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WORK PRODUCT PROTECTION, TAX ACCRUAL DOCUMENTS, AND *UNITED STATES V. TEXTRON, INC.*: WHY THE FIRST CIRCUIT GOT IT RIGHT FOR THE WRONG REASONS

I. INTRODUCTION

The work product rule protects documents and other materials prepared in anticipation of litigation.¹ Originally established through case law and now codified by statute, the doctrine protects an attorney's litigation strategy from discovery by opposing counsel.² Though sometimes referred to as a privilege exception within the rubric of the attorney-client privilege, the protection of work product can be distinguished in two fundamental ways.³ First, the doctrine may be

¹ See FED. R. CIV. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (holding protecting attorney's work product necessary to proper preparation of legal arguments and strategies). The Supreme Court stated:

Proper preparation of a client's case demands that [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the “[w]ork product of the lawyer.”

Hickman, 329 U.S. at 511 (internal citation omitted); see also BLACK'S LAW DICTIONARY 1746 (9th ed. 2009) (defining work product rule). The work product rule is “[t]he rule providing for qualified immunity of an attorney's work product from discovery or other compelled disclosure.” *Id.*

² FED. R. CIV. P. 26(b)(3)(A) (outlining work product rule); BLACK'S LAW DICTIONARY 1746 (9th ed. 2009) (“The exemption was primarily established to protect an attorney's litigation strategy.”); see also *Hickman*, 329 U.S. at 510 (establishing work product protection). Public policy justifies protecting an attorney's work product: “[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.” *Id.* at 510. “[C]ounsel should be able to work within an area of professional confidentiality, described by the work product rule.” RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 87 cmt. b (2000).

³ Compare BLACK'S LAW DICTIONARY 1746 (9th ed. 2009) (defining work product rule), with BLACK'S LAW DICTIONARY 1370 (9th ed. 2009) (defining attorney-client privilege). Attorney-client privilege is “[t]he client's right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.” BLACK'S LAW DICTIONARY 1370 (9th ed. 2009). The attorney-client privilege is distinct from work product protection:

overridden by a showing of “substantial need” and “undue hardship” under the Federal Rules of Civil Procedure, whereas the attorney-client protection may never be overcome.⁴ Second, the work product doctrine is broader than the protection afforded by the attorney-client privilege because it applies to more than just the communication between an attorney and her client; it includes any document or material prepared in “anticipation of litigation” regardless of whether an attorney produced the materials sought.⁵ The scope and nature of the phrase in “anticipation of litigation”

Although the work product rule has often been spoken of as creating a “privilege,” it is a qualified one that does not grant full immunity from discovery. To the extent the term “privilege” causes confusion between the work-product rule and the absolute privilege for confidential communications between attorney and client, it is important to keep in mind this distinction.

8 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2025 (3d ed. 2010).

⁴ FED. R. CIV. P. 26(b)(3)(A)(ii) (materials prepared in anticipation of litigation may be discovered if “the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”); *see* *Admiral Ins. Co. v. United States*, 881 F.2d 1486, 1494 (9th Cir. 1989) (noting work product protection may be overcome). “The principal difference between the attorney-client privilege and the work-product doctrine, in terms of the protections each provides, is that the privilege cannot be overcome by a showing of need, whereas a showing of need may justify discovery of an attorney’s work product.” *Id.* at 1494-95 (quoting Stephen A. Saltzberg, *Corporate and Related Attorney-Client Privilege Claims: A Suggested Approach*, 12 HOFSTRA L. REV. 279, 299 (1984)); *see also* *Upjohn Co. v. United States*, 449 U.S. 383, 384 (1981) (showing of undue hardship necessary to overcome work product protection); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 87 (2000) (explaining relationship between attorney-client privilege and work product doctrine).

⁵ FED. R. CIV. P. 26(b)(3)(A) (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).”); *see Hickman*, 329 U.S. at 508 (explaining differing scope of attorney-client privilege and work product). The Court explained, while “the memoranda, statements and mental impressions in issue in this case fall outside the scope of the attorney-client privilege and hence are not protected from discovery on that basis,” these documents were nevertheless protected under the work product rubric. *Id.* at 508, 514; *see also Upjohn*, 449 U.S. at 385 (illustrating difference between applicability of attorney-client privilege and work product protection). The Court stated, “[t]he notes and memoranda sought by the Government constitute work product based on oral statements. If they reveal communications, they are protected by the attorney-client privilege. To the extent they do not reveal communications they reveal attorneys’ mental processes in evaluating the communications.” *Upjohn*, 449 at 385; *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975) (“the work-product doctrine is distinct from and broader than the attorney-client privilege.”) (citing *Hickman*, 329 U.S. at 508); *Alltmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949) (stating *Hickman* Court extended protection to statements made by non-attorneys); *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 87 cmt. b (2000) (explaining work product doctrine broader than attorney-client privilege). “The attorney-client privilege is limited to communications between a client and lawyer and certain of their agents; in contrast, work product includes many other kinds of materials, even when obtained from sources other than the client.” *Id.* (citation omitted).

is the source of considerable contention.⁶

While granting broad protection, the work product doctrine does not protect “[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation.”⁷ Current controversy exists between the federal circuits over the breadth of protection the work product doctrine grants to “dual purpose” documents—those documents created both in the ordinary course of business and in anticipation of litigation.⁸ The majority of circuits apply the “because of”

⁶ See, e.g., Jeff A. Anderson et al., Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 843-45 (1983) (discussing meaning of “anticipation of litigation”); Claudine Pease-Wingenter, *Prophetic or Misguided?: The Fifth Circuit’s (Increasingly) Unpopular Approach to the Work Product Doctrine*, 29 REV. LITIG. 121, 133 (2009) (hereinafter Pease-Wingenter I) (describing uncertainty about meaning and scope of “anticipation of litigation”); Claudine Pease-Wingenter, *The Application of the Attorney-Client Privilege to Tax Accrual Work Papers: The Real Legacy of United States v. Textron*, 8 HOUS. BUS. & TAX L.J. 337, 344-46 (2008) (hereinafter Pease-Wingenter II) (discussing wording of statute).

⁷ FED. R. CIV. P. 26(b)(1) advisory committee’s note (stating parameters of qualified immunity provided by work product doctrine); see *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45, 52 (4th Cir. 1963) (holding statements made pursuant to federal regulations do not constitute attorney work product). In this automobile accident case, the Fourth Circuit held the defendant’s statements were discoverable because they were made pursuant to Interstate Commerce Commission (ICC) regulations, and as such “[t]hey were made in the ordinary course of business under ICC regulations and [did] not represent the lawyer’s work product within the [Hickman] holding.” *Id.* Of note, some commentators have suggested the “ordinary course of business” exception is “based on a misreading of the Advisory Committee Notes . . . and that policy concerns may favor abolition of the ordinary course of business exception.” Pease-Wingenter I, *supra* note 6, at 152-53; see also Thomas Wilson, Note, *The Work Product Doctrine: Why Have an Ordinary Course of Business Exception?*, 1988 COLUM. BUS. L. REV. 587, 601 (1988) (arguing rule protects “materials prepared pursuant to public requirements but related to litigation”). Such suggestions are not compelling as they relate to the public requirements exception. See *infra* note 99 and accompanying text.

⁸ *United States v. Adlman*, 134 F.3d 1194, 1197-98 (2d Cir. 1998) (referring to documents created for more than one purpose). Though the Second Circuit did not use the phrase “dual purpose,” it referred to such documents as “documents which, although prepared because of expected litigation, are intended to inform a business decision influenced by the prospects of the litigation.” *Id.* Compare *In re Grand Jury Subpoena*, 357 F.3d 900, 908 (9th Cir. 2004) (protecting “dual purpose” documents), *Adlman*, 134 F.3d at 1195 (“We hold that a document created because of anticipated litigation . . . does not 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.”), *In re Sealed Case*, 146 F.3d 881, 888 (D.C. Cir. 1998) (“The work-product privilege protects documents prepared in anticipation of litigation regardless of whether the anticipated litigation ever occurs.”), *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979) (finding documents prepared for administrative proceeding protected from discovery in simultaneous grand jury investigation), with *United States v. Textron, Inc.*, 577 F.3d 21, 26 (1st Cir. 2009) (holding “dual purpose” documents not protected), *cert. denied*, 130 S. Ct. 3320 (May 24, 2010), *Simon v. G.D. Searle & Co.* 816 F.2d 397, 401-02 (8th Cir. 1987) (finding work product doctrine does not protect aggregate corporate risk management documents), *United States v. El Paso Co.*, 682 F.2d 530, 542-43 (5th Cir. 1982) (declining to protect “dual purpose” documents). The Eighth Circuit has reasoned “[t]he purpose of the work product doctrine—that of preventing discovery of a lawyer’s mental impressions—is not violated by allowing discovery of

test which provides blanket protection for documents prepared in anticipation of litigation, and often protects even those documents also prepared during the ordinary course of business or for some other purpose.⁹ The minority of circuits have adopted the “primary purpose” test which grants substantially narrower protection to documents created for more than one purpose.¹⁰ Under the “primary purpose” test, courts shield documents from discovery only when the possibility of litigation is the “primary motivating force” behind the document preparation.¹¹

The controversy of whether the work product doctrine protects documents created for more than one purpose is particularly highlighted in the context of tax accrual work papers, documents that corporations must prepare to comply with federal securities law.¹² This Note addresses the

documents that incorporate a lawyer’s thoughts in . . . an indirect and diluted manner.” *Simon*, 816 F.2d at 402.

⁹ See *In re Grand Jury Subpoena*, 357 F.3d at 908; *In re Sealed Case*, 146 F.3d at 888; *Adlman*, 134 F.3d at 1195; *Nat’l Union Fire Ins. Co. of Pitt., Pa v. Murray Sheet Metal Co.*, 967 F.2d 980, 984-85 (4th Cir. 1992) (adopting “because of” test and suggesting it would grant broad protection to “dual purpose” documents); *In re Grand Jury Proceedings*, 604 F.2d at 803 (extending protection to “dual purpose” documents). But see *Simon*, 816 F.2d at 401-02 (applying “because of” test but declining to protect “dual purpose” documents).

¹⁰ See generally *El Paso*, 682 F.2d at 542-43 (holding work product doctrine did not protect documents because primarily prepared for business purposes). The Fifth Circuit reasoned because the requested documents were designed solely to support the defendant company’s balance sheet in compliance with Securities and Exchange Commission (SEC) regulations, and not to support a case for trial or negotiation, the work product doctrine did not apply. *Id.* at 543-44.; see also *infra* note 45 and accompanying text (citing authority viewing “primary purpose” test as narrow).

¹¹ See *El Paso*, 682 F.2d at 543 (drawing distinction between documents prepared “in anticipation of litigation” and those in ordinary course of business). The Fifth Circuit found the documents were prepared only as “a means to a business end” and thus did not enjoy work product protection. *Id.*

¹² See 15 U.S.C. § 781(b)(1)(J) (2010) (requiring publicly-traded companies to have public financial statements certified by independent tax auditor); see also 17 C.F.R. § 210 (2009). The Sarbanes-Oxley Act of 2002 (SOX) set enhanced financial reporting standards for publicly-held companies in the United States. See generally Sarbanes Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). Federal securities law compels public companies to prepare financial statements and obtain certification of those statements from an independent financial auditor. *Id.*; *Textron*, 577 F.3d at 22 (describing defendant company’s obligations under securities law); *El Paso*, 682 F.2d at 534 (noting defendant company must produce contingent tax liability analysis in compliance with securities laws); Pease-Wingenter II, *supra* note 6, at 339 (noting corporations’ financial reporting requirements); Katherine Pryor Burgeson, Note, *IRS Access to Tax Accrual Workpapers: Legal Considerations and Policy Concerns*, 51 FORDHAM L. REV. 468, 468-70 (1982) (describing public corporation’s obligations under federal securities law). As part of preparing these statements companies must analyze their contingent tax liabilities and create what is generally referred to as a “tax pool analysis” or “tax accrual work papers.” *El Paso*, 682 F.2d at 534. “The term ‘tax accrual work papers’ is one of several names used to describe the documentation supporting the amount of the tax reserve.” Pease-Wingenter II, *supra* note 6, at 339 (quoting *El Paso*, 682 F.2d at 533).

methods circuit courts have employed in their application of the work product doctrine to documents created for more than one purpose, emphasizing how the doctrine applies to tax accrual papers.¹³ Part II will trace the evolutionary history of the work product doctrine, from its origins in case law to its statutory codification, and will discuss the current circuit split regarding the doctrine's application to dual purpose documents.¹⁴ Part III will detail the case law establishing the different work product tests and will focus particularly on the two circuit decisions directly addressing the issue in the tax accrual papers context.¹⁵ It will explore the First Circuit's approach in *United States v. Textron, Inc.*,¹⁶ where a divided en banc court found that the work product doctrine did not afford protection to tax accrual papers.¹⁷ This Note will argue that a court need not apply a work product protection test when a statute compels production of a requested document, that publicly-traded companies are precluded from asserting a work product defense against the IRS's discovery request of its tax accrual work papers, and, even if a court grants protection, an IRS summons can overcome the doctrine because the government has the right to demonstrate that it has a substantial need to access the documents.¹⁸

II. HISTORY

Discovery is the court-mandated production of information from other parties and non-party witnesses.¹⁹ The Federal Rules of Civil Procedure establish a broad scope of discovery by stating that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.”²⁰ In mandating the production of

¹³ See *infra* Part III (outlining tests circuits use to determine whether work product doctrine protects “dual purpose” documents); see also *supra* note 12 and accompanying text (defining tax accrual papers).

¹⁴ See *infra* Part II (describing history and development of work product doctrine).

¹⁵ *Textron*, 577 F.3d at 26 (addressing work product in context of “dual purpose” documents); *El Paso*, 682 F.2d at 545 (determining whether “dual purpose” documents are protected by work product); see *infra* Part II (detailing circuit split).

¹⁶ 577 F.3d 21 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (May 24, 2010).

¹⁷ *Textron*, 577 F.3d at 31-32 (holding work papers not protected); see *infra* Part III.

¹⁸ See *infra* Part IV (arguing work product does not protect tax accrual work papers of publicly-traded companies).

¹⁹ See FED. R. CIV. P. 26 (outlining discovery rules); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 87 cmt. b (2000) (describing discovery in general).

²⁰ FED. R. CIV. P. 26(b)(3) (setting broad scope of discovery rules). “The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case.” FED. R. CIV. P. 26 advisory committee’s note (1946 amendment subdivision (b)); see Pease-Wingenter I, *supra* note 6, at 125 (“In 1937, the Federal Rules of Civil Procedure . . . were adopted and had the effect of greatly

information, courts have discretionary power to limit what is discoverable, though the information may be relevant to a party's claim or defense to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."²¹ Prior to 1970, the only codified limits to the broad scope of the rules circumscribing discovery was this open-ended language.²² The Supreme Court, however, set forth a discovery limitation in *Hickman v. Taylor*.²³

In *Hickman*, the Court faced the question of whether a potential plaintiff may request that an attorney turn over all documents written and prepared to defend against potential lawsuits following a boating accident.²⁴ The plaintiff specifically requested two types of documents: the written statements the attorney had recorded and unrecorded oral statements from interviews conducted with witnesses.²⁵ The trial court held the attorney in contempt for refusing to disclose the requested information.²⁶ The Third Circuit overturned the trial court's ruling, and

expanding the role of discovery.").

²¹ FED. R. CIV. P. 26(b)(3) and (c)(1); FED. R. CIV. P. 26 advisory committee's note (commenting on 1970 amendment (subdivision (b)(3) – Trial Preparation: Materials)). The advisory committee states:

All provisions as to scope of discovery are subject to the initial qualification that the court may limit discovery in accordance with these rules. Rule 26 . . . confers broad powers on the courts to regulate or prevent discovery even though the materials sought are within the scope of [the rules] . . . and these powers have always been freely exercised.

Id.

²² See *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (describing broadness of discovery rules). The Court explicitly stated in its pre-amendment discussion of discovery procedures that "discovery rules are to be accorded a broad and liberal treatment." *Id.*; see also Pease-Wingenter I, *supra* note 6, at 125-26 (noting broad scope of original 1937 rule).

²³ *Hickman*, 329 U.S. at 510-11 (referencing public policy behind limiting broadness of discovery rules). The Court noted:

[A] lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of [her] clients. In performing [her] various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.

Id. at 510.

²⁴ *Id.* at 497-503 (detailing issue presented to Court). The accident involved a tug boat and resulted in the death of five crew members. *Id.* at 498. Owners of the tug boat employed a law firm to defend against potential lawsuits rising from the accident. *Id.* An attorney of the firm, and the defendant in the *Hickman* case, interviewed the surviving witnesses and took their statements. *Id.* The plaintiffs in *Hickman* requested information related to these interviews. *Id.* at 499.

²⁵ *Id.* at 498-99.

²⁶ *Hickman v. Taylor*, 153 F.2d 212 (3d Cir. 1945), *aff'd*, 329 U.S. 495 (1947).

held that “‘privilege’ as used in the Rules comprehends the material asked for”²⁷ Affirming the Third Circuit’s decision, the Supreme Court created and defined “work product” as a doctrine that protects discovery of tangible documents and other things prepared in anticipation of litigation.²⁸ The Court alluded to two distinct types of work product: “ordinary” work product and “core” or “opinion” work product.²⁹ The Court explicitly stated that documents and other materials falling under the work product definition are discoverable only upon a “showing of necessity.”³⁰

Congress amended the Federal Rules of Civil Procedure in 1970 to include a codification of the work product rule set forth in *Hickman*.³¹ Rule 26 provides:

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 . . . [however if] . . . the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.³²

²⁷ *Id.* at 222-23.

²⁸ *Id.* at 511 (defining work product). The Court characterized work product to include “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible [things].” *Id.* The Court squarely affirmed the Third Circuit’s decision in concluding “the information here sought was part of the ‘work product of the lawyer’ and hence privileged from discovery.” *Id.* at 500.

²⁹ See *id.* at 508 (describing two types of work product). The Court, in explaining that the traditional attorney-client communication privilege does not extend to the *work* of an attorney, described two types of work product. *Id.* One type of work product is “the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client’s case.” *Id.* The second type of work product is “writings which reflect an attorney’s mental impressions, conclusions, opinions or legal theories.” *Id.* These two work product categories are now commonly recognized. See BLACK’S LAW DICTIONARY 1746 (9th ed. 2009) (defining opinion work product and ordinary work product). The Court in *Hickman* chose to protect both types of work product based on legitimate public policy concerns. See 329 U.S. at 511. If the Court compelled production of an attorney’s work product, then “[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.” *Id.*

³⁰ *Hickman*, 329 U.S. at 512.

³¹ FED. R. CIV. P. 26(b)(3); see *Hickman*, 329 U.S. at 511 (defining work product). Some commentators argue the 1970 amendments to the rule resulted only in a partial-codification of *Hickman*. See also Anderson et al., *supra* note 6, at 765 (“[R]ule 26(b)(3)’s partial codification of the [*Hickman*] doctrine created many new problems.”); Pease-Wingenter I, *supra* note 6, at 134 (“Rule 26(b)(3) is considered by commentators to be only a ‘partial codification’ of the protection recognized in *Hickman* . . .”).

³² FED. R. CIV. P. 26(b)(3)(A)-(B). While the amended rules mandate that courts must protect against the work product of attorneys, they also require that any claim of privilege or work

The amended rules codified and expanded *Hickman* by broadening the umbrella of protection to include materials prepared by an attorney *and* those prepared by or for a party's representative, such as a document prepared by an insurer or an agent.³³

The Court has consistently reaffirmed *Hickman* and the "strong public policy" underlying the work product privilege.³⁴ The Court has made clear that documents that "tend[] to reveal the attorney's mental process" receive particular protection that is not afforded to factual material.³⁵ This special treatment for the opinion work product is justified because "[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which [s]he can analyze and prepare [her] client's case."³⁶

It is critical to note that the amended rules simply state that only documents prepared in "anticipation of litigation or for trial" are protected.³⁷ The advisory committee notes specifically state that "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes are not under the qualified immunity provided by [Federal Rule 26(b)(3)(A)]."³⁸ Such a qualification is particularly important when applying the work product doctrine in the context of dual purpose documents, i.e., documents that are prepared in anticipation of litigation *and also* for ordinary business purposes.³⁹ The circuits have developed two

product must be made expressly. FED. R. CIV. P. 26(b)(5)(A)(i)-(ii).

³³ Compare FED. R. CIV. P. 26(b)(3)(A) (protecting documents prepared by "the other party's attorney, consultant, surety, indemnitor, insurer, or agent"), with *Hickman*, 329 U.S. at 511 (referring only to work product prepared by a party's attorney).

³⁴ See *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981) ("The 'strong public policy' underlying the work-product doctrine was reaffirmed recently in [*Nobles*]."); *United States v. Nobles*, 422 U.S. 225, 236-37 (1975) ("The work-product doctrine, recognized by this Court [in *Hickman*] reflects the strong 'public policy underlying the orderly prosecution and defense of legal claims.'").

³⁵ See *Upjohn*, 449 U.S. at 400 ("Rule 26 accords special protection to work product revealing the attorney's mental processes."); Anderson et al., *supra* note 6, at 820 ("*Hickman* and the 1970 amendments provide greater protection for opinion work product than for ordinary work product.>").

³⁶ *Nobles*, 422 U.S. at 238 (describing need to protect attorney work product); see also *United States v. Adlman*, 134 F.3d 1194, 1196 (2d Cir. 1998) ("The work-product doctrine . . . is intended to preserve a zone of privacy . . .").

³⁷ See FED. R. CIV. P. 26(b)(3)(A) ("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 . . .").

³⁸ FED. R. CIV. P. 26 advisory committee's note (1946 amendment) subdivision (b)) (clarifying qualified immunity of Rule).

³⁹ See *supra* notes 8-11 (describing two approaches to resolving work product immunity for "dual purpose" documents).

tests by determining whether the work product doctrine should protect dual purpose documents.⁴⁰ A majority of circuits employ the “because of” test while a circuit minority applies the “primary purpose” test.⁴¹ The fundamental question employed in the “because of” test is whether the document in question was prepared because of the prospect of litigation.⁴² If so, then the document is protected by the work product doctrine.⁴³ Under the “primary purpose” test, work is only protected when it is primarily motivated to provide support in potential future litigation.⁴⁴ Compared to the “because of” test, the “primary purpose” test provides much narrower protection to documents.⁴⁵

⁴⁰ See *supra* notes 8-11 and accompanying text (defining “because of” and “primary purpose” tests); see also *infra* Part III (describing cases where circuits applied each test).

⁴¹ Compare *In re Grand Jury Subpoena*, 357 F.3d 900, 909-10 (9th Cir. 2004) (“We conclude that the withheld documents, notwithstanding their dual purpose character, fall within the ambit of the work product doctrine.”), *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) (“The testing question for the work-product privilege, we have held, is whether . . . the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”) (citations omitted) (internal quotations omitted), *Adlman*, 134 F.3d at 1198 (adopting the “because of” test while specifically rejecting the “primary purpose” test), *Nat’l Union Fire Ins. Co. of Pitt., Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) (“[D]ocument must be prepared because of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation.”), *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401-02 (8th Cir. 1987) (finding requested documents not protected, but working within “because of” test rubric), *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979) (endorsing “because of” test), *with United States v. Textron, Inc.*, 577 F.3d 21, 26 (1st Cir. 2009) (stating use of “because of” test), *United States v. El Paso Co.*, 682 F.2d 530, 542-43 (5th Cir. 1982) (adopting “primary purpose” test).

⁴² *In re Grand Jury Subpoena*, 357 F.3d at 908 (describing “because of” test). The Ninth Circuit explained that the “because of” test “considers the totality of the circumstances and affords protection when it can fairly be said that the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[.]” *Id.* (quoting *Adlman*, 134 F.3d at 1195); see also cases cited *supra* note 41 (applying “because of” test).

⁴³ See *supra* note 41 and accompanying text (outlining various applications of “because of” test). The broad protection the “because of” test provides is apparent—only the First and Eighth Circuits have declined protection when using that test. See *Textron*, 577 F.3d at 30-31 (declining to protect “dual purpose” documents when using “because of” test); *Simon*, 816 F.2d at 401-02 (finding requested documents not protected while using “because of” test); see also Pease-Wingenter I, *supra* note 6, at 148 (stating some courts applying “because of” test do so in “liberal manner”). Pease-Wingenter argues there is some discord in how to interpret the “because of” test, with some courts requiring the documents serve a “supportive function” in litigation, while other courts apply the test “in a much more liberal manner, and do not require the materials to be in any way potentially useful in the anticipated litigation.” Pease-Wingenter I, *supra* note 6, at 148.

⁴⁴ *El Paso*, 682 F.2d at 543 (citing *Davis* in endorsing “primary purpose” test); *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. Unit A Feb. 1981) (applying work product when primary motivating purpose behind document’s creation is to aid in possible litigation). Pease-Wingenter I, *supra* note 6, at 142 (providing detailed analysis of meaning of “primary purpose” test).

⁴⁵ See *Textron*, 577 F.3d at 32 (1st Cir. 2009) (Torruella, J., dissenting) (implying narrow

III. FACTS

A. The “Because of” Test

The United States Court of Appeals for the Third Circuit squarely addressed the work product doctrine in *In re Grand Jury Proceedings*.⁴⁶ The case involved an appeal of a district court order directing an attorney to testify before a grand jury and produce subpoenaed documents.⁴⁷ The Third Circuit held that documents generated by a law firm in connection with its representation of a corporation qualified for consideration of the work product privilege.⁴⁸ The court reasoned that even though the documents may not have been prepared specifically in connection with the grand jury investigation, they could have been prepared *because of* the civil litigation that gave rise to the grand jury investigation.⁴⁹

The Eighth Circuit addressed the question in *Simon v. G.D. Searle & Co.*⁵⁰ In this products liability action against a manufacturer, the district court ordered production of certain corporate risk management

protection of “primary purpose” test). In his dissent, Judge Torruella dismissed the majority’s opinion, stating that it failed to follow circuit precedent and actually employed an “even narrower variant” of the “primary purpose” test. *Id.*; *Adlman*, 134 F.3d at 1198 (describing “primary purpose” test as limited in scope). The Second Circuit read Rule 26(b)(3) as sweeping much more broadly than a “primary purpose” test would allow, and found that employing the narrower test was “at odds with the texts and policies of the Rule.” *Id.* at 1198 (detailing scope of work product protection). The Fifth Circuit stated only documents created for the *primary purpose* of aiding in litigation enjoyed protection. *El Paso*, 682 F.2d at 543. Such a requirement necessarily results in less protection. *See id.* The Fifth Circuit implied as such when it suggested that the requested documents “[do] not contemplate litigation” to the extent required to bring them within the Rule’s protection. *Id.*; *see also* Pease-Wingenter II, *supra* note 6, at 340 (describing *El Paso*’s “primary purpose” test as “narrow”).

⁴⁶ 604 F.2d 798 (3d Cir. 1979).

⁴⁷ *Id.* at 800 (describing procedural history). The attorney was representing a company accused of making false statements to the EPA during a civil proceeding with that agency. *Id.* at 803. The grand jury subpoenaed the attorney during the criminal investigation of the perjury accusation resulting from the civil proceeding. *Id.*

⁴⁸ *Id.* at 801, 803. Though the Third Circuit did not reach the question of whether the work product doctrine protected the attorney from testifying and disclosing the requested documents, but rather remanded the question to the district court for further fact-finding, it specifically referenced the “because of” test in its order. *Id.* at 803-04.

⁴⁹ *Id.* at 803. A grand jury investigated allegations that the defendant corporation made false statements to the EPA in connection with that agency’s inquiry into whether the company had complied with chemical waste management laws. *Id.* at 799. The Third Circuit noted a crime-fraud exception could be used to override any claim of work product protection, and the timing of the alleged crime’s occurrence determined whether work product protection applied. *Id.* at 803-04.

⁵⁰ 816 F.2d 397 (8th Cir. 1987).

documents.⁵¹ The Eighth Circuit ultimately determined that these documents were not protected.⁵² The court reasoned that the documents only revealed aggregate liability reserve figures rather than individual case reserve figures; the court concluded that the documents were prepared for business planning purposes rather than in anticipation of litigation.⁵³

The Fourth Circuit addressed the issue in *Nat'l Union Fire Ins. Co. of Pitt., PA v. Murray Sheet Metal Co.*⁵⁴ and also adopted the “because of” test.⁵⁵ In remanding the case, the Fourth Circuit ordered the district court to conduct a further examination of the requested documents to determine whether they were prepared “because of the prospect of litigation.”⁵⁶

⁵¹ *Id.* at 400-01 (describing procedural history of case). Searle, a manufacturing company, maintained a risk management department that monitored the company’s products liability litigation and created documents analyzing its litigation reserves. *Id.* at 399. The plaintiff sought discovery of these risk management documents. *Id.* The documents were prepared by non-attorney corporate officials, but relied on individual case reserve figures prepared by attorneys. *Id.* at 398.

⁵² *Id.* at 402 (“Accordingly, we hold that the work product doctrine does not block discovery of Searle’s risk management documents or the aggregate case reserve information contained therein.”).

⁵³ *Id.* In support of its conclusion that the risk management documents were prepared for business planning purposes, the court noted that it considered Searle a self-insured company because its products liability insurance carried such a high deductible. *Id.* at 399. This was an important factor in concluding the risk management documents containing aggregate liability reserve figures were prepared for business planning purposes. *See id.* at 401. The Eighth Circuit appears to have reasoned that, while Searle could legitimately argue that documents containing individual products liability case reserve figures were prepared in anticipation of litigation, the same *could not* be argued for documents containing reserve figures in the aggregate. *See id.* The court noted:

The risk management department was not involved in giving legal advice or in mapping litigation strategy in any individual case. The aggregate reserve information in the risk management documents serves numerous business planning functions, but we cannot see how it enhances the defense of any particular lawsuit. Searle vigorously argues that its business is health care, not litigation, but that is not the point. Searle’s business involves litigation, just as it involves accounting, marketing, advertising, sales, and many other things. A business corporation may engage in business planning on many fronts, among them litigation.

Id. at 401.

⁵⁴ 967 F.2d 980 (4th Cir. 1992).

⁵⁵ *See id.* at 984 (explaining its application of work product doctrine). In relation to litigation pending between two insurance companies, one of the parties requested documents from a third, non-party company who refused to comply, claiming the documents constituted work product. *Id.* at 981-82. The Fourth Circuit stated that for the work product defense to lie, “[t]he document must be prepared *because* of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation.” *Id.* at 984.

⁵⁶ *Id.* at 986 (remanding case for further examination of requested documents). The court noted, “[d]etermining the driving force behind the preparation of each requested document is . . .

The Second Circuit addressed the issue in *United States v. Adlman*.⁵⁷ In *Adlman*, during an audit, the IRS made an informal document request for information related to a company's reorganization.⁵⁸ The company cited the work product doctrine as an affirmative defense in refusing to produce the documents.⁵⁹ The Second Circuit recognized that it was being asked to define "in anticipation of litigation" within the meaning of Rule 26(b)(3), and specifically adopted the "because of" test.⁶⁰ Under the Second Circuit's reasoning, a document "created because of the prospect of litigation . . . does not lose protection . . . merely because it is created in order to assist with a business decision."⁶¹ In so reasoning, the majority opinion rejected the narrower interpretation that the doctrine protects only documents prepared "primarily or exclusively to assist in litigation."⁶²

required in resolving a work product immunity question." *Id.* at 984.

⁵⁷ 134 F.3d 1194, 1194-95 (2d Cir. 1998). As a matter of first impression, the Second Circuit addressed whether Rule 26(b)(3) applies to "dual purpose" documents. *Id.* at 1197.

⁵⁸ *Id.* at 1195 (outlining underlying facts of case). Specifically, the IRS requested a legal memorandum prepared by the defendant company's accountant and lawyer that evaluated the tax implications of a contemplated merger. *Id.* The court described:

The [m]emorandum was a 58-page detailed legal analysis of likely IRS challenges to the reorganization and the resulting tax refund claim; it contained discussion of statutory provisions, IRS regulations, legislative history, and prior judicial and IRS rulings relevant to the claim. It proposed possible legal theories or strategies for [the defendant company] to adopt in response, recommended preferred methods of structuring the transaction, and made predictions about the likely outcome of litigation.

Id.

⁵⁹ *Id.* at 1196 (explaining company's affirmative defense). The company argued the requested memorandum contained legal opinions prepared in anticipation of litigation that was virtually certain to occur, not only because the company had been subjected to an annual audit for at least thirty years, but also because the size of the capital loss generated by the merger triggered a federal law requiring the IRS Commissioner to issue a report about the merger to Congress. *Id.*

⁶⁰ *Id.* at 1197-98 (defining meaning of "in anticipation of litigation"). The Second Circuit carefully analyzed the predominate tests employed by the courts of appeals in analyzing work product protection. *Id.* at 1198. In explicitly adopting the "because of" test the court stated, "[b]ecause we believe that protection of [dual purpose documents] is more consistent with both the literal terms and the purposes of the Rule, we adopt the [because of] formulation." *Id.*

⁶¹ *Id.* at 1202 (endorsing protection for "dual purpose" documents). The Second Circuit noted, though the "because of" test provides broader protection for "dual purpose" documents, it nevertheless "withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Id.* at 1202. Under similar reasoning, the Eighth Circuit came to a different conclusion when it declined to protect documents prepared for both business planning purposes and litigation. See *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987) ("A business corporation may engage in business planning on many fronts, among them litigation."); see also *supra* notes 51-53 and accompanying text (explaining Eighth Circuit's holding in *Simon*).

⁶² *United States v. Adlman*, 134 F.3d 1194, 1198-1202 (2d Cir. 1998) (rejecting "primary

The United States Court of Appeals for the District of Columbia Circuit addressed the issue in *In re Sealed Case*,⁶³ where the government moved to compel an attorney to produce materials related to a client's loan transaction.⁶⁴ The court held that the materials were prepared due to the prospect of litigation and thus were protected by the work product rule even though no specific claim had arisen at the time the attorney developed the materials sought.⁶⁵ In so reasoning, the court endorsed precedent that applied the "because of" test.⁶⁶

The Ninth Circuit took up the application of work product protection in the context of dual purpose documents in *In re Grand Jury Subpoena*.⁶⁷ In this case, the grand jury subpoenaed the defendant company's environmental consultant for all documents prepared in connection with the EPA's investigation of the company's potential violation of waste management laws.⁶⁸ Applying the "because of"

purpose" test). The Second Circuit analyzed the circuit court opinions adopting the "primary purpose" test and categorically rejected it as "at odds with the text and policies of the Rule." *Id.* at 1198. The court noted Rule 26(b)(3) was drafted with broad and inclusive language with the result that "[n]othing in the Rule states or suggests that documents prepared 'in anticipation of litigation' with the purpose of assisting in the making of a business decision do not fall within its scope." *Id.* at 1198-99. Judge Kearsse's dissent expressly disagreed. *Id.* at 1205 (Kearsse, J., dissenting) (disagreeing with majority's "expansion" of privilege). Judge Kearsse argued that the majority unnecessarily extended work product privilege to encompass "documents not prepared in anticipation of litigation but instead prepared in order to permit the client to determine whether to undertake a business transaction, where there will be no anticipation of litigation unless the transaction is undertaken." *Id.*; see also *Simon*, 816 F.2d at 401 (adopting reasoning similar to dissent in *Adlman*).

⁶³ 146 F.3d 881 (D.C. Cir. 1998).

⁶⁴ *Id.* at 883 (describing factual history). The court noted the lawyer stated in his affidavit that he prepared the requested documents in connection with the loan transaction "in anticipation of possible litigation." *Id.*

⁶⁵ *Id.* at 886. Relying on its own precedent, the court determined that the affidavits on record established that the attorney reviewed a matter for a client precisely because the client "feared [it] could lead to litigation." *Id.* Though the court did not couch the requested materials as "dual purpose" documents, it nevertheless employed the "because of" test in determining whether the work product privilege applied. See *id.* at 888.

⁶⁶ See *id.* (noting precedent required application of "because of" test); *In re Sealed Case*, 29 F.3d 715, 718 (D.C. Cir. 1994) (remanding case and ordering district court to apply "because of" test).

⁶⁷ 357 F.3d 900, 907 (9th Cir. 2004) ("We have not heretofore addressed the question whether protection under the work product doctrine may be extended to such 'dual purpose' documents.").

⁶⁸ *Id.* at 904 (providing factual summary). The defendant company retained an environmental consulting company to help prepare a defense for the allegations of violating waste management laws. *Id.* Seeking to avoid litigation, the company under investigation submitted a number of documents to the EPA pursuant to an administrative proceeding. *Id.* The grand jury then subpoenaed the environmental consulting company for all documents, notes, and memorandum prepared in connection with the administrative proceeding. *Id.* The company moved to quash the subpoena, claiming the work product privilege protected the documents from

standard, the court held that dual purpose documents are entitled to work product protection despite a contention that the documents would have been created in substantially similar form for another purpose, in this case, compliance with the EPA's administrative order.⁶⁹

B. The "Primary Purpose" Test

The "primary purpose" test requires courts to determine the fundamental motivation behind creating the requested documents, an admittedly challenging task.⁷⁰ If the primary motivation is to aid in litigation, then the work is protected.⁷¹ The Fifth Circuit addressed work

discovery. *Id.*

⁶⁹ *Id.* at 909-10 (applying "because of" test to "dual purpose" documents and finding requested documents protected). The court stated:

We conclude that the withheld documents, notwithstanding their dual purpose character, fall within the ambit of the work product doctrine. The documents are entitled to work product protection because, taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole.

Id.

⁷⁰ FED. R. CIV. P. 26 advisory committee's note (1946 amendment) subdivision (b) ("Some of the most controversial and vexing problems to emerge from the discovery rules have arisen out of requests for the production of documents or things prepared in anticipation of litigation or for trial."). The existing rules make no explicit provision for such materials. *Id.*; see also *United States v. Textron, Inc.*, 577 F.3d 21, 26 (1st Cir. 2009) (describing difficulty of applying work product to "dual purpose" documents). The First Circuit implicitly acknowledged the difficulty involved when thinking about "dual purpose" documents in the work product context: "how far work product protection extends turns on a balancing of policy concerns rather than the application of abstract logic. . . ." *Id.*; see also *United States v. Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998) ("The first problem we face is to determine the meaning of the phrase prepared 'in anticipation of litigation.' The phrase has never been interpreted by our circuit; furthermore, courts and commentators have expressed a range of views as to its meaning."); *United States v. El Paso*, 682 F.2d 530, 542 (5th Cir. 1982) ("[W]e concede that determining whether a document is prepared in anticipation is a slippery task."); *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. Unit A Feb. 1981). The court in *Davis* allowed that it was "difficult to reduce to a neat general formula the relationship between preparation of a document and possible litigation necessary to trigger the protection of the work product doctrine." *Id.* Nevertheless, the court concluded "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.* (internal citations omitted); see also *Pease-Wingenter I*, *supra* note 6, at 123 ("One of the most difficult issues arises when a document is prepared because of two or more motivations. In such instances, it can be unclear whether the requirement is met."). *Pease-Wingenter* suggests the Fifth Circuit's own explanation of the "primary purpose" test is evidence of the difficulty of applying the test in practice. See *id.* at 144-45 (stating Fifth Circuit failed to clarify which definition of "primary" its test employs).

⁷¹ See *El Paso*, 682 F.2d at 543 (finding documents not prepared "in anticipation of litigation" within meaning of rule). The Fifth Circuit found the documents were prepared only as

product protection's scope in the context of dual purpose documents in two cases.⁷² The court first conceived of the "primary purpose" test in *United States v. Davis*,⁷³ where it easily dismissed an attorney's refusal to turn over work papers developed in preparing a client's tax return because there was no evidence that the attorney and his client anticipated conflict with the IRS.⁷⁴ The court analyzed work product protection of dual purpose documents again in *United States v. El Paso*,⁷⁵ where, in conducting a routine audit of the defendant company, El Paso, the IRS requested "all analyses prepared by the El Paso Company regarding potential tax liabilities and tax problems."⁷⁶ The company refused, citing the work product in its defense.⁷⁷ The Fifth Circuit relied on its earlier *Davis* decision in holding that the requested documents were not protected because they were "not primarily motivated to assist in future litigation

"a means to a business end" and thus did not enjoy work product protection. *Id.*; see also *Textron*, 577 F.3d at 30 (discussing *El Paso* holding); *Davis*, 636 F.2d at 1040 (defining scope of work product protection).

⁷² *El Paso*, 682 F.2d at 533 (concerning IRS request for tax pool analysis); *Davis*, 636 F.2d at 1040 (examining IRS request for work papers attorney used in creating client's tax return).

⁷³ 636 F.2d 1028 (5th Cir. Unit A Feb. 1981).

⁷⁴ *Id.* at 1040 (finding requested documents not protected). The court noted:

Of the documents prepared by the attorneys themselves, none were even colorably prepared in anticipation of this or any other litigation except for the workpapers created by Davis in the course of preparing [his client's] tax returns for the years 1974 through 1978. But papers generated by an attorney who prepares a tax return are not within the work product privilege simply because there is always a possibility that the IRS might challenge a given return.

Id.

⁷⁵ 682 F.2d 530 (5th Cir. 1982).

⁷⁶ *Id.* at 533.

⁷⁷ *Id.* The IRS filed a petition requesting the district court to enforce its summons, which the district court granted. *Id.* The Fifth Circuit then granted El Paso's request for a stay pending resolution of the case. *Id.* On appeal, El Paso cited both attorney-client privilege and the work product doctrine in support of its refusal to comply with the summons. *Id.* at 538, 542. The court rejected both defenses and enforced the summons. *Id.* at 545. El Paso has a legitimate interest in protecting its work papers from the IRS—they contain a legal assessment of its tax positions. See Robert G. Nath, *Internal Revenue Service Summonses for 'Sensitive' Accountants' Papers*, 34 VAND. L. REV. 1561, 1568 (1981). Attorney Nath explains tax accrual work papers in the following manner:

[T]ypically contain a summary analysis of certain selected transactions, recorded in the corporation's general ledger, concerning the special reserve for contingent income taxes. The documents also usually include a computation of the tax provision and a memorandum discussing those items of income or expense for which the ultimate tax treatment is uncertain.

Id.

over [the company's tax] return."⁷⁸ The court also rejected El Paso's public policy argument that to permit disclosure of its tax pool analysis would result in a "chilling effect on the companies' willingness to prepare such analyses searchingly and critically."⁷⁹ The court rejected the implication behind El Paso's policy argument as well—that the significance of complying with securities laws trump the important purposes an IRS summons serves.⁸⁰ Instead, the court reasoned that the IRS's ability to exercise its broad investigatory powers overrides the fear of

⁷⁸ *United States v. El Paso*, 682 F.2d 530, 543 (5th Cir. 1982). The court took the view that "[t]he work product doctrine is not an umbrella that shades all materials prepared by a lawyer." *Id.* at 542. Rather, the court continued, the requested documents were "[w]ritten ultimately to comply with SEC regulations, [thus] the tax pool analysis carries much more the aura of daily business than it does of courtroom combat." *Id.* at 544; *see also* Pease-Wingenter II, *supra* note 6, at 340 (describing *El Paso* holding). The Fifth Circuit rejected El Paso's arguments on multiple grounds, including rejecting its work product claim "because the tax accrual workpapers failed the Circuit's narrow 'primary purpose' interpretation of the doctrine's 'anticipation of litigation' requirement." *Id.* Commentators have criticized the Fifth Circuit's adoption of the "primary purpose" test as a test "clearly at odds" with the rule. Pease-Wingenter I, *supra* note 6, at 161.

⁷⁹ *El Paso*, 682 F.2d at 544 (rejecting *El Paso*'s policy argument). El Paso argument, however, has found support elsewhere. *See* Jacob A. Kling, Comment, *Tax Cases Make Bad Work Product Law: The Discoverability of Litigation Risk Assessments After United States v. Textron*, 119 YALE L.J. 1715, 1719 (2010) (arguing such holdings "[are] likely to discourage companies from preparing such analyses for fear that they will be discoverable by the company's adversary in litigation.").

⁸⁰ *See El Paso*, 682 F.2d at 544 (rejecting El Paso's policy argument). The Fifth Circuit endorsed an IRS that has "broad authority to conduct tax investigations," and summarily rejected El Paso's proffered argument:

We are not swayed by the argument that the public policy of the securities laws implicitly overrides the clear grant of summons power to the IRS. While the IRS does not enjoy untrammelled authority to direct the production of documents, Congress has endowed the IRS with broad authority to conduct tax investigations. The Supreme Court has "consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies." We are unwilling to make inroads in the plainly-announced congressional policy to allow the IRS broad access to relevant, nonprivileged documents on the basis of El Paso's claim of a conflict with the policies underlying the securities laws.

Id. (internal citations omitted). There is support for the premise that courts endorse an IRS with broad investigatory powers. *See United States v. Euge*, 444 U.S. 707, 716 n.9 (1980) ("The IRS has] broad latitude to adopt enforcement techniques helpful in the performance of [its] tax collection and assessment responsibilities . . ."); *United States v. Powell*, 379 U.S. 48, 57 (1964) (noting IRS Commissioner's broad authority to issue summons); *United States v. Gertner*, 65 F.3d 963, 966 (1st Cir. 1995) (explaining Commissioner's wide latitude to issue summons); Pease-Wingenter II, *supra* note 6, at 343 (stating precedent "established extremely broad parameters for the I.R.S. when issuing summonses").

a “chilling effect” advanced by El Paso.⁸¹

C. *United States v. Textron, Inc.*

The First Circuit last confronted dual purpose documents in *United States v. Textron, Inc.*,⁸² where a divided en banc court declined to protect the defendant company, Textron’s, tax accrual documents.⁸³ The court noted precedent previously established that the work product doctrine does not protect documents “that would have been created in essentially similar form irrespective of the litigation.”⁸⁴ Relying on this precedent, and citing

⁸¹ *El Paso*, 682 F.2d at 544. The Fifth Circuit noted the U.S. tax collection system:

[D]epends primarily on the voluntary compliance of taxpayers acting in good faith . . . [and grants the] IRS access to a document, prepared for business reasons, that guides and channels the Service’s energy and limited resources to those areas of the return deserving of special scrutiny [that] fits within the congressional scheme of tax enforcement.

Id.; see also Nat’l Taxpayer Advocate, IRS, 2009 Annual Report to Congress 21 (2009), http://www.irs.gov/pub/irs-utl/1_09_tas_arc_vol_1_preface_toc_msp.pdf (discussing IRS challenges). In its 2009 annual report, the IRS discussed at length the challenges it faces including when inadequate resources cannot meet taxpayer demand for services. *Id.* But see *El Paso*, 682 F.2d at 546 (Garwood, J., dissenting) (rejecting majority’s reliance on importance of IRS’ ability to access tax accrual documents). Judge Garwood argued the majority granted the IRS access to the company’s tax pool analysis in consideration of “the convenience of the Service.” *Id.* Such a consideration, Judge Garwood argued, “will not suffice.” *Id.* Judge Garwood rejected the majority’s endorsement of the public policy reasons for endowing the IRS with broad investigatory powers, but focused on protecting the documents under the rubric of the attorney-client privilege without addressing whether the documents merited protection under the work product doctrine. *Id.* at 550-51. At least one commentator agrees that granting the IRS wide access to requested documents creates bad policy with implications beyond those in the tax world. See Kling, *supra* note 79, at 1719 (arguing against permitting disclosure of risk analysis documents). Kling argues that permitting disclosure of risk analysis documents, such as the tax pool analysis at issue in *El Paso*, has broad ramifications including the likelihood that the disclosure will “chill the preparation of these analyses and as a result reduce the quality of information available to potential investors and acquirers.” *Id.* Kling acknowledges, however, that the chilling effect may be “inapplicable” in the tax context. *Id.*

⁸² 577 F.3d 21 (1st Cir. 2009) (en banc).

⁸³ *Id.* at 31-32 (holding attorney work product did not shield tax accrual work papers from IRS summons). In *Textron*, the government filed a petition to enforce an IRS summons served on Textron, a publicly-traded corporation. *Id.* at 24. The district court denied the petition, and the government appealed. *Id.* at 25-26. A divided panel upheld the district court’s decision. *Id.* at 26. The en banc court granted the government’s petition for a rehearing and ultimately concluded that “the Textron work papers were independently required by statutory and audit requirements and that the work product privilege does not apply.” *Id.*

⁸⁴ *Id.* at 30 (quoting *Maine v. United States Dep’t of Interior*, 298 F.3d 60, 70 (1st Cir. 2002)). In *Textron*, the First Circuit noted that “the main aim of audit work papers is to estimate the amount potentially in dispute and the percentage chance of winning or losing.” *Id.* at 28. The tax reserve figures served “to support a financial statement and the independent audit of it.” *Id.* at

the Fifth Circuit's conclusion in *El Paso*, the en banc court held that the work papers had the sole purpose of supporting the company's financial statements and, as a result, were not created in anticipation of litigation within the rule's meaning.⁸⁵ Based on this reasoning, the court concluded that the protection did not extend to the papers sought by the IRS.⁸⁶ The *Textron* decision has generated considerable controversy.⁸⁷

30. The possibility that the work papers themselves might be useful in later litigation was of no consequence. *Id.* at 26, 28, 30.

⁸⁵ See *Textron*, 577 F.3d at 30 (citing direct precedent and *El Paso* in support of holding). "[T]he work product privilege is aimed at protecting work done for litigation, not in preparing financial statements. *Textron*'s work papers were prepared to support financial filings and gain auditor approval . . ." *Id.* at 31. But see *id.* at 33 (Torruella, J., dissenting) (claiming majority created new rule). Judge Torruella's sharp dissent in *Textron* argued that the majority opinion was incorrectly decided, even though it purported to follow precedent. *Id.* at 32. First, Torruella noted that rather than follow the "because of" test set forth in *Maine*, the majority imposed a new "'prepared for' test . . . an even narrower variant of the widely rejected 'primary motivating purpose' test used in the Fifth Circuit." *Id.* Second, Judge Torruella argued the test ignored the language of Rule 26(b)(3) and, as such, was contrary to the rule's purpose. See *id.*

⁸⁶ *Textron*, 577 F.3d at 30-32 (concluding work product protection not applicable). "There is no evidence in this case that the work papers were prepared for [potential use in litigation] or would in fact serve any useful purpose for *Textron* in conducting litigation if it arose." *Id.* at 30. Some commentators have endorsed the view that work papers are not useful in litigation. See Pease-Wingenter II, *supra* note 6, at 346 (arguing tax accrual work papers typically not useful in litigation).

⁸⁷ See *United States v. Textron, Inc.*, 577 F.3d 21, 33 (Torruella, J., dissenting) (criticizing majority's holding). While the *Textron* majority has found recent support, so has Judge Torruella's dissent. Compare *FPL Group, Inc. v. Internal Revenue Serv.*, 698 F. Supp. 2d 66, 85 (D.D.C. 2010) (endorsing the First Circuit's understanding of "in anticipation of litigation"), with *United States v. Deloitte LLP*, 610 F.3d 129, 138 (D.C. Cir. 2010) ("Judge Torruella's dissenting opinion in *Textron* makes a strong argument that while the court said it was applying the 'because of' test, it actually asked whether the documents were 'prepared for use in possible litigation,' a much more exacting standard.") (quoting *Textron*, 577 F.3d at 22 (Torruella, J., dissenting)); see also Martin J. McMahon et al., *Recent Developments in Federal Income Taxation: The Year 2009*, 10 FLA. TAX REV. 79, 223 (2010) ("The majority . . . held that the work product privilege protects only work done for litigation purposes (the 'prepared for' test or the 'primary purpose' test), and abandoned the prior First Circuit 'because of' test, encompassing work done in preparing financial statements that also is prepared in contemplation of litigation."); Sarah Seifert Mallett, Case note, *Work-Product Doctrine The First Circuit Further Confuses an Existing Circuit Split in United States v. Textron, Inc.*, 63 SMU L. REV. 251, 254 (2010) ("The First Circuit's decision in *Textron* misuses the court's decision in *Maine* and misinterprets the language and intent of Rule 26(b)(3)."); Kling, *supra* note 79, at 1718 ("[A]lthough the majority purported to reaffirm *Maine*, its analysis cannot be squared with the 'because of' test."). See also Michelle M. Henkel, *Textron Eviscerates the 60-Year-Old Work Product Privilege*, 125 Tax Notes 237, 237-39 (2009) (criticizing *Textron* opinion). Henkel sharply criticizes the majority's holding in *Textron*, stating, "[d]espite this alleged reaffirmance [of First Circuit precedent], the majority proceeds to inconsistently and wrongly apply a new standard that turns 60 years of jurisprudence on its head." Henkel, *supra* at 237-39.

IV. ANALYSIS

Only two circuits have conclusively addressed the issue of the work product doctrine in the tax accrual papers context.⁸⁸ The other circuit opinions addressing the doctrine over the last few decades deal exclusively with nontax issues.⁸⁹ In *Textron*, the court asserted that it was following the “because of” test previously established and used by the majority of circuits.⁹⁰ It has been argued that the First Circuit, despite its insistence to the contrary, applied a third rule—one that requires the court to address whether the documents were actually prepared for *use* in litigation and thus merit work product protection.⁹¹ Disputes between corporate taxpayers and

⁸⁸ See *Textron*, 577 F.3d at 30 (discussing direct precedent on point in other circuit contexts). The First Circuit recognized “work product protection for tax audit work papers has been squarely addressed only in two circuits: this one and the Fifth.” *Id.* The court also referred to its previously established precedent in *Maine* and found the *Maine* holding “applies straightforwardly” to the issue in *Textron*. *Id.*; see also *supra* notes 75-81 and accompanying text (outlining court’s reasoning in *El Paso*). The D.C. Court of Appeals recently faced the work product doctrine question in the context of tax accrual papers. See *Deloitte LLP*, 610 F.3d at 132. In remanding the case, the court simply stated materials produced during the audit process *may* be protected, but did not decide the question one way or the other. *Id.* at 138 (emphasis added). Other circuit opinions have addressed the discoverability of tax accrual work papers, but have primarily emphasized the relevancy of the documents. See *Burgeson*, *supra* note 12, at 472-78 (discussing circuit opinions analyzing tax accrual papers under relevancy standards).

⁸⁹ See generally *In re Grand Jury Subpoena*, 357 F.3d 900, 904 (9th Cir. 2004) (involving subpoena of consultant of company undergoing inquiry for violation of waste management laws); *In re Sealed Case*, 146 F.3d 881, 883 (D.C. Cir. 1998) (relating to request for attorney’s notes on loan transaction); *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998) (concerning request for attorney’s analysis of planned reorganization of company); *Nat’l Union Fire Ins. Co. of Pitt., Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) (involving insurance reimbursement action); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987) (concerning request for corporate risk management documents in products liability action); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979) (examining work product in context of criminal investigation stemming from alleged perjury in administrative proceeding).

⁹⁰ See *Textron*, 577 F.3d at 26 (“We now conclude that under our . . . prior *Maine* precedent . . . the *Textron* work papers were independently required by statutory and audit requirements and that the work product privilege does not apply.”); see also *Maine v. U.S. Dep’t of Interior*, 298 F.3d 66, 68 (1st Cir. 2002) (holding work product privilege protects requested documents prepared in anticipation of litigation). In its *Maine* decision, the First Circuit stated:

In light of the decisions of the Supreme Court, we therefore agree with the formulation of the work-product rule adopted in *Adlman* and by five other courts of appeals. Thus, we must conclude that in the instant case it was error to require the [government] to demonstrate that the . . . documents were created primarily for litigation purposes in order to claim the work-product privilege

Id. (citation omitted).

⁹¹ See *Textron*, 577 F.3d at 43 (Torruella, J., dissenting) (arguing First Circuit applied new test altogether). Judge Torruella asserted “[i]n reality, the majority applied a new test that

the IRS rarely result in litigation, lending credence to an argument that the First Circuit utilized a new test and that such a test would never trigger protection of tax work papers in the context of an IRS summons.⁹² However, such an argument misses the point.⁹³ The First Circuit addressed the work product doctrine in light of an independent statutory mandate directing Textron to prepare the tax accrual papers.⁹⁴ The court reasoned

requires that documents be actually ‘prepared for’ use in litigation.” *Id.*; *Smith v. Life Investors Ins. Co.*, No. 2:07-CV-681, 2009 WL 3364933, at *7 (W.D.Pa. Oct. 16, 2009) (“[T]he First Circuit recently rejected the ‘because of litigation’ test that is now used by the Third Circuit in favor of a narrower ‘prepared for litigation’ test.”); Mallett, *supra* note 87, at 255 (“The majority misconstrues [precedent] language . . . and Rule 26(b)(3) to develop a new ‘prepared for use in litigation’ test while departing from the inherent purpose and broad scope of the precedential ‘because of’ test.”); Kling, *supra* note 79, at 1718 (arguing First Circuit used new standard in assessing breadth of work product protection). Kling argues “the majority in *Textron* appears to have crafted a new standard limiting work product protection to documents prepared for use in litigation.” *Id.* Further, Kling argues such a standard “eliminate[s] work product protection for documents that are prepared in order to analyze a company’s litigation prospects for a business purpose rather than for use at trial.” *Id.*; see also Henkel, *supra* note 87, at 237 (arguing that *Textron* set forth new legal standard); Pease-Wingenter I, *supra* note 6, at 150 (arguing *Textron* court created new rule). Pease-Wingenter contends, “the reasoning in the majority’s opinion created tremendous uncertainty by purporting to apply the ‘because of’ test but explicitly requiring that documents be ‘prepared for potential use in litigation’ in order to be protected.” *Id.* Despite such contentions, the First Circuit insisted, “[i]t is not enough to trigger work product protection that the *subject matter* of a document relates to a subject that might conceivably be litigated.” *Textron*, 577 F.3d at 29. The majority further explained:

The privilege aimed centrally at protecting the *litigation process*, specifically, work done by counsel to help him or her in *litigating* a case. It is not a privilege designed to help the lawyer prepare corporate documents or other materials prepared in the ordinary course of business. Where the rationale for a rule stops, so ordinarily does the rule.

Id. at 30-31 (citation omitted).

⁹² See *Textron*, 577 F.3d at 24 (stating Textron does not typically litigate tax disputes with IRS). “Textron agreed that it usually settled disputes with the IRS through negotiation or concession or at worst through the formal IRS administrative process; but it testified that sometimes it had litigated disputed tax issues in federal court.” *Id.* While corporate taxpayers do not often litigate issues with the IRS, summons enforcement is a hotly-disputed issue. Nat’l Taxpayer Advocate, IRS, 2009 Annual Report to Congress 30 (2009), http://www.irs.gov/pub/irs-utl/3_09_tas_arc_vol_1_mli.pdf. In its 2009 annual report, the IRS reported that summons enforcement has “appeared as a Most Litigated Issue in the National Taxpayer Advocate’s Annual Report to Congress every year since 2005.” *Id.* If a work product protection test requires litigation to be a possibility, and litigation is unlikely, such a test would not protect the documents at issue. See Kling, *supra* note 79, at 1726 (“[T]here is now effectively a three-way circuit split concerning the application of the work product doctrine to documents that quantify a company’s litigation exposure for a business purpose.”).

⁹³ See *infra* notes 96-100 and accompanying text (asserting work product text irrelevant in presence of independent statute mandating document production).

⁹⁴ See *United States v. Textron, Inc.*, 577 F.3d 21, 31 (1st Cir. 2009) (stating securities laws and auditing requirements compelled production of Textron’s tax work papers); *supra* note 12 and accompanying text (describing federal laws requiring public companies to file independent

that, in establishing work product protection, the Supreme Court was primarily concerned with ensuring an attorney's proper preparation of her legal argument.⁹⁵ Where statute mandates the production of tax accrual papers, there is little risk that an attorney will decline to prepare them in support of a legal argument as a way to prevent an opponent's access to the documents.⁹⁶ Declining to protect the documents would *not* discourage their production because securities laws require them.⁹⁷ As a result, the presence of public reporting requirements presents a unique situation where

financial auditing papers). *But see* Henkel, *supra* note 87, at 239 (arguing public corporation's tax accrual papers not actually required by federal law); *see also infra* note 96 and accompanying text (summarizing Henkel's argument).

⁹⁵ *See Textron*, 577 F.3d at 31 (explaining work product doctrine's purpose to protect against "discouraging sound preparation for a lawsuit."). The First Circuit viewed the work product doctrine as protecting the integrity of an attorney's work in representing the best needs of a client headed toward litigation, rather than as a doctrine that protects documents that a statutory mandate *requires* a company to produce. *Id.* Such a view reflects the Supreme Court's reasoning about the work product doctrine's role in maintaining the integrity of the litigation process. *See Hickman v. Taylor*, 329 U.S. 495, 512 (1947) ("[T]he general policy against invading the privacy of an attorney's course of preparation is . . . well recognized and so essential to an orderly working of our system of legal procedure."); *see also* sources cited *supra* note 1 and accompanying text (describing purpose of work product protection).

⁹⁶ *See Textron*, 577 F.3d at 31-32 (implying concern for "sound preparation for a lawsuit" not relevant when independent law requires document-creation). Because the papers are required by independent law, no company would be discouraged from preparing them to defend against a lawsuit. *See id.* at 31. The First Circuit stated that, "the compulsion of securities laws and auditing requirements assure that [the documents in question] will be carefully prepared, in their present form." *Id.* at 31-32. The court suggested that the securities laws, in practice, protect against what work product purports to protect against; such a result renders unnecessary work product protection of documents created pursuant to statute. *See id.* At least one commentator, however, argues that there is a difference between an accounting firm's audit work papers and a corporation's tax accrual work papers, and that while securities laws require the former, they do not explicitly require the latter. Henkel, *supra* note 87, at 239. Henkel explains, "[i]t is clear that, although an accounting firm's audit and audit work papers are prepared only to comply with SEC and accounting requirements, a corporation's tax accrual work papers are prepared to evaluate its litigation risks." *Id.* Due to this distinction, Henkel argues, an accounting firm's audit work papers may be discovered, but a corporation's tax accrual work papers may be protected. *Id.* Whether a corporation's tax accrual work papers are prepared pursuant to statute or to evaluate its litigation risks is anything but "clear." *Id.*; *see supra* Part III(A)-(B) (discussing contentious holdings surrounding whether work papers serve to support litigation). This Note argues that a corporation's tax accrual work papers *are* required by statute as well as inform a business decision rather than form support for anticipated litigation. *See supra* note 12 and accompanying text; *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987) (finding "dual purpose" documents served business planning functions but failed to support defense of lawsuit); *see also United States v. Adlman*, 134 F.3d 1194, 1205 (2d Cir. 1998) (arguing work product should not protect documents "prepared in order to permit the client to determine whether to undertake a business transaction, where there will be no . . . litigation unless the transaction is undertaken.") (Kearse, J., dissenting).

⁹⁷ *See supra* notes 95-96 and accompanying text (arguing independent securities laws nullify need for work product protection).

the application of a work product rule is unnecessary.⁹⁸ The requirements neutralize the effects of the opposing tests: a document produced pursuant to a statute should not be considered as having been prepared “in anticipation of litigation” because it is necessarily produced “pursuant to public requirements unrelated to litigation.”⁹⁹ Such results support the argument that work product tests are unnecessary where documents are statutorily required.¹⁰⁰

⁹⁸ See sources cited *supra* notes 95-96; *infra* notes 99-100 and accompanying text (arguing work product protection inapplicable to tax accrual documents). But see Henkel, *supra* note 87, at 237 (stating statute mandates production of accounting firm’s work papers, not corporation’s work papers).

⁹⁹ FED. R. CIV. P. 26 advisory committee’s note (commenting on 1970 amendment (subdivision (b)(1) – In General)). See *supra* note 7 and accompanying text (describing scope of rule); *supra* note 12 and accompanying text (listing federal laws requiring public companies to file independent financial auditing papers). Regardless of what test is used—whether the “because of” test, the “primary purpose” test, or the purported “prepared for use” test—to determine whether work product protection applies to documents mandated by statute, the document will fail to trigger protection. See *supra* notes 95-98 and accompanying text. But see Thomas Wilson, *supra* note 7, at 601 (arguing public requirements exception commonly misread). Wilson argues that because the advisory committee’s notes to the 1970 amendment exclude materials prepared “pursuant to public requirements unrelated to litigation,” this necessarily implies that “materials prepared pursuant to public requirements but related to litigation are protected.” *Id.* The plain language of the advisory committee’s notes, however, deny protection to materials prepared pursuant to public requirements when the public requirements are unrelated to litigation. See FED. R. CIV. P. 26 advisory committee’s note (commenting on 1970 amendment (subdivision (b)(3) – Trial Preparation: Materials)). Arguably, the work product doctrine would protect materials prepared pursuant to public requirements when those public requirements are related to litigation. See *id.*

¹⁰⁰ See *United States v. Textron, Inc.*, 577 F.3d 21, 26 (1st Cir. 2009) (holding work product doctrine did not protect tax accrual work papers from IRS summons); *United States v. El Paso*, 682 F.2d 530, 544 (5th Cir. 1982) (holding work product doctrine did not protect tax pool analysis and supporting memoranda); see also *supra* note 99 and accompanying text (discussing identical results reached though different tests applied). The First Circuit applied the “because of” test in *Maine* and, putatively, in *Textron*, where the Fifth Circuit relied on the “primary purpose” test in its decision in *El Paso*. Compare *Textron*, 577 F.3d at 30 (finding precedent employing “because of” test “applies straightforwardly”), *Maine v. United States Dep’t of Interior*, 298 F.3d 66, 68 (1st Cir. 2002) (applying “because of” test), with *El Paso*, 682 F.2d at 543-44 (employing “primary purpose” test to “dual purpose” documents). Despite applying different tests in the same context, the First and Fifth Circuits reached the same result and declined to protect tax accrual work papers. The Supreme Court, perhaps because of the consistent results reached when applying different tests, declined to take up certiorari. See *Textron*, 130 S. Ct. 3320 (2010) (declining certiorari). But see *Textron*, 577 F.3d at 43 (Torruella, J., dissenting) (declaring majority’s decision further confuses a confusing issue). Judge Torruella insisted the First Circuit majority further obfuscated an already confusing choice of mutually exclusive tests. *Id.* Judge Torruella stated:

[T]he majority has thrown the law of work-product protection into disarray. Circuits have already split interpreting the meaning of “anticipation of litigation,” between the “primary purpose” and “because of” tests. Now this court has proceeded to further the split The time is ripe for the Supreme Court to intervene and set the circuits

As case law evolves surrounding the work product issue in the context of tax accrual papers, the circuits should be consistent in answering the question of whether these documents merit protection.¹⁰¹ This need is especially pressing where the IRS appears to be pursuing tax accrual work papers more aggressively.¹⁰² Should such an aggressive pursuit lead to more frequent litigation, corporations have a greater interest in protecting the papers from their IRS adversary.¹⁰³ While the IRS is correctly asserting its right to access tax accrual work papers under present law, such an assertion may result in giving the IRS an unfair litigation advantage.¹⁰⁴

straight on this issue

Id.

¹⁰¹ See *supra* notes 7-10 (highlighting circuit split and varying outcomes in applying work product protection to “dual purpose” documents).

¹⁰² Pease-Wingenter II, *supra* note 6, at 341 (stating IRS requesting tax accrual work papers with increasing frequency). Pease-Wingenter argues that the IRS has historically “exercised self-restraint in requesting tax accrual workpapers” to encourage auditor-client candor and strengthen the financial reporting system. *Id.* But, Pease-Wingenter contends that since 2002 the IRS has been loosening its “policy of self-restraint[.]” and its requests for auditing work papers is trending toward a more aggressive policy. *Id.* In the wake of the IRS becoming more aggressive in its discovery requests for work papers, the circuits could see an increasing amount of litigation where they must address the question of whether the documents are protected by the work product doctrine. See *id.*; see also Nat’l Taxpayer Advocate, IRS, 2009 Annual Report to Congress 35 (2009), http://www.irs.gov/pub/irs-utl/3_09_tas_arc_vol_1_mli.pdf (“It appears that as the IRS employs a more aggressive enforcement policy, it will continue to rely heavily on the summons enforcement tool, and we expect the courts will continue to see increased numbers of these cases.”) Such a development will require an even greater amount of consistency in the circuit decisions. See Pease-Wingenter II, *supra* note 6, at 341.

¹⁰³ See Nath, *supra* note 77, at 1568 (describing tax accrual work papers as “controversial” and “sensitive”); Pease-Wingenter II, *supra* note 6, at 341 (describing an IRS that has “loosened its policy of self-restraint”); see also *supra* 102 and accompanying text (implying evolving IRS policy on discovery requests will lead to increased litigation).

¹⁰⁴ See *supra* notes 78, 85-86 and accompanying text (finding statute makes purpose of documents to comply with independent laws rather than support litigation). Both the *Textron* and *El Paso* courts declined to address the question of whether the work product doctrine would protect such documents in the absence of an independent statutory requirement. *Textron*, 577 F.3d at 31 (referring to statutory mandate but declining to analyze test in absence of mandate); *El Paso*, 682 F.2d at 534 (referencing statute without discussing implications of absence of statute). In the absence of such a statute, the courts could possibly have reached a different conclusion in its application of the work product doctrine to tax accrual papers. See *supra* notes 12, 95-98 (discussing implications of statute on breadth of work product doctrine protection). The absence of a statute compelling production of the requested documents is implicit in Kling’s argument that tax cases make bad work product law. See Kling, *supra* note 79, at 1715. Kling suggests that the work product rule applied to tax accrual documents is anomalous, and that extending the rule beyond the context of tax accrual documents, such as litigation risk assessment documents is “bad law” for the reasons set forth in his publication. See *id.* at 1719-26. Kling states that, “although some of the arguments against an expansive work product doctrine may apply in the narrow context of tax accrual work papers because of their utility to the IRS in combating tax evasion, they are mainly inapplicable to litigation risk assessments outside of the tax context.” *Id.* at 1726.

Nevertheless, enhanced reporting regulations only apply to publicly-held corporations; thus, IRS access to tax accrual papers turns on whether the company is organized as a public corporation.¹⁰⁵ The privilege of holding oneself out as a public corporation carries with it greater public responsibilities.¹⁰⁶ Perhaps a part of these corporations' enhanced responsibilities includes allowing the IRS access to tax accrual work papers.¹⁰⁷

Finally, the circuit opinions that directly address the issue of tax accrual work papers and the work product doctrine have declined to consider whether a requesting party could override work product protection by a showing of "substantial need."¹⁰⁸ Even if a consensus is eventually reached that the federal rules protect work papers from an IRS summons, the government has a compelling argument that it has such a "substantial need" to review the papers.¹⁰⁹ The majority in both *El Paso* and *Textron*

¹⁰⁵ See *supra* note 12 and accompanying text (listing securities laws applicable to public corporations).

¹⁰⁶ See *supra* note 12 and accompanying text (describing securities laws applicable to public corporations and resulting heightened reporting requirements).

¹⁰⁷ See *supra* note 12 and accompanying text (describing public corporations' enhanced reporting requirements). The courts that have addressed the question of whether the work product rule protects tax accrual work papers have each referenced the independent statutes and general business laws requiring their production. *United States v. Textron, Inc.*, 577 F.3d 21, 22 (1st Cir. 2009) (referencing statute requiring public companies to prepare financial statements); *United States v. El Paso*, 682 F.2d 530, 534 (5th Cir. 1982) ("Public companies subject to the securities laws must file financial statements . . ."). However, there are countervailing arguments that the purpose of securities laws that impose financial reporting requirements on public companies is to evaluate the soundness of the corporations, not to give the IRS an unfair litigation advantage. See *supra* note 12 and accompanying text. Perhaps it is up to Congress to address the disparity between function and outcome by enacting a statute to prohibit IRS access to tax accrual work papers. See *supra* note 12 and accompanying text.

¹⁰⁸ See FED. R. CIV. P. 26(b)(3)(A)(iii) (specifying exceptions to work product protection). Specifically, the rule states that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation [unless the requesting party] . . . shows that it has substantial need for the materials." *Id.* Under this exception, if the court had granted work product protection to the requested documents in either *Textron* or *El Paso*, the IRS presumably could have argued that it had a "substantial need" to review the documents. See *Textron*, 577 F.3d at 21. The IRS declined to present that argument in either case. See *id.* at 21-25; see also *El Paso*, 682 F.2d at 530-36.

¹⁰⁹ See *supra* note 5 and accompanying text (describing exceptions to work product protection); see also *Textron*, 577 F.3d at 31 (alluding to possibility of government's public policy argument supporting substantial need claim). The court took pains to describe the "practical problems" inherent in the IRS's duty to review the tax positions of a corporation the size of *Textron*. *Id.* The court stated:

The practical problems confronting the IRS in discovering under-reporting of corporate taxes, which is likely endemic, are serious. *Textron's* return is massive-constituting more than 4,000 pages-and the IRS requested the work papers only after finding a specific type of transaction that had been shown to be abused by taxpayers. It is

relied heavily on public policy arguments that favor granting the IRS access to the requested documents.¹¹⁰ Such reliance suggests that courts may be amenable to making an exception even if superseding authority later holds that the work product doctrine shields dual purpose documents from discovery.¹¹¹ A positive result in the government's favor in

because the collection of revenues is essential to government that administrative discovery, along with many other comparatively unusual tools, are furnished to the IRS.

Id. Henkel, however, argues tax accrual papers represent the opinion work product of attorneys, and should be afforded greater protection on that basis. *See* Henkel, *supra* note 87, at 237; Pease-Wingenter I, *supra* note 6, at 155 (citing *Hickman* in stating opinion work product requires utmost protection). Despite such a contention, the government has a compelling argument for discovering the work papers, has the capacity under the circumstances to demonstrate a warranted and substantial need, and could successfully argue that it could not otherwise obtain the information without undue hardship. *See supra* note 108 and accompanying text. Such a successful line of arguments would override work product protection. *See supra* note 108 and accompanying text.

¹¹⁰ *See El Paso*, 682 F.2d at 533, 545 (citing public policy arguments in support of its decision). The Fifth Circuit began and ended its opinion with the public policy reasons supporting its holding. *Id.* It first remarked on the “immense” task the IRS faces when auditing a large company like El Paso. *Id.* at 533. The court noted that “El Paso is the holding company for several large corporations, including 67 subsidiaries” and that “[t]o prepare a return for a single year, El Paso’s in-house staff expends over 10,000 hours.” *Id.* The court concluded, “IRS access to a document . . . that guides and channels the Service’s energy and limited resources to those areas of the return deserving of special scrutiny fits within the congressional scheme of tax enforcement.” *Id.* at 545; *see also Textron*, 577 F.3d at 23-24 (outlining public policy supports granting IRS access to company’s audit papers). The First Circuit noted that the IRS requests work papers only in the limited circumstance of when a company’s behavior suggests tax shelter abuse. *See id.* The court argued that the IRS has increased such activity in the wake of considerable corporate scandals, such as Enron. *Id.* The court spoke at length about the practical problems the IRS confronts when auditing huge corporations and the importance of discovering under-reporting of corporate taxes. *Id.* at 31. The court was sympathetic to the IRS’s task, and justified its holding with a final public policy argument asserting that granting the IRS access to tax accrual work papers “serves the legitimate, and important, function, of detecting and disallowing abusive tax shelters.” *Id.* at 32. Not all agree with the First and the Fifth Circuit’s public policy arguments espousing the IRS with broad investigatory powers. *See supra* note 81 and accompanying text (describing *El Paso* dissent rejecting majority’s reliance on IRS’s ability to request tax work papers); Kling, *supra* note 79, at 1719 (arguing chilling effect of permitting IRS access an overriding policy concern); Mallett, *supra* note 87, at 254-55 (suggesting intent behind work product rule outweighs policy of strong IRS). Mallett stated succinctly that, “the [*Textron*] opinion offers biased public policy arguments to support the IRS’s position without addressing the underlying intent and policy of the work-product privilege doctrine.” *Id.* at 254. Mallett is not alone. *See* Henkel, *supra* note 87, at 241. Henkel argues that the *Textron* “majority wrote a results-driven opinion that appears to be based solely on the fact that the IRS was the party seeking the documents.” *Id.* Henkel concludes that, “[n]either the fact that the IRS is the opposing party nor the existence of a listed transaction provides any basis for granting the IRS access to opinion work product.” *Id.*

¹¹¹ *See supra* notes 108-109 and accompanying text (describing courts citing public policy in favor of IRS with strong investigatory powers). Finding in favor of the IRS is a trend among courts addressing the issue of summons enforcement. Nat’l Taxpayer Advocate, IRS, 2009

advancing that argument in the context of tax accrual papers could nullify the results reached regardless of which work product protection test is utilized.¹¹²

V. CONCLUSION

Though the First Circuit maintained that it followed precedent by applying the “because of” test in its *Textron* opinion, it is possible that it created an entirely new test that turns on whether litigation of the presenting issues is possible. In the narrow context where public reporting statutes compel production of tax accrual work papers, however, such documents fall outside the purview of the work product doctrine regardless of what test is used. As a result, publicly-traded companies that are subject to enhanced reporting requirements are precluded from asserting a work product defense against IRS discovery requests. Furthermore, even if a consensus is eventually reached that tax accrual work papers warrant protection, the IRS has a compelling argument that it has a substantial need to access information contained in the work papers of large corporations which it cannot otherwise obtain without undue hardship. The current state of the law supports both an IRS with broad investigatory powers and access to these documents. Should Congress wish to alter the outcome, it should consider passing legislation to shield tax accrual work papers from IRS discovery.

Stacey Roberts

Annual Report to Congress 31 (2009), http://www.irs.gov/pub/irs-utl/3_09_tas_arc_vol_1_mli.pdf Of the 158 cases where the issue was a summons enforcement, the IRS prevailed in full in 151. *Id.*

¹¹² See *supra* note 12 and accompanying text (describing securities laws applicable to public corporations and resulting heightened reporting requirements); *supra* note 108 (arguing IRS could override work product protection with substantial need argument).