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THE DISRUPTION OF MANDATORY DISCLOSURE WITH THE WORK PRODUCT DOCTRINE: AN ANALYSIS OF A POTENTIAL PROBLEM AND A PROPOSED SOLUTION

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The Disruption of Mandatory Disclosure with the Work Product Doctrine: An Analysis of a Potential Problem and a Proposed Solution†

> *Every idea for improved procedures must be imaginatively pretested to foresee its evolving shapes under the fires of adversary zeal.*
>
> —*Marvin E. Frankel*[1]

One of the most paradoxical and troublesome features of the Federal Rules of Civil Procedure is that they combine the adversary model of litigation with broad, party-initiated, and party-controlled discovery of all relevant information. Litigants, who will later battle over their legal standings at trial or at the settlement table, must repress their adversarial tendencies and cooperate to ensure all relevant information is exchanged between them. Their ultimate conflict is supposed to be a fully informed one.[2] The discovery provisions contained in Rules 26 through 37 provide the means for uncovering and exchanging this relevant information.[3] By using depositions,[4] interrogatories,[5] requests for documents,[6] and the other formal discovery procedures,[7] litigants can bring to their ultimate conflict the maximum number of relevant facts. However, formal discovery under the Federal Rules has not been without its abuses;[8]

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1. MARVIN E. FRANKEL, PARTISAN JUSTICE 18 (1980).

2. *See* 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001, at 15 (1970) ("The basic philosophy of the present federal procedure is that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged.").

3. *See* FED. R. CIV. P. 26-37.

4. FED. R. CIV. P. 27-28, 30-32.

5. FED. R. CIV. P. 33.

6. FED. R. CIV. P. 34.

7. *E.g.*, FED. R. CIV. P. 35 (allowing for a physical and mental examination of a party or a person in the legal control of a party if the mental or physical condition of the person is in controversy); FED. R. CIV. P. 36 (providing for requests for admission).

8. *E.g.*, National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 640 (1976) (reinstating a district court's dismissal of plaintiffs' case when their repeated failure to answer crucial

adversarial litigants have incentives to gain advantages over one another by frustrating this basic exchange of information.[9]

The Advisory Committee,[10] in response to the costs, delays, and abuses of formal discovery, promulgated amendments to the federal discovery procedures that implement mandatory disclosure provisions.[11] Federal district courts may adopt these amendments, and many have already done so.[12] The new mandatory disclosure provisions are expressly intended to accelerate and lessen the cost of party-initiated and party-controlled information gathering.[13] Shortly after the commencement of an action[14] and throughout pretrial litigation,[15] the litigants must

interrogatories "demonstrate[d] the callous disregard of responsibilities counsel owe to the Court and to their opponents" (quoting Metropolitan Hockey Club, Inc., 63 F.R.D. 641, 656 (E.D. Pa. 1974))); Daval Steel Prods. v. M/V Fakredine, 951 F.2d 1357, 1363 (2d Cir. 1991) (affirming sanctions against defendants for their "generally obstructive behavior" during discovery); *see* Herbert v. Londo, 441 U.S. 153, 179 (1979) (Powell, J., concurring) ("As the years have passed, discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice."); Committee on Discovery N.Y. State Bar Ass'n Section on Commercial and Fed. Litig., *Report on Discovery Under Rule 26(b)(1)*, 127 F.R.D. 625, 630, 628-31 (1990) [hereinafter *Report on Discovery*] (surveying cases with significant discovery disputes and concluding that even after a rule change designed to limit such abuses, "litigation has become expensive even for the wealthy and burdensome on the judicial system"); President's Council on Competitiveness, *Agenda for Civil Justice Reform in America*, 60 U. CIN. L. REV. 979, 981-83 (1990) [hereinafter *Agenda*] (lamenting the expensive discovery abuse in American litigation); *cf.* Ismail v. Cohen, 706 F. Supp. 243, 254 (S.D.N.Y. 1989) (stating that after four years of discovery disputes, the court "will not tolerate contumacious attitudes . . . nor vexatiousness in unduly prolonging" future litigation).

9. *See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1311-15 (1978) (arguing that several economic and psychological incentives encourage attorneys to disrupt routine discovery procedures); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 716 (1989) (arguing that even the most ethical lawyer will eventually be forced to adopt questionable discovery tactics for reasons of self defense).

10. The Advisory Committee, a 12-member division of the Judicial Conference of the United States, formulates and drafts the Federal Rules of Civil Procedure. *See generally* 4 WRIGHT & MILLER, *supra* note 2, § 1005, at 28-30 (1987) (discussing the history and function of the Advisory Committee); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 797 n.2 (1991) (discussing the structure of the Advisory Committee).

11. *See New Procedural Rules Take Effect, Move to Stop Voluntary Discovery Fizzles*, 62 U.S.L.W. 1077 (1993) [hereinafter *New Procedural Rules*] (reporting that the amendments to the Federal Rules, which include the controversial mandatory disclosure provisions, took effect through congressional inaction on December 1, 1993).

12. *See* Donna Stienstra, Implementation of Disclosure in Federal District Courts, with Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26, at 5 (March 1, 1994) (unpublished report, on file with the *Texas Law Review*) (reporting that as of March 1, 1994, 32 out of the 94 federal district courts had adopted mandatory disclosure of amended Rule 26, 5 had provisionally adopted Rule 26, 8 had adopted mandatory disclosure pursuant to local rule, and 13 had allowed judges to demand Rule 26 mandatory disclosure in particular cases).

13. *See* FED. R. CIV. P. 26 advisory committee's note (stating that the purpose of the mandatory disclosure procedures is to expedite the exchange of basic information about a case and thus save both time and money).

14. *See* FED. R. CIV. P. 26(a)(1) (stating that the initial required disclosure should be made at or within 10 days after the first pretrial conference).

15. *See* FED. R. CIV. P. 26(e)(1) (imposing a continuing duty to disclose newly acquired or

provide one another with all information that is relevant for deciding their dispute on the merits.

Mandatory disclosure is a further step towards the 1938 ideal behind the federal discovery provisions: All relevant information should be revealed before the litigants argue the law in light of the facts.[16] Litigants are supposed to tell each other the identities of individuals[17] and exchange documents, data compilations, and tangible things[18] if such information transfers could reveal relevant facts.[19] This compelled disclosure is an attempt to reveal all relevant information in a more timely and inexpensive manner than is possible under the existing discovery rules.[20] However, similar to the formal discovery provisions already in place, mandatory disclosure is subject to abuse as clever adversarial attorneys seek to disrupt the low-cost flow of information between the litigants.[21]

The work product doctrine provides one way to avoid revealing information pursuant to mandatory disclosure duties. To comply with mandatory disclosure, litigants and their attorneys must make legal evaluations under the substantive law to decide which individuals, documents, and other information could lead to relevant facts.[22] Litigants must wade through countless lists of individuals and voluminous documents to decide which items of information are helpful for deciding their dispute on the merits. This process of searching creates mental impressions, conclusions, opinions, and legal theories that have been consistently protected from discovery.[23] Turning over the fruits of this investigation in compliance with mandatory disclosure could reveal the litigants' "intangible opinion

corrected information that would fall under the required disclosure provisions of Rule 26(a)(1)).

16. *See supra* note 2; Sherman L. Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 918 (1983) (noting that the federal discovery procedures of 1938 demanded disclosure of all nonprivileged information "relevant to the subject matter of the case"). *See generally* Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 791-93 (1989) (discussing the favorable initial acceptance of the Federal Rules of Civil Procedure as well as their liberalizing amendments).

17. FED. R. CIV. P. 26(a)(1)(A); *see also* FED. R. CIV. P. 26(e)(1) (requiring supplementation of this information "at appropriate intervals").

18. FED. R. CIV. P. 26(a)(1)(B); *see also* FED. R. CIV. P. 26(e)(1) (requiring supplementation of this information "at appropriate intervals").

19. For a full discussion of Rules 26(a)(1) and 26(e)(1) as amended, see *infra* Part I(A).

20. FED. R. CIV. P. 26(a) advisory committee's note.

21. *See* Virginia E. Hench, *Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Disclosure Rules Amendments and the Just, Speedy, and Inexpensive Determination of Every Action*, 67 TEMP. L. REV. 179, 205 (1994) (arguing that mandatory disclosure without creating a more effective case management system will not eliminate discovery abuses and merely amounts to "wishing them away").

22. The new rules require exchanges of this information if it is "relevant to disputed facts alleged with particularity in the pleadings." FED. R. CIV. P. 26(a)(1)(A); FED. R. CIV. P. 26(a)(1)(B). These rules also require the exchange of information that "bear[s] on the nature and extent of injuries suffered." FED. R. CIV. P. 26(a)(1)(C).

23. *See infra* notes 78-88 and accompanying text.

work product"—the unrecorded mental impressions, conclusions, opinions, and legal theories of the litigants.[24]

By arguing that mandatory disclosure interferes with this elusive category of work product, litigants could disrupt the efficient operation of mandatory disclosure. Arguments for the protection of intangible opinion work product at a minimum can raise the motion costs of the litigants[25] and potentially can prevent the exchange of relevant information,[26] forcing litigants to find the same information through costly formal discovery procedures.

This Note delineates the complicated category of work product protection referred to as intangible opinion work product protection and describes how it can potentially disrupt the mandatory disclosure of information. Part I explains the rationale and policy behind the new federal mandatory disclosure provisions and outlines their most important and controversial requirements. Part II surveys and categorizes the work produce doctrine, concluding that the most elusive category of work product—intangible opinion work product—threatens to disrupt mandatory disclosure duties. Part III, through a hypothetical product liability lawsuit, demonstrates how this elusive type of work product protection makes a strong argument under present federal law for not disclosing basic pretrial information pursuant to mandatory disclosure. Part IV examines the arguments in favor of this type of work product protection in the mandatory disclosure context and argues that there is no justification for allowing it to disrupt mandatory disclosure.[27] Finally, Part V concludes that intangible opinion work product protection should not be allowed to frustrate the new federal mandatory disclosure duties; courts should dismiss these work product claims as they arise, or, alternatively, the Federal Rules of Civil Procedure should be further amended to prevent these claims in the mandatory disclosure context.

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24. *See infra* subpart II(B).

25. An argument that information should be protected as intangible opinion work product begins with a motion from the nondisclosing litigant to claim protection. *See* FED. R. CIV. P. 26(b)(5) (requiring a party who withholds otherwise discoverable information as "trial preparation material" to make an express claim for discovery immunity). The opposing litigant then makes a motion to compel disclosure and to sanction the nondisclosing adversary. FED. R. CIV. P. 37(a)(2)(A). In this way, the structure of the present federal rules incites several costly motions with each claim for discovery immunity under the work product doctrine.

26. A successful intangible opinion work product claim would probably prevent an opponent from discovering the protected information altogether. *See* FED. R. CIV. P. 26(b)(3) (preventing the discovery of "the mental impressions, conclusions, opinions, or legal theories" of a litigant); *supra* note 72 (explaining why opinion work product is almost always immune from discovery).

27. This Note concludes that intangible opinion work product protection is unjustified only in the mandatory disclosure context, not in the context of formal discovery. As to whether this protection is justified in this latter context, this Note expresses no position. However, for an excellent criticism of this type of work product protection, see Sporck v. Peil, 759 F.2d 312, 319-20 (3d Cir. 1985) (Seitz, J., dissenting).

I. An Overview of Mandatory Disclosure

For years, commentators have contemplated using procedures like mandatory disclosure to reform the discovery system established by the Federal Rules of Civil Procedure.[28] Heeding the advice of these commentators, Congress began reforming the federal discovery procedures with the Civil Justice Reform Act of 1990 (CJRA).[29] The CJRA encouraged federal district courts to use experimental local rules, including informal mandatory disclosure procedures,[30] to improve federal civil discovery.

The Advisory Committee[31] suggested a model plan for mandatory disclosure in proposed Rule 25.1.[32] At the end of an experimental period in 1995, the district courts employing mandatory disclosure provisions like proposed Rule 25.1 were to report their findings to the Advisory Committee.[33] Much to the annoyance of critics, however, the Advisory Committee did not wait for feedback from the CJRA experimental period.[34] In the spring of 1993, at the urging of the Advisory Committee, the Supreme Court submitted to Congress proposed amendments to the Federal Rules.[35] These amendments contained mandatory disclosure provisions and other discovery reforms.[36] On December 1, 1993, the amendments

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28. *See* Brazil, *supra* note 9, at 1352-56 (outlining a model proposal for mandatory disclosure to solve discovery abuse); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1057, 1057-59 (1975) (arguing that the rules of professional responsibility "should compel disclosures of material facts and forbid material omissions"); Schwarzer, *supra* note 9, at 721-23 (proposing a mandatory disclosure rule to eliminate adversarial discovery tactics).

29. Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified as amended in scattered sections of 28 U.S.C.). The discovery reforms of the CJRA were codified at 28 U.S.C. § 471 (Supp. V 1993).

30. *See* 28 U.S.C. § 473 (Supp. V 1993) (outlining an "expense and delay reduction" plan for district courts that encourages "cost-effective discovery through the voluntary exchange of information").

31. *See supra* note 10.

32. FED. R. CIV. P. 25.1 (Advisory Committee Reporter's Proposed Draft, Mar. 8, 1990), *reprinted in* Mullenix, *supra* note 10, at 858-61.

33. 28 U.S.C. § 471 (Supp. V 1993).

34. *See* Amendments to Federal Rules of Civil Procedure, 146 F.R.D. 402, 512 (1993) (Scalia, J., dissenting) ("Apparently, the advisory committee considered this [experimental period] too prolonged, . . . preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation."); *IADC and Others Urge Congress to Delete Disclosure from Rules*, 60 DEF. COUNSEL J. 507, 515 (1993) [hereinafter *IADC*] (insisting that the implementation of a federal mandatory disclosure program prior to the expiration of the CJRA experimental period would be premature).

35. *See* Letter from Chief Justice Rehnquist to the Speaker of the House of Representatives Foley, 146 F.R.D. 402, 403 (1993) (transmitting the 1993 proposed amendments of the Advisory Committee, including the new mandatory disclosure provisions, to Congress for consideration). The Chief Justice makes all appointments to the Advisory Committee, 4 WRIGHT & MILLER, *supra* note 2, § 1007, at 35, and submits their recommended amendments of the Federal Rules to Congress, 28 U.S.C. §§ 2072-2074 (1988 & Supp. V 1993).

36. The amendments contain other, less controversial reforms, such as rules requiring extensive disclosure of information about expert witnesses, FED. R. CIV. P. 26(a)(2)(A)-(C); a rule placing presumptive limits on the use of discovery provisions, like interrogatories and depositions, FED. R.

became part of the Federal Rules.[37] However, the Advisory Committee is allowing reluctant district courts to opt out of these new amendments and to use the prior rules instead.[38]

A. *The Mechanics and Nature of Mandatory Disclosure Duties*

Mandatory disclosure imposes upon each litigant the duty to provide to the opponent all relevant information for resolving the dispute. The initial duty, contained in Rule 26(a)(1), requires litigants shortly after the pleadings, and without waiting for discovery requests, to turn over all information "relevant to the disputed facts alleged with particularity in the pleadings."[39] This exchange should include information about individuals, documents, data compilations, and tangible things, provided that such information is relevant to the issues raised by the pleadings.[40] Furthermore, litigants claiming damages must turn over documents and other evidentiary material used to compute their damages, "including materials bearing on the nature and extent of injuries suffered."[41] Rule 26(e)(1) imposes a continuing duty to supplement this extensive body of relevant information.[42] Thus, if after further investigation litigants uncover information falling within the Rule 26(a)(1) categories, they must disclose such information at that time, regardless of whether the information is helpful or harmful to their case.[43]

Both the initial disclosure duty and the continuing duty to supplement require litigants to sift through the information they have gathered and to evaluate it in light of the issues raised by their dispute. Each individual interview, document, or tangible item must be analyzed in order to determine if it offers information either relevant to issues in the pleadings[44] or bearing on the injuries suffered.[45] In order for the mandatory discovery process to operate effectively, litigants must evaluate all information

CIV. P. 26(b)(2); and a rule demanding that parties meet shortly after the initiation of a lawsuit to plan their discovery and to discuss early settlement, FED. R. CIV. P. 26(f).

37. *New Procedural Rules*, *supra* note 11, at 1077.

38. *See* STEINSTRA, *supra* note 12, at 1 ("[Rule 26] permits each court by local rule or order to exempt all cases or categories of cases from some of the rule's requirements . . . ."); *see also* FED. R. CIV. P. 26(a)(1) advisory committee's note to 1993 Amendments (noting that a district court may "reject all [mandatory disclosure] requirements for the present").

39. FED. R. CIV. P. 26(a)(1)(A)-(B).

40. *Id.*

41. FED. R. CIV. P. 26(a)(1)(C).

42. FED. R. CIV. P. 26(e)(1).

43. FED. R. CIV. P. 26(e) advisory committee's note to 1993 amendments ("The obligation to supplement disclosures and discovery responses applies whenever a party learns that its prior disclosures or responses are in some material respect incomplete or incorrect.").

44. FED. R. CIV. P. 26(a)(1)(A)-(B).

45. FED. R. CIV. P. 26(a)(1)(C).

objectively, without regard to their interests in the outcome of the lawsuit.[46]

B. *Perspectives on the Policy of Mandatory Disclosure*

Determining the likely effects of mandatory disclosure on federal pretrial litigation has caused a disagreement over the policy of the program itself. One perspective on policy comes from the Advisory Committee, which considers mandatory disclosure to be an extension of the legitimate operation of formal discovery.[47] The Committee notes that the purpose of the new provisions is "to accelerate the exchange of basic information about [a] case and to eliminate the paper work involved in requesting such information."[48] The Advisory Committee, therefore, views mandatory disclosure as a more efficient way to exchange relevant information that otherwise would be revealed through formal discovery.

Critics of the program, on the other hand, consider it to be a radical procedure that threatens the adversary system of litigation.[49] Forcing litigants to turn over information that is helpful to their opponents and harmful to their own interests, critics argue, is extremely inconsistent with the adversarial relationship between the litigants.[50]

The best perspective for assessing the policy of the new mandatory disclosure provisions incorporates milder versions of these extreme positions. The Advisory Committee is correct, in theory, that mandatory disclosure seeks to exchange the same information that would be exchanged in formal discovery through the use of interrogatories, depositions, requests for documents, and the other discovery procedures. However, this view of mandatory disclosure presupposes that adversarial litigants do not abuse the formal discovery procedures, but instead use them to exchange all relevant information. The critics of mandatory disclosure are correct in arguing that it alters the relationship between the litigants, but the resulting

46. The Advisory Committee expects litigants to exercise these disclosure duties "to secure the just, speedy, and inexpensive determination" of their dispute. FED. R. CIV. P. 1; *see* FED. R. CIV. P. 26(a) advisory committee's note. Consequently, the litigants must not resort to gamesmanship when carrying out their disclosure obligations. FED. R. CIV. P. 26(a)(1)(A)-(B) advisory committee's note.

47. *See* Mullenix, *supra* note 10, at 804 (noting the Advisory Committee's belief that mandatory disclosure would result in the exchange of information "usually obtained under formal discovery requests").

48. FED. R. CIV. P. 26 advisory committee's note to 1993 amendments.

49. *See* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 402, 511 (1993) (Scalia, J., dissenting) (arguing that the new federal mandatory disclosure program "does not fit comfortably within the American judicial system, which relies on adversarial litigation to develop the facts before a neutral decisionmaker"); *IADC*, *supra* note 34, at 507 (claiming that "disclosure is sharply at odds with fundamental tenets of our adversary system").

50. *See* Frankel, *supra* note 28, at 1055, 1055-59 (discussing the conflict between the lawyer's role as a "hired gun" and the lawyer's public service role in uncovering the truth).

relationship does not threaten the adversary system of justice.[51] Mandatory disclosure depends upon a more cooperative and sharing relationship between the litigants than does formal discovery;[52] mandatory disclosure expects litigants to be mindful of their opponents' interests so that if they uncover relevant and otherwise discoverable information, damaging or helpful to their own case, they will turn it over without the prompting of discovery requests. The best characterization of mandatory disclosure is that it seeks to more efficiently exchange the information that the nonadversarial use of formal discovery would exchange and that it does this by fostering a more cooperative relationship between the litigants than exists during formal discovery.

II. An Overview of the Work Product Doctrine

A. *The Categories of Work Product Protection*

To understand how compliance with mandatory disclosure duties can conflict with work product protection, the complex work product doctrine must be briefly surveyed and categorized. The work product doctrine was born in the famous United States Supreme Court case *Hickman v. Taylor*[53] in 1947 and was roughly codified in 1970 in Rule 26(b)(3).[54] Courts and commentators have struggled over the years to define precisely what types of information are exempted from formal discovery by the work product doctrine,[55] and four categories of protected information have emerged: tangible ordinary work product, intangible ordinary work product, tangible opinion work product, and intangible opinion work product.[56]

51. *See infra* section IV(B)(2).

52. It is this more cooperative relationship that Justice Scalia criticized when he wrote that "[r]equiring a lawyer to make a judgment as to what information is 'relevant to disputed facts' plainly requires him to use his professional skills in the service of the adversary." *Amendments to the Federal Rules*, 146 F.R.D. at 511 (Scalia, J., dissenting).

53. 329 U.S. 495 (1947).

54. For a discussion of why Rule 26(b)(3) does not precisely codify the work product doctrine, see Kevin M. Clermont, *Surveying Work Product*, 68 CORNELL L. REV. 755 (1983).

55. *See* ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 143 (1985) ("There continues to exist a fair amount of confusion regarding what is and what is not discoverable from efforts made and materials prepared in anticipation of litigation or for trial."); 8 WRIGHT & MILLER, *supra* note 2, § 2022, at 189-90 (noting the difficulties that the federal courts have encountered in developing work product protection).

56. The distinction between ordinary and opinion work product is not unique to this Note. *See In re* Doe, 662 F.2d 1073, 1076 n.2 (4th Cir. 1981) (explaining the distinction between ordinary and opinion work product), *cert. denied sub nom.* Doe v. United States, 455 U.S. 1000 (1982); *In re* Murphy, 560 F.2d 326, 334 (8th Cir. 1977) (noting that Rule 26(b)(3) implicitly distinguishes between ordinary and opinion work product). Moreover, other commentators have recognized the distinction between tangible and intangible work product. *See, e.g.*, Special Project, *The Work-Product Doctrine*, 68 CORNELL L. REV. 760, 839-40 (1983) (asserting that intangible work product, because of its unwritten or oral form, may merit even higher protective standards than tangible work product). However, recognizing four distinct categories of work product based upon the ordinary-opinion distinction and the tangible-intangible distinction is purely original to this Note.

To receive work product protection, any discovery information must pass two threshold requirements: the information must have been produced in anticipation of litigation, and the information must have been produced by or for a party, or by or for that party's representative.[57] The other requirements for work product protection depend on the category in which the information falls.

1. Tangible Ordinary Work Product, Intangible Ordinary Work Product, and Tangible Opinion Work Product.—Ordinary work product protection is not expressly created by *Hickman v. Taylor* or by Rule 26(b)(3).[58] This protection encompasses information created in anticipation of litigation by litigants that does not contain the "mental impressions, conclusions, opinions, or legal theories"[59] of the litigants.[60] Tangible ordinary work product consists of recorded documents and other tangible things like witness statements,[61] investigative reports,[62] intraoffice

57. According to Professors Wright and Miller, in order to come within the qualified immunity from discovery created by Rule 26(b)(3) three tests must be satisfied. The material must be:

1. "documents and tangible things;"
2. "prepared in anticipation of litigation or for trial;" and
3. "by or for another party or by or for that other party's representative."

8 WRIGHT & MILLER, *supra* note 2, § 2024, at 196-97 (1970 & Supp. 1994) (footnote omitted) (quoting FED. R. CIV. P. 26). The last two requirements are characteristics of all four categories of work product identified by this Note. The first is not found in either intangible ordinary work product or intangible opinion work product, which both consist of unrecorded—not physically manifest—information. This raises the question of whether Rule 26(b)(3) is the source of protection for intangible ordinary and intangible opinion work product. For a discussion of this question and a conclusion that *Hickman v. Taylor*, not Rule 26(b)(3), protects all intangible work product, see Special Project, *supra* note 56, at 840-41.

58. *See* Special Project, *supra* note 56, at 793 (stating that Rule 26(b)(3) "distinguishes ordinary from opinion work product by implication only").

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

60. *See, e.g.*, *In re* Doe, 662 F.2d at 1076 n.2 (noting that ordinary work product "refer[s] to those documents prepared by the attorney which do not contain the mental impressions, conclusions or opinions of the attorney").

61. *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 509-10 (1947) (denying the production of defense counsel's witness statements taken in anticipation of litigation). Witness statements taken by someone other than a litigant's attorney are also protected as tangible ordinary work product. *See, e.g.*, United States v. Nobles, 422 U.S. 225, 238-39 (1975) (noting that witness statements taken by an attorney's investigator would be protected work product); Almaguer v. Chicago, R.I. & Pac. R.R., 55 F.R.D. 147, 148 (D. Neb. 1972) (denying the production of witness statements taken by "the defendant's nonlawyer claim agent").

62. *See, e.g.*, United States v. Leggett & Platt, Inc., 542 F.2d 655, 659-60 (6th Cir. 1976) (granting work product protection for government investigative reports whether prepared in the anticipation of the instant case or other, closely related litigation), *cert. denied*, 430 U.S. 945 (1977); FDIC v. Cherry, Bekaert & Holland, 131 F.R.D. 596, 603-04 (M.D. Fla. 1990) (protecting an FDIC investigator's work papers relating to loans).