

## COMMENTS

### MOVE OVER WORK PRODUCT—IT’S TIME FOR SOME REAL DISCOVERY: A CALL FOR A COST-ALLOCATING AMENDMENT TO RULE 26(b)3<sup>†</sup>

#### INTRODUCTION

Imagine you are a commercial farmer and you recently lost your entire year’s worth of crops because the product you thought was protecting your crops was in fact killing them.<sup>1</sup> Imagine further that the manufacturer of that product recently tested soil on your farm, but because of the work product doctrine,<sup>2</sup> the manufacturer is able to withhold those test results even though they are highly relevant to your case. This unfortunate event is common in civil litigation today, especially in document-intensive litigation.<sup>3</sup>

In the world of civil litigation, work product affects all attorneys no matter the side they represent. This device enables the opportunistic attorney to hide hundreds or even thousands of documents that may be harmful or damaging to his or her case.<sup>4</sup> Conversely, those attorneys who constantly battle their opposition in discovery hearings, trying desperately to obtain information that could potentially help prove their case, loathe work product immunity.<sup>5</sup> As one commentator has observed, “[w]ork product’ is the dirty little secret

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<sup>1</sup> See *In re E.I. DuPont de Nemours & Co.—Benlate Litig.*, 99 F.3d 363 (11th Cir. 1996).

<sup>2</sup> See FED. R. CIV. P. 26(b)(3).

<sup>3</sup> Areas like products liability and securities fraud litigation are complex and rely extensively on document discovery. See Paul Dieseth, *The Use of Document Depositories and the Internet in Large Scale and Multi-Jurisdictional Products Liability Litigation*, 27 WM. MITCHELL L. REV. 615, 631 (2000); Terrence G. Stolly, *Scienter Under the Private Securities Litigation Reform Act of 1995: Unexpected Implications on Director and Officer Liability and D&O Insurance*, 29 CAP. U. L. REV. 545, 546 (2001).

<sup>4</sup> Often these attorneys are representing repeat or institutional litigants. See generally Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 17 (1991).

<sup>5</sup> See generally Charles P. Cercone, *The War Against Work Product Abuse: Exposing the Legal Alchemy of Document Compilations as Work Product*, 64 U. PITT. L. REV. 639 (2003).

shared by many litigators. The words need only be whispered before discovery is stopped dead in its tracks.”<sup>6</sup>

In addition, the work product doctrine favors repeat or institutional players over individual or one-time players.<sup>7</sup> It allows lawyers to bill hour after hour as they spend months and sometimes years in pretrial hearings arguing about what evidence will be immune from discovery. Many scholars have identified this problem,<sup>8</sup> and some have suggested interesting solutions.<sup>9</sup> Nevertheless, the work product doctrine continues to stir up discussion, disgust, and delight among the different members of the legal community.<sup>10</sup>

Work product immunity presents a fundamental paradox in our civil litigation system.<sup>11</sup> The adversarial model invokes visions of battle and zealous client representation, with each attorney independently preparing his or her own path to victory. However, with the creation of the Federal Rules of Civil Procedure (Federal Rules) and modern discovery, the American system has embraced and protected a progressive and broad discovery system designed to search for and obtain the truth.<sup>12</sup> Discovery works to correct flaws in the former model<sup>13</sup> via mandatory cooperation and information exchanges.<sup>14</sup> Despite its good intentions, the work product doctrine strays from this ideal and inspires secrecy, surprise, and overzealous representation.<sup>15</sup>

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<sup>6</sup> *Id.* at 640.

<sup>7</sup> *See id.* at 651.

<sup>8</sup> *See generally* Jeff A. Anderson et al., Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 762 (1983).

<sup>9</sup> For more critical analysis of work product see, for example, Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787 [hereinafter Brazil, *Civil Discovery*]; Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposal for Change*, 31 VAND. L. REV. 1295 (1978) [hereinafter Brazil, *Adversary Character*]; Cercone, *supra* note 5, at 651; Elizabeth Thornburg, *Rethinking Opinion Work Product*, 77 VA. L. REV. 1515 (1991); Kathleen Waits, *Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework*, 73 OR. L. REV. 385 (1994). These articles critically analyze the fundamental problems and frustrations of the work product doctrine and some provide novel solutions.

<sup>10</sup> Compare Thornburg, *supra* note 9, at 1517 (proposing to abolish work product entirely), with Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 362 (1990) (arguing that work product provides the “level of confidentiality needed to induce the lawyer to perform the optimal amount of legal investigation”).

<sup>11</sup> *See* W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 895 (1996) (“Discovery does not belong to the adversary system.”).

<sup>12</sup> *See* Thornburg, *supra* note 9, at 1516.

<sup>13</sup> *See infra* Part I.

<sup>14</sup> *See generally* Anderson et al., *supra* note 8.

<sup>15</sup> *See infra* notes 164–75 and accompanying text.

Many commentators have argued for the abolition of certain facets of work product immunity, leaving most aspects of the doctrine intact.<sup>16</sup> This Comment proposes to eliminate ordinary and fact work product immunity and to allow only opinion work product to remain intact. This Comment also prescribes a new cost-shifting or cost-sharing scheme to help eliminate the free-rider concerns surrounding pretrial discovery.<sup>17</sup>

Part I begins with a historical glance at the work product doctrine and work product immunity, including the theoretical reasons behind their existence and the policy arguments attempting to explain its tensions with broad discovery. Next, Part II compares the Supreme Court's landmark decision impacting work product immunity with Federal Rule 26(b)(3). Part III dissects the work product supporters' arguments and concerns while addressing the practical applications of the work product doctrine. This Part also examines the different theories and policy arguments surrounding the successes and failures of the doctrine in litigation. Part IV presents a case study where defense lawyers used the work product doctrine to suppress vital information from the plaintiffs. Part V introduces an amendment which would eliminate from discovery all fact and ordinary work product immunities.<sup>18</sup> The proposed system includes a cost-shifting scheme, which essentially eliminates the significant transaction costs and free-rider concerns involved with discovering fact and ordinary work product. Finally, Part VI expands and critiques the proposed system and its application in the discovery system.

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<sup>16</sup> See, e.g., Anderson et al., *supra* note 8, at 760; Edward H. Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269, 1331–33 (1969); Kathleen Waits, *Work Product Protection for Witness Statements: Time for Abolition*, 1985 WIS. L. REV. 305, 308.

<sup>17</sup> See *infra* Part II.B.2.

<sup>18</sup> This Comment argues only for the elimination of fact and ordinary work product and does not suggest or address the elimination of opinion work product. *But see* Thornburg, *supra* note 9, at 1517 (arguing that the entire doctrine should be eliminated because “it is not needed to protect the adversary system or the legal profession”).

## I. BACKGROUND ON THE FEDERAL RULES OF CIVIL PROCEDURE

### A. *The Theory of Broad Discovery*

Broad discovery became available to all civil litigants with the adoption of the Federal Rules in 1938.<sup>19</sup> The intended purpose of the Federal Rules is to “secure the just, speedy, and inexpensive determination of every action.”<sup>20</sup> To further this goal, the Court adopted and expanded wide-ranging pretrial discovery rules through several amendments, with the most recent amendment added in December 2003.<sup>21</sup> The Federal Rules were created in response to an increasing sense of frustration with the “sporting theory of justice” at the time.<sup>22</sup> That system, employed by much of the legal profession, often rewarded oratorical skill over the merits of a case.<sup>23</sup> Recognizing this problem, the Supreme Court declared in 1947 that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”<sup>24</sup> To avoid the games, secrets, and surprises that attorneys utilized in the past, the discovery devices aimed to foster negotiations and information exchange, while still emphasizing the merits of a case.<sup>25</sup>

### B. *Background on Rule 26*

Federal Rules 26 through 37 outline and explain the discovery devices that litigants may use during trial preparation.<sup>26</sup> Rule 26 presents the range of provisions that define the scope and the limitations of the discovery devices.<sup>27</sup> In 1970, the Supreme Court promulgated Rule 26(b) as part of a strategic effort

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<sup>19</sup> Rules of Civ. Proc. for the Dist. Cts. of the U.S., 308 U.S. 645 (1938); H.R. Doc. No. 75-460 (3d Sess. 1938); H.R. Doc. No. 75-588 (3d Sess. 1938); see also Caroline T. Mitchell, Note, *The Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412, 413 (1983).

<sup>20</sup> FED. R. CIV. P. 1.

<sup>21</sup> Mitchell, *supra* note 19, at 413.

<sup>22</sup> Mitchell, *supra* note 19, at 412 (citing Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice, Address Delivered Before the Convention of the American Bar Association (Aug. 26, 1906), in 35 F.R.D. 241, 273 (1964)); see United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958); Hickman v. Taylor, 329 U.S. 495, 501 (1947); J. Pike & J. Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297, 298 (1940).

<sup>23</sup> See Mitchell, *supra* note 19, at 412; see also Proctor & Gamble Co., 356 U.S. at 682; Hickman, 329 U.S. at 501; Pike & Willis, *supra* note 22, at 297-98.

<sup>24</sup> Hickman, 329 U.S. at 507.

<sup>25</sup> See *id.*

<sup>26</sup> See FED. R. CIV. P. 26-37.

<sup>27</sup> See FED. R. CIV. P. 26.

to merge the standards regulating the scope of pretrial discovery.<sup>28</sup> Rule 26(b)(1) defines the broad scope of discovery.<sup>29</sup> It also provides that discoverable information need not be admissible at trial, so long as the information is “reasonably calculated to lead to the discovery of admissible evidence.”<sup>30</sup> While Rule 26(b)(1) provides for broad discovery, the scope of Rule 26(b)(2) grants the court discretion to limit and alter the boundaries of pretrial discovery.<sup>31</sup>

Moreover, a court may also regulate the use of discovery devices when and if the court finds: (1) the discovery is repetitive or unduly burdensome; (2) the party seeking discovery has wasted ample opportunities to obtain the information by other means; or (3) the burden of the proposed discovery outweighs its benefits.<sup>32</sup> Rule 26(b)(3), codified in 1970, limits the disclosure of work product to documents or things “prepared in anticipation of litigation” by a party, its attorney, or its representative agent as defined by the rule.<sup>33</sup>

### *C. The Work Product Doctrine*

The work product doctrine provides that a party wishing to obtain information considered “work product” may do so only after meeting two

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<sup>28</sup> See FED. R. CIV. P. 26 & advisory committee’s note.

<sup>29</sup> FED. R. CIV. P. 26(b)(1). The rule states:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

*Id.*

<sup>30</sup> *Id.*

<sup>31</sup> FED. R. CIV. P. 26(b)(2) (permitting courts to limit the number of depositions, requests to admit, and interrogatories as well as the length of depositions).

<sup>32</sup> *Id.*

<sup>33</sup> FED. R. CIV. P. 26(b)(3). The Rule states:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

*Id.*

requirements.<sup>34</sup> First, the party must make a showing of “substantial need” for the requested information.<sup>35</sup> Second, the party must establish its inability to obtain the information’s equivalent without “undue hardship.”<sup>36</sup> Additionally, any party’s materials that are labeled “mental impressions” or “opinion” work product are absolutely immune from discovery unless that party waives such immunity.<sup>37</sup>

A broad discovery system that allows each party equal access to relevant evidence fundamentally improves judicial administration by reducing the inherent unfairness in an otherwise unequal system.<sup>38</sup> Broad discovery puts less emphasis on the quality of the representation<sup>39</sup> and more emphasis on exchanging information in a joint search for the truth.<sup>40</sup> An open discovery system minimizes surprises in trial, narrows the scope of the litigation, exposes bogus defenses, resolves potential issues, and encourages settlement.<sup>41</sup>

## II. THE SUPREME COURT AND RULE 26(B)(3)

### A. *Hickman v. Taylor*

While the work product doctrine aims to “protect[] trial preparation materials from discovery,”<sup>42</sup> the unclear scope of this doctrine results in frequent litigation.<sup>43</sup> In *Hickman v. Taylor*,<sup>44</sup> for example, the Supreme Court

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (“In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”). Opinion work product comprises documents or things “prepared in anticipation of litigation” that might reveal an attorney’s “mental impressions, conclusions, opinions, or legal theories . . . .” *Id.*

<sup>38</sup> See Cercone, *supra* note 5, at 654–55.

<sup>39</sup> This often depends on the depth of a party’s resources and potentially could negatively affect the outcome of his or her case. See Mitchell, *supra* note 19, at 414; see also Hoffman v. Palmer, 129 F.2d 976, 996–97 (2d Cir. 1942).

<sup>40</sup> See Waits, *supra* note 16, at 414.

<sup>41</sup> See *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 944–45 (1961) [hereinafter *Developments*].

<sup>42</sup> Anderson et al., *supra* note 8, at 762.

<sup>43</sup> See 4 J. MOORE & J. LUCAS, MOORE’S FEDERAL PRACTICE ¶ 26.343 (2d ed. 1983). “[W]ork product protection is the most frequently litigated discovery issue.” Anderson et al., *supra* note 8, at 763.

<sup>44</sup> 329 U.S. 495 (1947). In *Hickman*, the plaintiff sued after several crewmembers of a tugboat drowned. *Id.* at 498. Shortly after the boat sank, the defendants (owners of the tugboat) employed a major law firm to defend against any potential suits by the families of the deceased crewmembers. *Id.* The plaintiffs made

preserved a “zone of privacy within which attorneys could work” without interference from opposing counsel.<sup>45</sup> In *Hickman*, defense counsel collected written and oral statements from numerous witnesses in preparation for potential litigation.<sup>46</sup> Counsel for the plaintiff then requested copies of the written statements and detailed information regarding the oral statements to prepare for later questioning and examining of those witnesses.<sup>47</sup>

Classifying the described material as “work product,” the Supreme Court held that the information was undiscoverable because the plaintiff failed to make the proper showing “of the necessity for the production of any of this material or any demonstration that denial of production would cause undue hardship or injustice.”<sup>48</sup> The Court explained that creating a rule compelling attorneys to reveal materials they skillfully gathered in anticipation of litigation would yield “[i]nefficiency, unfairness and sharp practices.”<sup>49</sup> The Court further explained that “[p]roper preparation of a client’s case demands that [the lawyer] assemble information, sift . . . the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.”<sup>50</sup>

In his concurring opinion, Justice Jackson warned that permitting discovery in *Hickman* would severely damage the adversary system: “Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.”<sup>51</sup> Allowing such

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numerous discovery requests on the defendant owners. *Id.* The Supreme Court asserted the basic issue was “whether any of those [discovery] devices may be used to inquire into materials collected by an adverse party’s counsel in the course of preparation for possible litigation.” *Id.* at 505.

<sup>45</sup> Anderson et al., *supra* note 8, at 765. Before *Hickman*, a work product doctrine had slowly developed in response to the newly adopted Federal Rules of Civil Procedure. *Id.* at 765–73.

<sup>46</sup> *Hickman*, 329 U.S. at 499.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 509. The Court explained:

[A]ttempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties . . . falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims.

*Id.* at 510.

<sup>49</sup> *Id.* at 511.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 516 (Jackson, J., concurring).

discovery, Justice Jackson opined, would be “demoralizing to the Bar,”<sup>52</sup> and prove ultimately detrimental to the “welfare and tone of the legal profession.”<sup>53</sup>

## B. *The Policies Behind the Hickman Decision*

### 1. *Preserving Zealous Representation and Avoiding Unfairness and Inefficiency*

The *Hickman* Court presented several policy-based justifications for protecting work product. First, the Court noted that “[m]uch of what is now put down in writing would remain unwritten” without work product protection.<sup>54</sup> In other words, if attorneys know that any information or research they competently gather will also be available to the opposing parties, this knowledge may reduce their incentive to prepare vigorously in advance for clients. Second, the Court remarked, “[a]n attorney’s thoughts, heretofore inviolate, would not be his own.”<sup>55</sup> Additionally, the Court predicted that if it allowed such discovery, the resulting judicial practices would involve “inefficiency, unfairness and sharp practices,” and in turn, “the interests of the clients and the cause of justice would be poorly served.”<sup>56</sup>

### 2. *The Free-Rider Problem*

The most compelling policy argument in favor of limiting discovery work product, however, is in Justice Jackson’s discussion of avoiding the “free-rider problem.”<sup>57</sup> Free-riding, or the free-rider problem in the discovery context, is when one attorney appropriates the work of another attorney, or when one litigant is able to profit from the work of the opposing side for very little

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<sup>52</sup> *Id.* One of Jackson’s concerns was that allowing this discovery practice could require a lawyer to defend the accuracy of his encounters with witnesses that his adversary later obtained through discovery. *See id.*

<sup>53</sup> *Id.* at 515.

<sup>54</sup> *Id.* at 511 (majority opinion). The Court speculated that if a lawyer’s “statements, memoranda, correspondence, briefs, mental impressions, [and] personal belief” were available upon mere demand to opposing counsel, then the lawyer would have less incentive to prepare diligently. *Id.*

<sup>55</sup> *Id.* Ironically, the Court here emphasizes that allowing discovery of materials similar to those at issue in this case would lead to “[i]nefficiency,” but the Court seems to lose sight of the fact that one of the foundations of discovery is efficiency through exchanging information and the interaction of the opposing parties. Therefore, the Court’s concern that exchanging greater amounts of information will lead to inefficiency is illogical or at the very least potentially mistaken. *See id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 516 (Jackson, J., concurring); *see* James R. Pielemeier, *Discovery of Non-Testifying “In House” Experts Under Federal Rule of Civil Procedure 26*, 58 *IND. L.J.* 597, 608 (1983).

money or effort.<sup>58</sup> There are three principles that best illustrate the arguments against the freerider problem.<sup>59</sup> Although courts and scholars use different names, the first argument seeks to discourage laziness<sup>60</sup> or financial unfairness.<sup>61</sup>

This first principle dictates that no party should be able to gain from an opposing party's efforts, by stealing the fruits gathered by the first party in trial preparation, because this practice would incite and encourage laziness from the requesting party.<sup>62</sup> The second principle, related to the first, attempts to "encourage diligence."<sup>63</sup> The idea is that if the system protects a lawyer's trial preparation materials from discovery, it will encourage future diligence, since the lawyer will trust that his work is safe from opposing counsel.<sup>64</sup> The third principle is the "protecting confidentiality policy," a culmination of the first two.<sup>65</sup> This final theory emphasizes the importance of maintaining the privacy and confidentiality of an attorney's development of his or her trial strategy.<sup>66</sup>

Furthermore, while the overarching principle of modern discovery encourages open and honest exchanges of information, there is still something sacred about an attorney's strategic preparation for trial.<sup>67</sup> Therefore, according to the Court, those preparations and strategies must be immune from discovery.<sup>68</sup>

The *Hickman* decision invigorated the important ideals that the Federal Rules sought to further: maintaining broad discovery and eliminating the "sporting theory of litigation."<sup>69</sup> The case failed, however, to provide any sort of resolution as to the scope of the work product doctrine and proved instead to be the source of lasting and widespread confusion among the lower courts.<sup>70</sup>

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<sup>58</sup> See generally Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 71–72 (1997).

<sup>59</sup> See Pielemeier, *supra* note 57, at 608.

<sup>60</sup> See *id.*

<sup>61</sup> See *Hickman*, 329 U.S. at 518 (noting that party seeking witnesses' statements gave no reason why he could not conduct the interviews himself) (Jackson, J., concurring).

<sup>62</sup> See Pielemeier, *supra* note 57, at 608.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> See Thornburg, *supra* note 9, at 1527.

<sup>67</sup> *Id.*; see *Hickman v. Taylor*, 329 U.S. 495, 510 (1947) (privacy in trial preparation is essential to the orderly working of the judicial system).

<sup>68</sup> *Hickman*, 329 U.S. at 510.

<sup>69</sup> Mitchell, *supra* note 19, at 412 (citing Pound, *supra* note 22, at 273).

<sup>70</sup> See Anderson et al., *supra* note 8, at 78; Paul A. Rothman, Comment, *The Work Product Doctrine in the State Courts*, 62 MICH. L. REV. 1199, 1202 (1964) ("[T]he lower federal courts have gone in every

### 3. Differences between the Rule and Hickman

*Hickman* and Rule 26(b)(3) do not present identical standards and in fact differ in several ways. First, the work product doctrine, after the 1970 amendment to Rule 26(b)(3), extends protection to lawyers and nonlawyers, whereas the *Hickman* opinion addressed only attorney work product.<sup>71</sup> Rule 26(b)(3) specifically protects the work product of a party and a party's "agent,"<sup>72</sup> which has been interpreted to encompass employees.<sup>73</sup> Second, the 1970 amendments eliminated Rule 34's "good cause" requirement, which had been a source of much confusion after the *Hickman* decision.<sup>74</sup> Moreover, the *Hickman* decision applied to intangible as well as tangible items,<sup>75</sup> whereas Rule 26(b)(3) applies only to documents and tangible items.<sup>76</sup> The Rule focuses on the requirement that the item was "prepared in anticipation of litigation,"<sup>77</sup> which produces its own practical problems and ambiguities of exactly when "anticipation" begins.<sup>78</sup>

Finally, Rule 26(b)(3) singles out "opinion work product" for special protection.<sup>79</sup> This protection suggests bifurcation within the rule.<sup>80</sup> Moreover,

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conceivable direction in applying the *Hickman* 'work product' doctrine.") (footnotes omitted).

<sup>71</sup> FED. R. CIV. P. 26 advisory committee's note.

<sup>72</sup> FED. R. CIV. P. 26(b)(3).

<sup>73</sup> See, e.g., *Almaguer v. Chi., Rock Island & Pac. R.R. Co.*, 55 F.R.D. 147 (D. Neb. 1972) ("[I]t is fair to conclude from the Advisory Committee's Note and the cases cited in it that statements taken by a claim agent immediately after an accident are taken in anticipation of litigation.").

<sup>74</sup> FED. R. CIV. P. 26 advisory committee's note; see also *Anderson et al.*, *supra* note 8, at 762.

The "good cause" requirement had been a source of flexibility as well as confusion and conflict. Although the amorphous quality of the requirement lessened predictability, it allowed judges to consider the equities in the situations before them. Once the "good cause" requirement was eliminated, [l]awyers and judges turned to other aspects of the work product doctrine to provide flexibility.

*Id.* at 783 n.156.

<sup>75</sup> *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) ("This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . .").

<sup>76</sup> FED. R. CIV. P. 26(b)(3).

<sup>77</sup> *Id.*

<sup>78</sup> See, e.g., *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Co.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993); *Maertin v. Armstrong World Indus., Inc.*, 172 F.R.D. 143, 148 (D.N.J. 1997); *Fox v. Cal. Sierra Fin. Servs.*, 120 F.R.D. 520, 524 (N.D. Cal. 1988); *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 725 n.6 (N.D. Ill. 1978); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 42-43 (D. Md. 1974).

<sup>79</sup> FED. R. CIV. P. 26(b)(3); *supra* text accompanying note 33.

<sup>80</sup> See *Anderson et al.*, *supra* note 8, at 784; see also David L. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055, 1068 (1979) (discussing conflicting views on the impact of the 1970 amendments).

since the rule provides different degrees of protection for different materials, and courts exercise enormous discretion regulating when and how to apply work product protection, this leads to uncertain outcomes in the courts.<sup>81</sup>

Perhaps as a result of these and other differences in the definitions and applications of the work product doctrine, no limitation currently exists as to what constitutes a “document or tangible thing” within the meaning of Rule 26(b)(3). This fact has led to confusion, and the doctrine is applied inconsistently in a widespread range of circumstances by courts.<sup>82</sup> For example, various courts have held letters,<sup>83</sup> interview notes,<sup>84</sup> interview transcripts,<sup>85</sup> surveillance tapes,<sup>86</sup> and various types of studies<sup>87</sup> to be within the work product.<sup>88</sup>

In *Marshall v. D.C. Water & Sewage Authority*, the District Court for the District of Columbia went so far as to hold that two “buck slips” or post-it notes qualified for work product protection “[b]ecause they were prepared by a party’s agents (the people who worked for the defendant) ‘for trial.’”<sup>89</sup> The court’s conclusion presumably broadens the scope of what constitutes material

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<sup>81</sup> Anderson et al., *supra* note 8, at 784.

<sup>82</sup> Andrea L. Borgford, *The Protected Status of Opinion Work Product: A Misconduct Exception*, 68 WASH. L. REV. 881, 887 (1993).

<sup>83</sup> See, e.g., *Rail Intermodal Specialists, Inc. v. Gen. Elec. Capital Corp.*, 154 F.R.D. 218, 219 (N.D. Iowa 1994) (work product doctrine protected two letters which were sent by defense counsel to its two expert witnesses).

<sup>84</sup> See, e.g., *Ryall v. Appleton Elec. Co.*, 153 F.R.D. 660, 662–63 (D. Colo. 1994) (holding it was improper to order production of notes taken by employer’s attorney because notes were taken in anticipation of litigation and protected under work product); *Massachusetts v. First Nat’l Supermarkets, Inc.*, 112 F.R.D. 149, 151 (D. Mass. 1986) (holding work product protected attorney’s notes of interviews conducted with client’s employees taken during investigation of government antitrust probe).

<sup>85</sup> See, e.g., *Am. Standard Inc. v. Bendix Corp.*, 71 F.R.D. 443, 446 (W.D. Mo. 1976) (transcripts of the interview conducted by plaintiff’s attorney of antitrust defendant’s employees were protected under work product immunity).

<sup>86</sup> See, e.g., *Ford v. CSX Transp., Inc.*, 162 F.R.D. 108, 111–12 (E.D.N.C. 1995) (“[A]llowing discovery of surveillance materials after the deposition of the plaintiff, but before trial, best meets the ends of justice and the spirit of the discovery rules to avoid surprise at trial”); see also *Martino v. Baker*, 179 F.R.D. 588, 590 (D. Colo. 1998) (holding although surveillance tapes are protected under the work product doctrine, since they do not contain the lawyer’s mental impressions and legal theories, the protection may be overcome by a showing of substantial need).

<sup>87</sup> See, e.g., *Martin v. Monfort, Inc.*, 150 F.R.D. 172, 173 (D. Colo. 1993) (defendant’s counsel directed that time and motion studies be prepared in anticipation of litigation and thus were protected under work product).

<sup>88</sup> See 6 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 26.70 (3d ed. 2005).

<sup>89</sup> 218 F.R.D. 4, 6 (D.D.C. 2003). Finding the slips would reveal which documents counsel thought were needed to answer the interrogatories, thereby necessarily revealing both counsel’s theory of how to answer them and the mental process counsel used to perform the legal task. *Id.*

created in anticipation of litigation, as it protects materials created anywhere along a continuum—further blurring the line.<sup>90</sup>

Furthermore, some courts have held that an attorney's selection process in grouping certain documents is entitled to protection under the work product doctrine.<sup>91</sup> These demonstrate the tension between the progressive and open discovery system envisioned under the Federal Rules and the adversary system's need for secrecy, which is the essence and spirit of work product immunity.<sup>92</sup>

### III. DISSECTING THE WORK PRODUCT DOCTRINE

#### A. *The Lazy Lawyer and the Unfavorable Fact Scenarios*

The work product doctrine is broader than the related attorney-client privilege, which protects only communications.<sup>93</sup> The purpose of the attorney-client privilege is to promote free and open communication between attorneys and their clients by protecting client confidences.<sup>94</sup> In contrast, as the Court explained in *Hickman*, the work product doctrine is supposed to protect an attorney's mental processes and documents to allow the attorney to examine, evaluate and prepare for a client's case without fear of interference from opposing counsel.<sup>95</sup> The Court's rationale is that disclosing work product would discourage lawyers from zealously developing their clients' cases.<sup>96</sup> As

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<sup>90</sup> As Judge John M. Facciola explained:

Given the vital importance of discovery to effective trial preparation, there is no reason to leave out the middle time period between the anticipation of litigation and trial. A much more rational reading of the rule protects material created anywhere along the continuum from anticipation of trial until trial, including, of course, discovery.

*Id.*

<sup>91</sup> *Sporck v. Peil*, 759 F.2d 312, 315–16 (3d Cir. 1985) (holding that identification of selected documents would reveal counsel's selection process and would thereby reveal counsel's mental impressions and/or processes). This rule especially affects cases involving large corporations and hundreds of thousands of files. This rule seems to expand further the work product immunity.

<sup>92</sup> See Cercone, *supra* note 5, at 641–42.

<sup>93</sup> See 6 MOORE, *supra* note 88, at ¶ 26.70[8].

<sup>94</sup> *Id.*

<sup>95</sup> *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947).

<sup>96</sup> See James A. Gardner, *Agency Problems in the Law of Attorney–Client Privilege: Privilege and “Work Product” Under Open Discovery (Part II)*, 42 U. DET. L.J. 253, 270 (1965).

discussed next, supporters of this argument fear two scenarios: the “lazy lawyer”<sup>97</sup> and “unfavorable facts.”<sup>98</sup>

The “lazy lawyer” scenario assumes that without work product protections, lawyers have little or no incentive to prepare thoroughly for a case and instead will rely on the exposed work of their adversary.<sup>99</sup> The “unfavorable facts” scenario assumes that without work product protections, lawyers will only partly prepare cases to avoid exposing facts unfavorable to their clients, terminating any avenues that seem to favor opposing counsel.<sup>100</sup> Both of these scenarios assume that absent the work product doctrine, lawyers automatically will fail to prepare adequately for their clients’ cases—an assumption that, while not impossible, is implausible.<sup>101</sup>

Arguably, work product protection is not what motivates lawyers to prepare thoroughly for trial, but rather it is the adversary system itself, including a combination of economics and reputation. As one scholar notes: “[N]o lawyer or investigator can ever be absolutely confident that his or her work product will be protected. The fact that parties still choose to take statements indicates that forces other than the work product doctrine encourage the creation of these documents.”<sup>102</sup>

The nature of our system is highly competitive and demands that lawyers skillfully advocate on behalf of their clients or risk losing the case.<sup>103</sup> Even under the current system, no lawyer can ever be certain that the work product doctrine will protect his or her work.<sup>104</sup> The fact that parties still choose to investigate and create these materials suggests that “forces other than the work product doctrine encourage the creation of these documents.”<sup>105</sup> Therefore, the real question is whether a discovery system that included materials now protected under work product would overwhelm the driving forces in our system that demand and encourage trial preparation.<sup>106</sup>

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<sup>97</sup> Anderson et al., *supra* note 8, at 786; Thornburg, *supra* note 9, at 1527.

<sup>98</sup> Thornburg, *supra* note 9, at 1527.

<sup>99</sup> See D. Christopher Wells, *The Attorney Work Product Doctrine and Carry-Over Immunity: An Assessment of Their Justifications*, 47 U. PITT. L. REV. 675, 686–88 (1986).

<sup>100</sup> See Thornburg, *supra* note 9, at 1527.

<sup>101</sup> *Id.*

<sup>102</sup> Waits, *supra* note 16, at 330–31.

<sup>103</sup> See Thornburg, *supra* note 9, at 1534.

<sup>104</sup> See Waits, *supra* note 16, at 331.

<sup>105</sup> *Id.* These forces or concerns that encourage lawyers to act in certain ways are addressed throughout the rest of Part III.B.

<sup>106</sup> See Thornburg, *supra* note 9, at 1534.

### B. *The Driving Forces: Economics and Reputation*

Lawyers face a variety of practical realities that make trial preparation important even without work product immunity. “A lawyer’s single most important asset is his or her reputation.”<sup>107</sup> A lawyer’s livelihood depends almost entirely on his or her reputation both inside and outside the legal community.<sup>108</sup> Economic analysis is critical for both lawyers and the legal system.<sup>109</sup> Arguably, the ultimate goal for any trial lawyer is to incur the least amount of costs and still win the case.<sup>110</sup> Potential clients choose lawyers for a variety of reasons, but presumably, reputation is always a factor.

If a lawyer repeatedly fails to prepare for trial, he will eventually lose cases and clients, and will develop a “lazy lawyer” reputation. Moreover, lawyers who inadequately prepare their clients’ cases may face additional repercussions such as malpractice suits or sanctions by the Bar.<sup>111</sup> Good reputations depend on consistent trial management and successful records, and this requires a certain degree of skill and preparation.<sup>112</sup> In litigation contexts, a good reputation is a valuable asset to a lawyer, as judges may give more credence to a representation made by a lawyer who is known to be trustworthy.<sup>113</sup> Thus, credibility in the courtroom may often help a lawyer win a case.<sup>114</sup> Consequently, the “lazy lawyer” scenario is unconvincing in this context as the winning side will not consistently be the “lazy lawyer.” Indeed the complexities of success and reputation make that scenario implausible.

Maintaining a successful practice is also dependent upon smart business decisions.<sup>115</sup> Economic forces drive lawyers and often determine key decisions in litigation.<sup>116</sup> The work product doctrine necessarily increases the costs of

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<sup>107</sup> Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. REV. 229, 248 (2004).

<sup>108</sup> *See id.*

<sup>109</sup> *See* Ronald J. Allen, *Work Product Revisited: A Comment on Rethinking Work Product*, 78 VA. L. REV. 949, 951 (1992).

<sup>110</sup> *See id.*

<sup>111</sup> *See generally* Allen K. Harris, *The Professionalism Crisis—The “z” Words and Other Rambo Tactics: The Conference of Chief Justices’ Solution*, 53 S.C. L. REV. 549, 573–76 (2002).

<sup>112</sup> *See id.* at 574; Wells, *supra* note 99, at 688.

<sup>113</sup> W. Bradley Wendel, *Informal Methods of Enhancing the Accountability of Lawyers*, 54 S.C. L. REV. 967, 970 (2003) (“A repeat-player lawyer with a contrary reputation faces numerous costly obstacles, such as the refusal by other lawyers to agree to reasonable schedule changes, the need to memorialize every agreement in writing, and difficulty making credible commitments.”).

<sup>114</sup> *Id.*

<sup>115</sup> *See generally* Harris, *supra* note 111, at 562; Thornburg, *supra* note 9, at 1529 n.73.

<sup>116</sup> *See* Cercone, *supra* note 5, at 650.

litigation by forcing litigants to duplicate materials.<sup>117</sup> Successful litigants often win because they have the financial resources to outspend the opposing side in pretrial discovery.<sup>118</sup> The decisions about who to depose and what facts to investigate are crucial when money is limited, and thus, for a plaintiff facing a large corporation, gathering evidence frugally is critical.<sup>119</sup>

Despite the Federal Rule's idealistic goals, the current application of the discovery devices, combined with the adversarial nature of the system, produces many opportunities for litigants to engage in needless and costly discovery delays.<sup>120</sup> Although the goal of the work product doctrine is to ensure the proper functioning of the adversarial system, in practice the doctrine actually leads to frequent, bitter, and costly discovery disputes.<sup>121</sup> Many scholars have declared the work product doctrine to be one of the "most controversial and vexing problems" in the Federal Rules.<sup>122</sup>

#### IV. A CASE STUDY: *DUPONT* AND *BENLATE 50DF*

##### A. *Background*

To clarify the problems fostered by the work product doctrine, this Comment explores a real-life scenario. E.I. DuPont de Nemours and Company (DuPont) manufactured Benlate 50DF, which was designed to kill fungi that targeted plants.<sup>123</sup> Use of Benlate 50DF in the agricultural industry was at the heart of over two-hundred actions brought against DuPont by farmers across the country claiming the product killed their crops.<sup>124</sup>

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<sup>117</sup> Waits, *supra* note 16, at 313 ("Our legal system, with its massive litigation costs, should no longer tolerate a rule which so seriously impedes each party's efficient acquisition of information.")

<sup>118</sup> *See id.* at 314–15; Cercone, *supra* note 5, at 651.

<sup>119</sup> *See* Thornburg, *supra* note 9, at 1517.

<sup>120</sup> FED. R. CIV. P. 26 advisory committee's note.

<sup>121</sup> *See* Cercone, *supra* note 5, at 639, 651.

<sup>122</sup> Anderson et al., *supra* note 8, at 762 (citations omitted); *see also* FED. R. CIV. P. 26 advisory committee's note; *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 733 (4th Cir. 1974) ("[C]ertainly, the most controversial problem in the discovery area is the extent to which a party may require divulgence of facts, legal contentions, or trial tactics gathered or devised by his adversary in preparation for litigation."); *Developments*, *supra* note 41, at 1027 ("Undoubtedly the most controversial problem in the discovery area . . ."); Annot., 35 A.L.R. 3d 412, 422 (1971) ("One of the most controversial problems in the discovery area.")

<sup>123</sup> *Matsuura v. E. I. DuPont de Nemours & Co.*, 73 P.3d 687, 689 (Haw. 2003).

<sup>124</sup> Marianne M. Jennings, *The Model Rules and the Code of Professional Responsibility Have Absolutely Nothing to Do with Ethics: The Wally Cleaver Proposition as an Alternative*, 1996 WIS. L. REV. 1223, 1234–35. A series of work product disputes arose in these complex cases, but this Comment will only address the

DuPont previously settled complaints regarding Benlate 50DF in 1991 and 1992 for over \$500 million<sup>125</sup> and later withdrew the product from the market.<sup>126</sup> However, DuPont's top outside lawyer at the time, Thomas M. Burke,<sup>127</sup> warned the company that finding a root cause of the problem could backfire in court and recommended that the company continue researching to avoid having to admit fault.<sup>128</sup> Accordingly, Mr. Burke asserted, "It is a much better litigation position to state that we have looked, are looking and will continue to look but have had no success . . . than it is to admit that we have isolated the mechanism of injury."<sup>129</sup> Consequently, Dupont halted settlement payments after claiming that its extensive testing showed that its fungicide product could not have caused the alleged plant damage, even if administered at higher doses.<sup>130</sup>

Mr. Burke held considerable control over the Benlate research. The research manager at the time told his staff, "You are essentially working for Tom Burke, not DuPont, in support of claims and litigation."<sup>131</sup> Apparently, DuPont's lawyers ordered all communications, including electronic mail and

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so-called Alta test disputes.

<sup>125</sup> Scott McMurray, *On Eve of Trial, Court Documents Show DuPont Knew of Benlate Risk for Years*, WALL ST. J., June 30, 1993, at B1. In his article, Mr. McMurray provides a timeline of the important events:

1970: DuPont markets Benlate fungicide in powder form.

1983: Belgian greenhouse owners claim Benlate damages ornamental plants. DuPont did not issue a warning.

1987: DuPont markets easier to use "DF" form of Benlate. Annual sales quickly climb toward \$100 million.

May 1989: First incident of Benlate contamination with atrazine at outside companies formulating Benlate. The Environmental Protection Agency fines DuPont and its formulators.

Mar. 1991: Second Benlate contamination incident occurs and DuPont recalls Benlate DF. Widespread reports of plant damage lead DuPont to suspect Benlate and begin paying damages.

Nov. 1992: After paying damages of \$500 million and \$12 million for field tests, DuPont says Benlate does not harm plants, and halts payments.

May–June 1993: Federal judge slams DuPont with \$1 million contingent fine for failing to produce evidence to growers, threatens to direct jury in July 6 trial to find DuPont liable for Benlate damages.

*Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Thomas M. Burke was with Florida firm Cabaniss & Burke during this litigation. Mr. Burke now practices with Holland & Knight in its Orlando office.

<sup>128</sup> Milo Geyelin, *Scorched Earth: DuPont Draws Fire For Stonewall Defense of a Suspect Fungicide*, WALL ST. J., May 3, 1995, at A1.

<sup>129</sup> *Id.*

<sup>130</sup> McMurray, *supra* note 125.

<sup>131</sup> Geyelin, *supra* note 128.

notes, to be marked “work product” and “attorney-client communication.”<sup>132</sup> Arguably, this tactic later allowed DuPont’s lawyers to withhold large numbers of company records during pretrial factfinding unless a plaintiff obtained a court order.<sup>133</sup>

Additionally, DuPont instructed its researchers within the company not to share information regarding their work with anyone, including their supervisors, and to avoid having hallway discussions.<sup>134</sup> The company cautioned its researchers against drawing conclusions or speculating about any testing or experiment results.<sup>135</sup> One of DuPont’s in-house lawyers even suggested that the company not include the word “Benlate” when labeling documents that described the periodic new findings meetings, instead proposing “Luncheon Update Meetings.”<sup>136</sup>

### B. *The Benlate Litigation*

The early suits alleged that DuPont contaminated Benlate during its manufacturing process with many things, including sulfonyleurea (“SU”) herbicides and other dangerous byproducts.<sup>137</sup> According to the complaints, Benlate killed crops it was supposed to protect in conditions of heat and humidity.<sup>138</sup> Despite its assertions that the product was safe, DuPont faced numerous lawsuits and complaints in over forty states.<sup>139</sup> The judge in the first Benlate trial, *In re E.I. DuPont de Nemours & Co.—Benlate Litigation*,<sup>140</sup> which settled in 1993, held no fewer than ten discovery hearings, authored twelve orders against DuPont for “obstructive practices,”<sup>141</sup> and imposed sanctions twice against DuPont.<sup>142</sup> After repeated discovery delays, the trial

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<sup>132</sup> *See id.*

<sup>133</sup> *See Matsuura v. E.I. DuPont de Nemours & Co.*, 73 P.3d 687, 711 (Haw. 2003).

<sup>134</sup> Geyelin, *supra* note 128.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* This practice is unethical and the court sanctioned DuPont for their conduct. *See infra* text accompanying note 143. For more information on discovery misconduct, see Harris, *supra* note 111, at 568–74.

<sup>137</sup> *See Matsuura*, 73 P.3d at 689.

<sup>138</sup> *Id.*

<sup>139</sup> Jan Hollingsworth, *Suits Shed Light on DuPont’s Benlate*, TAMPA TRIB., Feb. 2001, at 1.

<sup>140</sup> 918 F. Supp. 1524 (M.D. Ga. 1995), *rev’d on other grounds*, 99 F.3d 363 (11th Cir. 1996). The first Benlate case, brought by four nursery owners in Georgia, Alabama, Michigan, and Hawaii, went to trial but settled in 1993 without full access to the Alta data. *Id.* at 1538.

<sup>141</sup> *Id.* at 1530.

<sup>142</sup> *Id.* Recalling DuPont’s conduct from the first trial the Judge explained:

This Court had never experienced the kind of deliberate refusal to comply with discovery orders

judge accused DuPont of stonewalling “under the guise of attorney-client privilege and work product protection,” since DuPont’s lawyers invoked protection for more than one million documents before it inspected them to ensure the doctrines applied.<sup>143</sup>

The plaintiffs in the first case had both indirect and circumstantial evidence of SU contamination, but throughout pretrial discovery were not able to produce direct test results of their soils and waters.<sup>144</sup> As is often true in products litigation, the sophisticated testing equipment required to produce this type of evidence was not available to the plaintiffs or their experts, so the plaintiffs agreed to allow DuPont’s agents on their properties to collect soil samples.<sup>145</sup>

### C. *Alta Laboratories*

DuPont hired an outside company, Alta laboratories<sup>146</sup> in California, to conduct further testing of Benlate using plaintiffs’ soil samples.<sup>147</sup> Alta analyzed soil and plant samples from various Benlate plaintiffs’ properties in an attempt to determine whether SU was present.<sup>148</sup> In exchange for plaintiffs’ soil samples, DuPont agreed to provide the test results to plaintiffs.<sup>149</sup> However, DuPont withheld almost all the results and only produced doctored “summaries.”<sup>150</sup> These summaries misrepresented the findings to show the soil did not contain SUs, and only produced them after the district court

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that was evidently taking place during this period of time. It became apparent to the Court that DuPont was using its in-house legal staff, local Wilmington, Delaware, counsel, national coordinating counsel, and others to carry out a deliberate effort to restrict legitimate discovery in these and similar cases.

*Id.*

<sup>143</sup> Geyelin, *supra* note 128. DuPont repeatedly refused to produce early field tests that it claimed refuted the contamination theories. *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *See id.*

<sup>146</sup> At the time of the testing, Alta was presumably one of the only labs in the country capable of the sophisticated analytical chemistry tests necessary for detecting SU in the soil samples. *See In re E.I. DuPont de Nemours & Co.—Benlate Litig.*, 918 F. Supp. 1524, 1529 (M.D. Ga. 1995), *rev’d on other grounds*, 99 F.3d 363 (11th Cir. 1996).

<sup>147</sup> *Matsuura v. E.I. du Pont de Nemours & Co.*, 330 F. Supp. 2d 1101, 1107 (D. Haw. 2004).

<sup>148</sup> *Id.* at 1107.

<sup>149</sup> *See id.*

<sup>150</sup> *In re E.I. DuPont de Nemours & Co.—Benlate Litig.*, 918 F. Supp. at 1529. Later findings revealed that DuPont hid the actual results that indicated the soil did contain SUs. *Id.*

ordered production.<sup>151</sup> DuPont hid the results that revealed the soil was contaminated.<sup>152</sup>

DuPont funded additional testing at Alta using soil from other plaintiffs' farms in Florida and Hawaii.<sup>153</sup> The results of the additional testing revealed that SUs had contaminated those farms as well.<sup>154</sup> However, DuPont did not initially reveal the results of its testing in any Benlate litigation, asserting that the work product immunity applied.<sup>155</sup> Many courts found that the Alta tests should not receive work product immunity because DuPont initiated the testing with permission of the original plaintiffs, the data was factual in nature, and was inside the scope of the plaintiffs' discovery requests covered by court orders.<sup>156</sup> Finally, in 1994, after various discovery battles, court orders, and sanctions across the country, DuPont produced the Alta test results to plaintiffs who had not yet settled.<sup>157</sup> Accordingly, the work product doctrine disadvantaged many of the original plaintiffs and increased the transaction costs of all the Benlate suits.<sup>158</sup>

#### *D. DuPont Hides Behind Work Product Claims*

Throughout the entire Benlate litigation, DuPont dragged its feet with regard to producing critical evidence and manipulated many of the trial courts by refusing to disclose the Alta tests despite receiving court orders.<sup>159</sup> Hiding behind the work product doctrine, DuPont clearly wasted the courts and plaintiffs' time and resources by not producing critical documents.<sup>160</sup> By the end of 1992, DuPont projected the cost of its litigation efforts for one case alone at \$170 million, including \$30 million solely for legal fees, not including

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See *Matsuura v. E.I. DuPont de Nemours & Co.*, 330 F. Supp. 2d 1101, 1108 (D. Haw. 2004).

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*; see also *In re E.I. DuPont de Nemours & Co.—Benlate Litig.*, 918 F. Supp. at 1529; *Matsuura*, 73 P.3d at 690.

<sup>156</sup> See *In re E.I. DuPont de Nemours & Co.—Benlate Litig.*, 918 F. Supp. at 1547–51; *Kawamata Farms, Inc. v. United Agri Prods.*, 948 P.2d 1055, 1066 (Haw. 1997).

<sup>157</sup> See *In Re E.I. DuPont De Nemours & Co.*, 99 F.3d 363, 364 (11th Cir. 1996). Arguably, the doctrine worked in this case since DuPont eventually produced the results. However, the early plaintiffs were disadvantaged and the doctrine should equally apply to litigants regardless of where they fall in a series of litigation.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> See *Cercone*, *supra* note 5, at 649 (“If lawyers are really honest with themselves, many work product claims, like those asserted in connection with a document compilation shown to a fact witness, are designed solely to suppress the discovery of relevant, often damaging information.”).

judge-ordered fines and sanctions.<sup>161</sup> In 1995, a Hawaii state court held that Benlate was a defective product and awarded the plaintiffs, nine farmers, \$8.5 million.<sup>162</sup> The same Hawaii court later increased the award by \$3.2 million, accounting for the accumulated interest because of DuPont's delay tactics.<sup>163</sup>

### *E. Abusing the System*

Unfortunately, this is not the first time,<sup>164</sup> nor will it be the last time, a defendant or a plaintiff abuses the work product doctrine to avoid producing unfavorable information. Indeed, many scholars argue that the work product doctrine favors wealthy institutional litigants who are repeat players in the system at the expense of individual or "one-time" plaintiffs.<sup>165</sup> Moreover, withholding and abusing the system in this way often costs litigants and the public more than actually producing the potentially damaging information in the beginning.<sup>166</sup> Although a court eventually forced DuPont to produce the Alta test results, the work product rule did allow DuPont to delay the process and waste many courts' money and resources.<sup>167</sup> While supporters may claim the doctrine eventually worked since the court forced disclosure, the problem of unnecessarily high transaction costs remains.<sup>168</sup> The result of the problem is a more expensive trial with unnecessary delay,<sup>169</sup> leaving both sides angry and

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<sup>161</sup> Geyelin, *supra* note 128.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> See, e.g., *Daval Steel Prods. v. M/V Fakredine*, 951 F.2d 1357, 1363 (2d Cir. 1991) (affirming sanctions against defendants for their "generally obstructive behavior" during discovery); *Thomas v. Gen. Motors Corp.*, 174 F.R.D. 386, 389 (E.D. Tex. 1997) (ordering disclosure of work product materials based upon defendants' delay in producing discovery).

<sup>165</sup> Cercone, *supra* note 5, at 651. Lawyers representing repeat players have economic incentives to keep asserting work product claims and delay litigation since they are paid by the hour. See Thornburg, *supra* note 9, at 1529-30 n.73.

<sup>166</sup> Joel Cohen, 'Obstruction': *Can Civil Litigants Afford the Texaco Price Increase?*, N.Y.L.J., Mar. 3, 1997, at 1. Mr. Cohen writes:

This is not to mention the fact that the discovery abuse . . . may actually cost a far more onerous settlement than would occur but for the exponential damage caused by a court's or the media's scrutiny of the cover-up. And when lawyers knowingly participate in the alleged abuse, as described in *DuPont*, the costs may not only result in fines, but the possibility of criminal penalties and disciplinary consequences.

*Id.* (citations omitted).

<sup>167</sup> See Geyelin, *supra* note 128.

<sup>168</sup> See Cohen, *supra* note 166.

<sup>169</sup> See Steven Lubet & Cathryn Stewart, *A "Public Assets" Theory Of Lawyers' Pro Bono Obligations*, 145 U. PA. L. REV. 1245, 1281-82 (1997) ("Increased litigation, of course, is a boon to working lawyers, as it generates additional billable hours. Clients pay for those hours, and public taxes pay for the courts' time and

unsatisfied on some level.<sup>170</sup> In our litigious society, discovery disputes are becoming more frequent, more costly, and are consuming too much of the courts' time.<sup>171</sup>

Despite these difficulties, there has been some discourse regarding a cost-sharing approach that leaves the current work product immunity intact.<sup>172</sup> Clients in these schemes, especially corporations, recognize that they can reduce their costs if they share information and reduce the necessity of duplicative efforts.<sup>173</sup> Accordingly, they will agree to share some of their attorney's material.<sup>174</sup> While this idea is certainly possible, it involves inherently high risks for both parties and is unlikely in reality to reduce any of the real problems with work product immunity. As one scholar asserts:

It would be difficult for all but the most sophisticated to ignore counsel's advice to maintain the secrecy of work product. Furthermore, each individual client would be handicapped by uncertainty, unable to predict whether the information provided would outweigh the information received.<sup>175</sup>

Thus, the majority of clients and lawyers will likely continue to utilize the work product immunity no matter what the less expensive alternatives provide.

## V. THE PROPOSAL

To combat the problems associated with the current work product doctrine, a new proposal must find a way to reduce transaction costs, uphold the integrity of the adversary system, address free-rider concerns, and safeguard

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support personnel.") (citations omitted).

<sup>170</sup> See *id.* at 1281 ("[T]he evidentiary privileges exact a price in the form of information suppression. Lawyers would hardly fight so hard for them if it were otherwise. The suppression of information, in turn, may result in the frustration of justice.").

<sup>171</sup> See *Herbert v. Londo*, 441 U.S. 153, 179 (1979) (Powell, J., concurring) ("As the years have passed, discovery techniques and tactics have become a highly developed litigation art—one not infrequently exploited to the disadvantage of justice.").

<sup>172</sup> See *id.* at 178 ("No doubt certain institutional repeat-players have adopted such cost sharing approaches. For most clients, however, such a tactic would be impossible."); see also Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521, 1544 (1993) ("Chief Judge Robert Parker, the Chair of the Judicial Conference Committee on Court Administration and Case Management, has characterized excessive discovery as the 'single greatest factor that contributes to unacceptable cost.'") (citations omitted).

<sup>173</sup> Lubet, *supra* note 169, at 1280.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 1282 n.189.

opinion work product, which the American system highly esteems.<sup>176</sup> Accordingly, this Comment proposes to amend Rule 26(b)(3) to read as follows:

A party may request discovery of documents and tangible things previously protected under work product, but shall pay fifty percent of the opposing party's reasonable<sup>177</sup> costs to obtain such material.<sup>178</sup> In ordering discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party to the litigation.

This proposed Rule allows both parties to discover previously protected material that is often highly relevant and vital for a fair adjudication on the merits, while still protecting opinion work product.<sup>179</sup> This proposal would also greatly reduce the time and astronomical transaction costs that plague discovery proceedings and create incentives for cooperation throughout the entire discovery process.<sup>180</sup> Moreover, even in cases where transaction costs are not a major concern, the proposed Rule still provides a streamlined investigation process, invites cooperative information development, and safeguards opinion work product.<sup>181</sup>

As discussed in Part II, supporters of the work product doctrine argue that eliminating it would encourage free-riding and destroy the adversary system.<sup>182</sup>

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<sup>176</sup> See Anderson et al., *supra* note 8, at 784–85.

<sup>177</sup> If the judge finds the producing party's costs to be unreasonable, then the producing party may lose an opportunity to collect fifty percent of his costs and instead incur all costs of the request himself. A judge may always sanction such a party if the misconduct continues. See FED. R. CIV. P. 37.

<sup>178</sup> In the first statement, the proposed rule omits the current Federal Rule's requirements that the matter "be prepared in anticipation of litigation" and that the requesting party show it has "substantial need" for the information and is unable without "undue hardship" to obtain the equivalent. See FED. R. CIV. P. 26(b)(3). This Comment does not suggest subjecting all discovery to the cost-shifting scheme, but only tangible materials that were previously protected under the work product immunity.

<sup>179</sup> This proposal does not affect the attorney-client privilege.

<sup>180</sup> In commercial litigation where both parties are large and equally wealthy, work product immunity may not disadvantage either party. Cf. Thornburg, *supra* note 9, at 1561–62 n.209 (noting that in cases such as personal injury, malpractice, products liability, consumer fraud, civil rights, and employment discrimination, smaller one-shot litigant plaintiffs will often be facing larger repeat litigant defendants (including insurers of nominally one-shot defendants) and thus will be at a significant disadvantage).

<sup>181</sup> Transaction costs may be less of an issue if neither party is a repeat player nor a corporation. Even in these cases, however, the proposed Rule will still streamline the discovery investigations and return the trial's focus to the merits. By allowing discovery of fact and ordinary work product, the proposed Rule delivers a more accurate picture of the facts.

<sup>182</sup> See *supra* Part II.B.2.

However, if the new system imposed a cost-shifting method that vastly eliminated any freerider concerns, the first justification for work product would presumably no longer apply.<sup>183</sup> Furthermore, there are strong arguments opposing the state of the current adversary system, and arguably eliminating the work product doctrine would help restore professional ideals to the system.<sup>184</sup> This Comment will illustrate how the new Rule 26(b)(3) and cost-shifting scheme are designed to minimize free-rider concerns.

#### A. *The System's Existing Tools*

By proposing to eliminate fact and ordinary work product from the work product doctrine, this Comment does not suggest an uncontrolled or lawless exchange of such information between parties. Nevertheless, courts are already equipped with tools that allow them to handle nearly all discovery issues. First, Rule 26(b)(1) grants the court broad discretion in deciding what is relevant and what should be discoverable, and courts should use this rule more often to facilitate a smoother discovery process.<sup>185</sup> Second, under the current system, courts can and do arrange discovery schedules and sanction parties who fail to comply with the Federal Rules and the court's orders.<sup>186</sup> Third, courts can and do participate in a variety of cost-shifting schemes,<sup>187</sup>

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<sup>183</sup> Cf. Anderson et al., *supra* note 8, at 770 (noting that a common rationale for protecting work product is the “unfairness of letting the other party, through discovery, obtain free of charge the material gathered or prepared by his adversary”) (quoting FED. R. CIV. P. 30 advisory committee’s note); Cercone, *supra* note 5, at 662 (noting that “the *Hickman* Justices (and later commentators) were concerned that the lack of work product production would encourage attorney laziness”). The proposed cost-shifting method is only a starting point designed to foster more debate and more discussion of potential solutions. The proposal itself may in fact work well in large-scale complex litigation involving repeat players with expensive discovery needs.

<sup>184</sup> See Waits, *supra* note 16, at 339 (“Just because an adversary model is useful in data interpretation is no reason to assume it is equally valuable in basic data acquisition. . . . [it] is a lousy method of information development. As has already been discussed, such a system is horrendously expensive and duplicative.”) (citations omitted).

<sup>185</sup> FED. R. CIV. P. 26(b)(1) (parties may discover any nonprivileged relevant matter (or the court may for good cause order its discovery) and the material does not have to be admissible at the trial if its discovery appears reasonably calculated to lead to the discovery of admissible evidence).

<sup>186</sup> FED. R. CIV. P. 37 (providing for sanctions upon failure to comply with discovery requests, orders, or planning).

<sup>187</sup> See, e.g., ILL. S. CT. R. 201(b)(2) (courts “may apportion the cost involved in originally securing the discoverable material, including when appropriate a reasonable attorney’s fee, in such manner as is just”); Fauteck v. Montgomery Ward & Co., 91 F.R.D. 393, 398–99 (N.D. Ill. 1980) (holding that work product doctrine did not protect computer readable personnel records, but requiring plaintiffs to share defendant’s costs in producing that information); Elizabeth G. Thornburg, *Work Product Rejected: A Reply to Professor Allen*, 78 VA. L. REV. 957, 965 (1992) (“Courts can, as they already do with experts, enter orders allocating costs. The tactical behavior may not stop, but it can be addressed directly. The courts may need to intervene, as they already do.”).

making the proposed cost-shifting solution a mere extension of the current situation by employing the scheme as a fundamental part of discovery.<sup>188</sup> Under the proposed system, the critical functions that courts currently exercise will continue to be important aspects of discovery and arguably even more important, absent fact and ordinary work product immunity.

*B. The Look and Feel of the New Rule*

The proposed Rule fosters a more open system of discovery and arguably allows for more communication and cooperation between parties. Under the proposed Rule, parties will know that their opponents will have access to material previously protected by work product,<sup>189</sup> and will therefore have greater incentives to communicate and cooperate in their initial plans of discovery.<sup>190</sup> Accordingly, parties will be able to streamline their investigations if they disclose all relevant information at the beginning of the discovery process. Wayne D. Brazil, U.S. Magistrate and strong supporter of mandatory disclosure, articulates how the initial exchange would work:

[The Rule must] shift[] counsel's principal obligation during the investigation and discovery stage away from partisan pursuit of clients' interest and toward the court; impos[e] a duty on counsel to investigate thoroughly the factual background of disputes; impos[e] a duty on both counsel and client to disclose voluntarily, and at all stages of trial preparation, all potentially relevant evidence and information; narrow[] the reach of the attorney-client privilege[]; mak[e] early discovery conferences mandatory; substantially expand[] the role of the court in monitoring the execution of discovery; and require thorough judicial review of, or participation in, all settlements that exceed a specified dollar amount.<sup>191</sup>

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<sup>188</sup> Imposing discovery costs on parties is not a new concept and, in fact, the White House Counsel even considered implementing a scenario that made parties pay for any discovery request exceeding the specific number that the Counsel set as the standard for litigation. President's Council on Competitiveness, *Agenda for Civil Justice Reform in America*, 60 U. CIN. L. REV. 979, 986-87 (1992) [hereinafter *Agenda*] ("The Council recommends several fundamental reforms to the discovery process, including . . . an extensive document request, a limited set of depositions and written questions [all of which are free]. Beyond this initial round, however, the requesting party would have to pay for additional discovery.").

<sup>189</sup> Parties will have access only after paying fifty percent of the costs to the producing party under the proposed Rule.

<sup>190</sup> Once more, the proposed Rule does not eliminate opinion work product, and, thus, this Comment will not address such issues.

<sup>191</sup> Brazil, *Adversary Character*, *supra* note 9, at 1349. A former University of Missouri law professor, Professor Brazil did not suggest fully eliminating work product protection, but his ideas are similar and his mandatory disclosure method is exactly what this Comment proposes. *Id.*

By mandating full disclosure of all relevant materials, not only those required by Rule 26(a), pretrial discovery is simpler because the proposed Rule merely adds another layer to the current process.<sup>192</sup> As one scholar asserts, “[d]rafting discovery requests will be simpler and less expensive in terms of attorney time (e.g., ‘please produce your investigative file’),”<sup>193</sup> instead of long, drawn-out cat and mouse games designed to delay, mislead, or avoid production of evidence. The proposed Rule will arguably reduce the amount of unnecessary discovery requests as well as transaction costs.

With work product immunity, an opposing lawyer must carefully ask the “right” questions to gain the information he seeks.<sup>194</sup> Cost is the real difference between these two scenarios; absent fact and ordinary work product, the proposed Rule arguably necessitates fewer production requests, depositions, interrogatories, and hearings.<sup>195</sup> Thus, rather than subsuming the merits of the action, pretrial discovery will return to its original purpose—a means of gathering facts to facilitate informed decisionmaking. As one scholar correctly asserts, “The discovery system is not bound up with the adversary system; partisanship comes into play only after all of the facts have been revealed to both sides.”<sup>196</sup>

Additionally, the abolition of fact and ordinary work product signifies the elimination of most, if not all “in camera”<sup>197</sup> reviews that courts currently conduct as a necessary reaction to discovery disputes involving work product claims.<sup>198</sup> These proceedings can often take weeks or months to resolve and

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<sup>192</sup> See FED. R. CIV. P. 26(a). In 1993, the Federal Rules were amended to require disclosure of certain materials. See FED. R. CIV. P. 26 advisory committee’s note.

<sup>193</sup> Thornburg, *supra* note 187, at 962.

<sup>194</sup> Thornburg, *supra* note 9, at 1528. Professor Thornburg explains:

Often, of course, the adversary may *not* be able to ask the magic question that unlocks the harmful information. In that case, the work product doctrine may operate to conceal from the trier of fact important information that may even skew the results of the trial. Not even the proponents of work product immunity, however, openly advocate its use to prevent discovery of relevant facts.

*Id.* at 1528 n.68 (citation omitted).

<sup>195</sup> See Cercone, *supra* note 5, at 645 (noting that when discovery disputes drag on, actual “[d]iscovery grinds to a halt, the factual merits of the [case] get shunted to the sidelines, and the only ones benefiting from this are the lawyers, as their billable hours pile up from haggling over another discovery dispute”).

<sup>196</sup> Harris, *supra* note 111, at 572 (emphasis removed).

<sup>197</sup> See Anderson et al., *supra* note 8, at 817–18 n.346 (noting that the in camera review system may seem ideal, but it “has created problems because no standard procedures have been created to regulate its use”).

<sup>198</sup> Cercone, *supra* note 5, at 650–51. Professor Cercone asserts:

A work product claim for document compilations shown to a fact witness will invariably be met

typically delay the discovery process, increase the litigation costs, and clog the courts.<sup>199</sup>

### C. *Erosion of the Adversarial Process*

Supporters of the work product doctrine argue that it is vital to maintaining the adversary system.<sup>200</sup> In doing so, they assume that adversarial gathering of facts is the best way to discern the truth.<sup>201</sup> Moreover, work product proponents argue that the adversarial process only works when each party prepares independently for its own case throughout the process, “culminating in an adversarial presentation of evidence and arguments.”<sup>202</sup> To ensure this result, supporters argue work product protection is required.<sup>203</sup>

These arguments offered by work product supporters fail in two main respects. First, traditional work product supporters place too much emphasis on trial, assuming that most litigants actually experience a full-blown trial.<sup>204</sup> Second, they fail to recognize that determining the truth is a two-step process.<sup>205</sup> One of the main problems with the work product doctrine and its insertion into the adversary system is that modern litigation is less focused on trial.<sup>206</sup> Going to trial is not the typical end for a lawsuit.<sup>207</sup> In fact, some

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with a motion to compel its discovery, which involves brief writing, arguing motions, court time (for the judge or magistrate to conduct an in camera inspection of the document compilations at a minimum) and lost discovery time.)

*Id.* (citations omitted).

<sup>199</sup> See John Calvin Conway, Note, *Self-Evaluative Privilege and Corporate Compliance Audits*, 68 S. CAL. L. REV. 621, 639 (1995) (noting that in camera reviews are “a very costly, time-consuming process”). See generally Anderson et al., *supra* note 8, at 817.

<sup>200</sup> See generally Robert F. Kane, *The Work-Product Doctrine—Cornerstone of the Adversary System*, 31 INS. COUNS. J. 130 (1964) (arguing that work product protection is a necessary element of our adversarial system).

<sup>201</sup> *Kagan v. Langer Transp. Corp.*, 43 F.R.D. 404, 405 (S.D.N.Y. 1967) (“[R]equiring production of such attorney’s work product would . . . destroy counsel’s incentive diligently to prepare for trial . . . since otherwise he could, merely by sitting back and doing nothing, avail himself of the work product and professional diligence of counsel for the other side.”).

<sup>202</sup> Thornburg, *supra* note 9, at 1525.

<sup>203</sup> See John H. Bangbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Harris, *supra* note 111, at 572; Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984).

<sup>204</sup> Thornburg, *supra* note 9, at 1526.

<sup>205</sup> See *id.*

<sup>206</sup> See *id.* at 1525.

<sup>207</sup> Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (noting that only 1.8% of civil cases went to trial in federal courts in 2002, compared to 11.5% of cases in 1962).

scholars assert that too many litigants today settle their cases before all of the relevant facts are revealed.<sup>208</sup> These cases that settle during discovery<sup>209</sup> “risk a lopsided settlement based on incomplete information because of work product protection.”<sup>210</sup>

Moreover, in litigation, as previously mentioned, determining the truth is a two-step process. The first step is to acquire all of the relevant information available, and the second step is to evaluate or interpret that data.<sup>211</sup> Traditional work product supporters simply lump these two ideas together, assuming that the adversarial spirit is necessary throughout.<sup>212</sup> While the adversarial model works well when lawyers are attempting to evaluate and interpret data, it is not necessary or desirable in data collection if the goal, in fact, is to discover the truth.<sup>213</sup>

One of the fundamental problems with the work product doctrine is that in practice it fosters unprofessional conduct by allowing counsel to hide crucial facts while placing their clients’ interests above the goals of justice and truth.<sup>214</sup> When lawyers are compiling information, they “do not merely attempt to expose all the evidence which is good for their side; they work equally hard to suppress negative information.”<sup>215</sup> Therefore, by permitting discovery of fact and ordinary work product, the proposed Rule does not destroy the adversarial system; it simply streamlines the data collection method.

Today’s adversarial system is much different from the one created in 1938, as the Federal Rules have undergone changes and amendments.<sup>216</sup> Many

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<sup>208</sup> See Brazil, *Civil Discovery*, *supra* note 9, at 811–12 (noting an American Bar Foundation survey that found ninety-six percent of the lawyers involved had settled a case even though the lawyer or client “still had arguably significant information (including information protected by privilege) which, to the best of [the lawyer’s] knowledge another party had not discovered,” especially in large cases, federal cases, and cases involving corporate clients).

<sup>209</sup> See *infra* Part VI.B. This is exactly what happened to the original litigants in the DuPont cases in that they settled before DuPont ever produced the Alta testing evidence. *In re E.I. DuPont de Nemours & Co.—Benlate Litig.*, 918 F. Supp. 1524, 1530 (M.D. Ga. 1995), *rev’d on other grounds*, 99 F.3d 363 (11th Cir. 1996).

<sup>210</sup> Thornburg, *supra* note 9, at 1525.

<sup>211</sup> See *id.*; Waits, *supra* note 16, at 338–40.

<sup>212</sup> Waits, *supra* note 16, at 338 (arguing that the adversarial model is useful in data interpretation but not data collection).

<sup>213</sup> *Id.*

<sup>214</sup> See Harris, *supra* note 111, at 572. See generally Bangbein, *supra* note 205, at 823.

<sup>215</sup> Waits, *supra* note 16, at 339.

<sup>216</sup> See generally FED. R. CIV. P. 11, 16, 26(a). The rules have been amended over the years to allow more

scholars believe the current Federal Rules are a “watered down” version of past ones, with the former being more adversarial.<sup>217</sup> For example, in 1993 Rule 26(a) was amended to require parties disclose certain initial material during three stages of discovery.<sup>218</sup> This rule forces parties to produce certain material before being asked, or face potential sanctions from the judge.<sup>219</sup> In addition to the major change in Rule 26(a), other Federal Rules like Rule 11 and Rule 16 were amended to provide for greater cooperation, judicial discretion, and judicial case management.<sup>220</sup> Consequently, this recent trend in the Federal System reveals a changing tone or a shift toward cooperative justice and away from battling adversaries.

#### *D. Avoiding the Free-Rider Phenomenon*

To eliminate free-rider concerns, the new scheme includes a cost-shifting system that applies to litigants on both sides.<sup>221</sup> The idea is simple: previously protected materials under fact and ordinary work product will be discoverable, but a requesting party must pay fifty percent of the cost that the opposing party incurs.<sup>222</sup> The proposed Rule provides incentives for parties to discuss discovery plans early since they can avoid duplicative efforts for most, if not

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judicial involvement to help curb abusive tactics by attorneys, therefore subjecting attorneys to sanctions and requiring good faith signatures when filing documents with the court..

<sup>217</sup> See Stephan Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFF. L. REV. 487, 525–28 (1980) (defending the adversarial system).

<sup>218</sup> See FED. R. CIV. P. 26 advisory committee’s note (noting that Rule 26(a) was radically amended to require “mandatory disclosure by each party in the litigation of much of the information which historically (at least since the Federal Rules were promulgated in 1938) had been the subject of partisan discovery”).

<sup>219</sup> See *id.*

<sup>220</sup> See Thomas O. Main, *Perspectives on Dispute Resolution in the Twenty-First Century: “An Overwhelming Question” About Non-Formal Procedure*, 3 NEV. L.J. 388 (2002); see also Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789 (1989); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989); Eric F. Spade, *A Mandatory Disclosure and Civil Justice Reform Proposal Based on the Civil Justice Reform Act Experiments*, 43 CLEV. ST. L. REV. 147, 154 (1995) (“The 1983 amendments to Rules 11, 16, and 26 mandated sanctions for frivolous litigation and discovery abuse while expanding judicial case management.”); Carl Tobias, *Judicial Discretion and the 1993 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 933–52 (1991).

<sup>221</sup> Cf. FED. R. CIV. P. 26(b)(4)(c) (allowing fee shifting for discovery done by expert witnesses); Waits, *supra* note 16, at 329.

<sup>222</sup> Cf. Cercone, *supra* note 5, at 690 (noting that if free discovery results in “gross unfairness because one side incurred extraordinarily high costs . . . then a judge, as part of a scheduling or case management order, could order ‘cost sharing’ among the parties,” instead of remedying the problem “through the confusing prism of work product, which only serves to obfuscate the real issue”) (citations omitted).

all of the discovery process.<sup>223</sup> Thus, the proposed cost-shifting scenario simplifies much of the discovery process, significantly reduces transaction costs, and encourages cooperation from the beginning.

### 1. *The Cost-Shifting Scheme*

By applying the cost-shifting scheme, litigants in any case can streamline their investigation and greatly reduce the time and money spent in discovery battles without fear that the opposing party will freely appropriate their work. Recall the earlier example of the cases involving DuPont and the Benlate products.<sup>224</sup> Suppose that DuPont and the plaintiffs both want to depose several key witnesses. Instead of duplicating these depositions, they would discuss times and locations in advance and make one trip, hold one deposition per witness, and split the cost.<sup>225</sup>

Conceivably the depositions may take more than one day if a particular witness is extremely important, but both sides will still save time and money and both will have access to the results. Suppose also that DuPont plans to test plaintiffs' soil and the plaintiffs want the test results. The plaintiffs in this scenario would also pay fifty percent of the cost of the testing involving their soil. Consequently, if the testing costs \$600,000 then plaintiffs would have to pay \$300,000. Nevertheless, if a party does not need or want other results from previous litigation or testing, they will not have to pay those costs. In the testing example, if the plaintiffs could not afford to pay for results from the past ten years, they would simply plan their case around the most relevant years or those tests involving the most pertinent information. The plaintiffs would be free to question DuPont's employees and scientists in depositions to determine which tests would be most pertinent to their needs.

Conversely, if the plaintiffs hired their own expert eight months prior to filing suit and DuPont wanted all the test results and information surrounding that expert, DuPont will pay fifty percent of the costs the plaintiff incurred. Once more, parties are only required to pay fifty percent of the substantive costs of the information they request.

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<sup>223</sup> Reducing the level of duplicative discovery materials would be entirely dependent on the willingness of the parties to cooperate. Parties who take advantage of the proposed system will significantly reduce their time and expenses if they discuss discovery plans from the beginning of the process.

<sup>224</sup> See *supra* Part IV.A–D.

<sup>225</sup> The parties should do the calculations themselves if they can achieve a compromise or could ask the court to appoint a special master from the beginning to be in charge of all expense calculations and payment or reimbursement events.

## 2. *The Special Master*

A fear that one side will unnecessarily spend more money to injure the less wealthy opponent exists, but this potential problem is an area where the judge or a special master could step in and monitor such issues.<sup>226</sup> A special master could be extremely helpful in calculating costs of discovery for each side<sup>227</sup> and reducing the number of necessary hearings and inevitable disputes between parties.<sup>228</sup> Because the special master would be an agent of the court,<sup>229</sup> he or she would help preserve the integrity of the discovery process, serving as an objective third party in the area of discovery costs, payments, and reimbursements. However, the proposed Rule does not require the use of a special master and the cost shifting can certainly be done by the parties alone if they are amicable or by an active and willing judge.

Moreover, the parties could divide the costs as they arise or decide to keep a running total and pay at the end of the discovery process. Once more, if parties are unable to calculate these costs themselves, a special master may prove helpful in calculating and imposing payment. Although courts currently do not rely heavily on special masters to determine fees and costs in civil litigation, using one in the discovery system is a feasible idea and one worthy of further exploration.<sup>230</sup>

In the DuPont example, a special master may be better suited for objectively calculating and/or allocating the testing costs, and perhaps having a third party involved would alleviate any concerns the plaintiffs may have. Otherwise, DuPont alone could calculate the costs of the Alta testing. DuPont would then provide the plaintiffs with a reasonable figure and the plaintiffs would pay fifty percent of that number.

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<sup>226</sup> See FED. R. CIV. P. 53; Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 67–68 (1997). The advantage of a special master is that “it imposes the cost of childish bickering on sometimes infantile counsel and their clients rather than on the public, and leaves the judge accessible to those who need decisions on the merits or who need prompt attention to legitimate discovery disputes.” Carrington, *supra*, at 66–67.

<sup>227</sup> The special master would prove extremely helpful in complex cases that call for intense discovery proceedings.

<sup>228</sup> See Macey & Miller, *supra* note 4, at 58. Although a special master may be costly, the costs are justifiable because a special master could assist in tedious factual inquiries and his or her time is presumably less valuable than that of a trial judge. Special masters might prove particularly useful if individuals could be used repeatedly and develop expertise in specific types of fee calculations.

<sup>229</sup> See FED. R. CIV. P. 53.

<sup>230</sup> See Macey & Miller, *supra* note 4, at 58. Courts use special fee masters for calculations in securities fraud litigation. See *In re Flight Transp. Corp. Sec. Litig.*, 685 F. Supp. 1092, 1094 (D. Minn. 1987) (appointing a “Fee Review Committee” to audit the number of hours expended by each of the twenty-eight plaintiffs’ firms and each firm’s hourly rates).

### 3. *Practical Application*

Applying the proposed Rule is no more complex than many of the procedures courts and special masters tackle every day.<sup>231</sup> In the beginning of the discovery process or perhaps during the pretrial conference,<sup>232</sup> the parties could express their preferences in deciding whether they wanted a special master appointed, or alternatively, wanted to employ the cost-shifting scheme themselves. The judge would then use his or her discretion to decide.<sup>233</sup> If during the process difficult or contested calculations arise, the judge could intercede and appoint a special master to finish the cost allocating. For example, in the DuPont litigation, because the relevant testing was not conducted many years before but was conducted after the litigation began, it seems the calculations may be simpler, since the parties could more easily obtain the records. In that scenario the parties would likely be able to calculate and split the costs among themselves. If, however, the plaintiffs in the DuPont case did not feel comfortable with DuPont calculating the costs, the plaintiffs could always ask the court to appoint a special master to ensure fairness.

Additionally, the application is no more challenging in cases involving large corporations like DuPont than it is with small independent parties. Large corporations typically have a main corporate headquarters in charge of developing new products, testing those products, and/or maintaining all related corporate documents. Therefore, acquiring those documents from corporate litigants should not create substantial hurdles for either party.

By requiring cost-sharing, the proposed Rule provides litigants an opportunity to engage cooperatively in the information development stage and directs their adversarial energy where it more appropriately belongs—a trial based upon the merits of that information. However, this proposed Rule is not immune from criticism and may spark a whole host of disapproving observations and remarks. This Comment anticipates and addresses some of these concerns in the final Part.

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<sup>231</sup> FED. R. CIV. P. 53(e). Special masters have “authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties.” *Id.* They may “impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.” *Id.*

<sup>232</sup> *See* FED. R. CIV. P. 16.

<sup>233</sup> If the parties expressed a desire to perform the cost-shifting themselves, presumably most judges would honor the initial requests and only intervene when problems arose.

## VI. CRITIQUING THE PROPOSAL: THE GOOD, THE BAD, AND THE UNKNOWN

The proposed cost-shifting scheme is not the final solution for the “dirty little secret”<sup>234</sup> that is the work product doctrine, but it is a start. By forcing the parties to engage in discussions regarding sharing discovery costs, the goal of lowering transaction costs and streamlining the discovery process may become a reality.

Under the current system, parties are required to set up a pretrial conference to discuss issues dealing with timing, discovery, and various other things.<sup>235</sup> This initial meeting is the perfect opportunity for the parties not only to engage in discussions regarding timing and discovery, but also to discuss trial preparation more expansively with regard to cost sharing, planning, and cooperating throughout the entire process. Parties will be able to contemplate what sort of evidence they need as they do now and strategize together to figure out the most cost effective way of meeting those needs.

The new cost-sharing system will not be without critics. Critics may argue that by allowing parties to pay only for the specific test results they need, the new rule still allows free-riding. While that assertion may have some merit, the system still allows parties to navigate and develop their own discovery plans. Moreover, if the proposed Rule forced parties to discover material they do not need, not only would that seem completely unfair, but it would necessarily raise the transaction costs. Therefore, by allowing a party to request and pay for specific documents, the proposed Rule reduces transaction costs and avoids bogging down the courts and the discovery process with unnecessary material.

Additionally, scenarios may exist where one or both parties refuse to turn over documents, refuse to negotiate, destroy documents, or simply overcharge the opposing side. For example, critics may ask what would prevent a party from hiring the most expensive expert, knowing they only have to pay fifty percent of the cost. Under the proposed Rule, even if the parties or the court use a special master, the parties will still select their own experts and economic theory suggests that parties will not choose an expert unless it benefits their case.<sup>236</sup> Secondly, the proposed Rule indicates that the court will have the

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<sup>234</sup> See Cercone, *supra* note 5, at 651.

<sup>235</sup> See FED. R. CIV. P. 16.

<sup>236</sup> See Note, *Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action*, 117 HARV. L. REV. 2665 (2004).

ability to use its discretion in determining the reasonableness of the opposing party's costs. If a court finds that a particular party is repeatedly abusing the cost-shifting scheme and refusing to allocate reasonable costs, the court may then order the noncompliant party to incur all of its own costs for a particular discovery request or for the entire process.<sup>237</sup>

Moreover, when these or any other events occur, the judge may use his or her discretion to decide what the best course of action is after considering all of the circumstances.<sup>238</sup> If neither side can cooperate when dealing with the costs of discovery, the judge always has the option of appointing a special master to calculate and decide on reasonable costs.

After all, the goal of the new system is to give both sides the opportunity to search for the truth while still acknowledging free-riding concerns. As one scholar appropriately declares:

If disclosure is important, even an imperfectly complete disclosure system is preferable to one that has major gaps in its coverage. If this is not the case, the entire disclosure and discovery system should be scrapped, because those who are willing to cheat can attempt to avoid every disclosure and discovery requirement, with some possibility of success.<sup>239</sup>

Life without fact and ordinary work product immunity will undoubtedly be different. Nevertheless, the cost-sharing scheme has the potential to give each

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In practice, a defendant would not invest in hiring the expert unless procuring the expert's testimony represented the most beneficial use of the defendant's money. That is, if investing in some other facet of the litigation (or, indeed, if investing in some business opportunity totally unrelated to litigation) were likely to bring about a greater benefit than hiring the expert would yield, the defendant would choose to take the other investment option even if the benefits of the expert's testimony exceeded its costs.

*Id.* at 2673 n.41.

<sup>237</sup> Under the new rule, the judge has the ability to determine what constitutes "reasonable costs" and will be able to use his or her discretion when sanctioning noncomplying parties. For more information on sanctioning, see FED. R. CIV. P. 37. The attorney's power to select experts is not exclusive; courts can appoint experts who will testify at trial. *See, e.g.*, FED. R. EVID. 706 (a "court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection."). However, widespread use of court-appointed experts raises many practical problems and public policy concerns, and thus the practice is rare. *See Easton, supra* note 107, at 492 n.82.

<sup>238</sup> In other words, the judge may have to utilize his or her sanctioning power and become more active with regard to the initial pretrial meetings.

<sup>239</sup> Easton, *supra* note 107, at 591 n.417.

side greater access to the pool of evidence while reducing the length and cost of their trial experience. Arming litigants with the chance to gain a more accurate picture of their case will indeed better the system.

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