleventh Circuit decisions and concluded that a binding test had not been adopted.[120] The *Regions* court did not apply one of the two existing tests—the because of or primary motivating purpose test—because it determined that under the facts of the case the material in question would be protected under either test.[121] Since no cases addressing this issue have been presented in the Eleventh Circuit after *Regions*, the circuit court should analyze the existing tests and adopt the test that most closely aligns with both the plain language of Rule 26(b)(3) and the policy of the work product privilege.[122]

B. The Court Should Analyze the Plain Language and Policy of Rule 26(b)(3)

Rule 26(b)(3) states, "[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party."[123] The inclusion of the phrase in anticipation of litigation clearly indicates that material other than that created for trial is protected.[124] However, the plain language of the Rule does not define the meaning of in anticipation of litigation.[125] For this, the court should look to the policy underlying the work product privilege for guidance.[126]

The Supreme Court articulated the policy of work product protection in *Hickman v. Taylor*: "[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by

---

120. *Id.*; *supra* notes 62–63 and accompanying text.
121. *Supra* note 64.
122. *Supra* note 65.
123. FED. R. CIV. P. 26(b)(3).
124. United States v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998) ("If the drafters of the Rule intended to limit its protection to documents made to assist in preparation for litigation, this would have been adequately conveyed by the phrase 'prepared . . . for trial.'").
125. *Id.* at 1197 (finding that in anticipation of litigation had not been defined and noting the various meanings given the phrase by other courts and commentators).
126. Several courts have looked to the policy and intent of the privilege to define in anticipation of litigation. *See id.* at 1197–1203 (analyzing the plain language, policy and advisory committee's notes in determining that the because of litigation test is most closely aligned with the text and policy of the privilege). *But see* United States v. El Paso, 682 F.2d 530, 542 (5th Cir. 1982) (looking to the language and advisory committee's notes but determining that the primary motivating purpose test is the more appropriate test).

opposing parties and their counsel. Proper preparation . . . demands that he . . . prepare his legal theories and plan his strategy without undue and needless interference."[127] The Court has reaffirmed this policy and stated, "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."[128]

As the Second Circuit noted in *United States v. Adlman*, the policies articulated by the Supreme Court and the intent of the drafters of the Rule suggest that a business purpose alone should not bar the protection of the material that reveals the opinions and legal theories concerning litigation.[129] This interpretation would not deny protection of dual-purpose documents merely because they have a business purpose; rather, the focus would be on why the documents were created and whether they contain protected material.[130] The Eleventh Circuit should keep these important policy considerations in mind when analyzing the appropriate test to adopt.

C. The Court Should Analyze the Tests Adopted by Other Courts

In attempting to define in anticipation of litigation, circuit courts have adopted one of three main tests[131]—the majority of circuits have adopted the because of litigation test;[132] the Fifth Circuit has adopted

127. Hickman v. Taylor, 329 U.S. 495, 510–11 (1947).

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

129. *Adlman*, 134 F.3d at 1199 ("[T]he policies underlying the work-product doctrine suggest strongly that work-product protection should not be denied to a document that analyzes expected litigation merely because it is prepared to assist in a business decision."). The intent of the Rule's drafters is helpful in defining in anticipation of litigation. The advisory committee's note states that "each side's informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side." *1970 Amendments*, *supra* note 43, at 501.

130. *Adlman*, 134 F.3d at 1200 ("We see no basis for adopting a test under which an attorney's assessment of the likely outcome of litigation is freely available . . . merely because the document was created for a business purpose . . . . The fact that a document's purpose is business-related appears irrelevant to the question whether it should be protected under Rule 26(b)(3).").

131. *See id.* at 1195 (because of litigation test); United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982) (primary motivating purpose test); United States v. Textron Inc., 577 F.3d 21, 31 (1st Cir. 2009) (new for use in litigation test). For a discussion of each of the three tests, see discussion *supra* Part I.B.

132. For other courts adopting the because of test, see *supra* note 39.

the primary motivating purpose test;[133] and the First Circuit has recently created the for use test.[134]

1. The Because of Litigation Test is Well Reasoned

The because of litigation test is a well-reasoned test that considers both the actual language of the Rule and the underlying purpose of the work product privilege.[135] The because of test protects material created because of anticipated litigation and allows protection of material whether or not it may have a business purpose.[136] Material is denied protection only if it would have been prepared in substantially similar form regardless of the anticipated litigation.[137] The primary goal of the because of test is protection of material that contains the mental impressions, conclusions, and opinions of the attorney, and it allows protection of material that may have a business purpose but nonetheless was created because of anticipated litigation.[138]

The because of litigation test does not conflict with the plain language of Rule 26(b)(3), which protects documents prepared in anticipation of litigation, nor does it conflict with the underlying policy of the work product doctrine which is to protect the attorney's assessment of the issue in light of potential litigation.[139] For these reasons, the because of litigation test has been widely adopted and is the most prevalent test utilized by circuit courts to analyze material under the in anticipation of litigation requirement for work product protection.[140]

---

133. *El Paso*, 682 F.2d at 542 (primary motivating purpose test).
134. *Textron*, 577 F.3d at 31 (new for use in litigation test).
135. *See* discussion *supra* Part II.B.1.
136. *Id.*
137. United States v. Adlman, 134 F.3d 1194, 1195 (2d Cir. 1998).
138. *Id.*
139. *See* discussion *supra* Part II.B.1.
140. *See* discussion *supra* Part II.B.1; *see also supra* note 76.

2. The Primary Motivating Purpose Test Denies Protection to Dual-Purpose Documents

The primary motivating purpose test has been expressly adopted by only one circuit.[141] This test protects material only when the *primary* purpose of the material is to assist in possible future litigation.[142] Application of the primary motivating purpose test has resulted in the denial of protection because the primary purpose of the material was business related (i.e., to obtain a clean audit opinion of the financial statements), despite the fact that the work papers contained important mental impressions and legal opinions related to anticipated litigation.[143]

The primary motivating purpose test places too much emphasis on the potential business purpose—at the expense of the protection of important legal opinions related to litigation that may be contained in the material.[144] This emphasis is inconsistent with the primary goal of work product protection—to protect the attorney's mental impressions and opinions regarding anticipated litigation.[145] The Supreme Court, since *Hickman v. Taylor*, has stressed the policy goal of the privilege as the protection of the mental impressions and opinions of the attorney.[146]

Additionally, the primary motivating purpose test places too much emphasis on a comment of the drafters that ordinary business documents are not protected.[147] The advisory committee notes state that ordinary business documents are not protected, but this comment must be read in conjunction with the actual language of the Rule.[148]

---

141. United States v. El Paso, 682 F.2d 530, 542 (5th Cir. 1982); *see also* Henkel, *supra* note 7, at n.22.

142. *El Paso*, 682 F.2d at 542.

143. *See id.* at 543–44.

144. The *El Paso* court determined that because the work papers at issue were created primarily to substantiate the company's tax reserve on its financial statements, the material was not protected. *Id.* at 543.

145. Hickman v. Taylor, 329 U.S. 495, 510–11 (1947).

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

147. *1970 Amendments*, *supra* note 43, at 501 ("Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity . . . .").

148. The text of the Rule states that material other than only that prepared for trial are protected. FED. R. CIV. P. 26(b)(3). Specifically, material prepared in anticipation of litigation is also protected. *Id.* The

When read together, the advisory committee notes imply protection of dual-purpose documents and only emphasize that ordinary business documents, which would be created even if litigation was not anticipated, would be denied protection.[149] The committee notes stress the importance of protecting the opinions and impressions of the attorneys preparing for anticipated litigation.[150] Unlike the primary motivating purpose test, the because of litigation test addresses these concerns by requiring the court to ask whether the material would have been prepared even if there had been no anticipation of litigation—allowing protection of dual-purpose documents but denying protection to ordinary business records that would have been prepared whether there was anticipated litigation or not.[151]

3. The For Use Test Denies Protection to Documents Not Created for Trial

The for use test, recently created by the First Circuit in *Textron v. United States*, protects material only if prepared for use in litigation.[152] This court's view is that the work product privilege is aimed at protecting work done for litigation and not for preparing financial statements.[153] The court states: "'[P]repared in anticipation of litigation or for trial' did not . . . mean prepared for some purpose other than litigation: it meant only that the work might be done *for* litigation but *in advance of* its institution."[154] Application of the for use test has resulted in the denial of protection to dual-purpose

---

advisory committee's notes state, "Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity . . . ." The advisory committee notes imply that ordinary business records prepared where there is no anticipation of litigation are not in anticipation of litigation, but the notes do not imply that material created *with* anticipated litigation in mind that have a business purpose would not be protected—that would directly contradict the plain language of the in anticipation of litigation clause in the Rule. *1970 Amendments*, *supra* note 43, at 501.

149. *Id.*

150. *See* discussion *supra* Part II.B.1.

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

152. United States v. Textron Inc., 577 F.3d 21, 31 (1st Cir. 2009).

153. *Id.* (holding that work product privilege does not protect material created in preparation of financial statements).

154. *Id.* at 29.

documents because the material was prepared for a business purpose, despite the fact that the material contained important mental impressions and legal opinions related to anticipated litigation.[155]

Much like the primary motivating purpose test, the for use test also places too much emphasis on the potential business purpose—and the advisory committee notes—at the expense of the protection of important legal opinions related to litigation.[156] The for use test is inconsistent with the plain language of the Rule and the primary goal of work product protection.[157] The for use test goes one step further than the primary motivating purpose test, and it rewrites the Rule to require preparation for use in anticipated litigation or for use at trial.[158] Rule 26(b)(3) states that material prepared in anticipation of litigation—not "*for use in anticipation of litigation*"—is protected.[159] Additionally, the First Circuit's reliance on the advisory committee notes is misplaced.[160]

In contrast, the because of test addresses these concerns by requiring the court to ask whether the material would have been prepared even if there had been no anticipation of litigation—allowing protection of dual-purpose documents but denying protection to ordinary business records that would have been prepared whether or not litigation was anticipated.[161]

D. The Eleventh Circuit Should Formally Adopt the Because of Litigation Test

The primary motivating purpose test is too narrow because it denies protection to most dual-purpose documents at the expense of the protection of important legal opinion related to anticipated

155. *Id.* at 29–30.
156. *See supra* note 144.
157. *See supra* note 148.
158. *See supra* note 148. As noted by the court in *United States v. Adlman*, "Nowhere does Rule 26(b)(3) state that a document must have been prepared to aid in the conduct of litigation in order to constitute work product." United States v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998).
159. FED. R. CIV. P. 26(b)(3).
160. *See supra* note 148.
161. *Adlman*, 134 F.3d at 1195.

litigation—a key principle of the work product doctrine.[162] The for use in anticipated litigation test is too narrow because it denies protection to documents not created to be used in anticipated litigation, which is at odds with the actual language of Rule 26(b)(3).[163] The Eleventh Circuit should join the majority of courts that have addressed the issue of dual-purposed documents and adopt the because of litigation test. This test considers both the actual language of the Rule and the underlying purpose of the work product privilege, eliminating the concerns and issues raised by the primary motivating purpose and the for use tests.[164]

CONCLUSION

The struggle between the IRS and business taxpayers regarding the discovery of tax accrual work papers will continue until the Supreme Court addresses the issue and imposes a test.[165] Until then, the IRS will continue to seek a road map of the corporation's vulnerable tax positions, and corporate taxpayers will continue to fight, desperate to keep the IRS from discovering the legal analysis of their weak spots.[166] In balancing these competing interests, the Eleventh Circuit should seek to adopt a test that is consistent with the plain language of the Rule and the spirit of the work product privilege outlined by the Supreme Court in *Hickman v. Taylor*.[167] The because of litigation test accomplishes both of these goals—allowing the IRS access to work papers created where the taxpayer has no reasonable basis for anticipating litigation and protecting the attorney's legal opinions in

162. *See* discussion *supra* Part III.C.2.
163. *See* discussion *supra* Part III.C.3.
164. *See* discussion *supra* Part III.C.1.
165. *See* United States v. Arthur Young, 465 U.S. 805, 807 (1984) (IRS challenge of judgment holding tax work papers privileged); United States v. El Paso Co., 682 F.2d 530, 532 (5th Cir. 1982) (appeal of enforcement of IRS summons seeking taxpayer's tax accrual work papers); *Adlman*, 134 F.3d at 1194; I.R.S. Announcement 2002-63 (July 8, 2002) (IRS expands internal policy on seeking tax accrual work papers).
166. *See Arthur Young*, 465 U.S. at 807 (IRS challenge of judgment holding tax work papers privileged); *El Paso*, 682 F.2d at 532 (appeal of enforcement of IRS summons seeking taxpayer's tax accrual work papers); *Adlman*, 134 F.3d at 1194; I.R.S. Announcement 2002-63 (IRS expands internal policy on seeking tax accrual work papers).
167. *See* discussion *supra* Part III.B.

cases where litigation is reasonably anticipated. Adopting the because of test eliminates the need to determine whether a business purpose for the material exists, because anticipation of litigation—not the absence of a business purpose—is the real key to protection of material under Rule 26(b)(3).