No. 09-750

In The

Supreme Court of the United States

TEXTRON INC. AND SUBSIDIARIES, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE SUPPORTING PETITIONERS

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BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS AMICUS CURIAE SUPPORTING PETITIONERS

DRI—the Voice of the Defense Bar respectfully submits this brief as amicus curiae in support of petitioners.[1]

INTEREST OF AMICUS CURIAE

Amicus curiae DRI—the Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the availability, skills, and effectiveness of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, their clients, and the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient.

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[1] Pursuant to Rule 37.2(a), the parties' counsel of record were notified ten days prior to the due date of the intention to file this brief. Petitioners have filed with the Clerk of the Court a blanket letter consenting to the filing of this brief, and a copy of a letter consenting to the filing of this brief by respondent has been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

To promote these objectives, DRI participates as amicus curiae in cases, such as this one, that raise issues of fundamental import to its membership and the judicial system. Preservation of a strong work product privilege is one of DRI's greatest concerns. That privilege is absolutely necessary to facilitate frank and open communications between attorneys and their clients, and to ensure effective and thorough representation.

The judgment below, which deepens an already existing circuit conflict, adopts a narrow view of the work product privilege. Not only is this contrary to guidance from this Court, but if left standing, the decision will have a deleterious effect on the attorney-client relationship and on the quality of advice that attorneys impart, especially to corporations.

SUMMARY OF ARGUMENT

The work product privilege, first recognized by this Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), and now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, serves a vital role in our judicial system.

This privilege protects from discovery documents that "are prepared in anticipation of litigation or for trial." Fed. R. Civ. P. 26(b)(3)(A). The privilege promotes effective legal advocacy by permitting attorneys to have candid and confidential communications with their clients and to fully explore and analyze all aspects of a case or a potential case. The court of appeals below adopted a narrow standard for the work product privilege, protecting from discovery only those documents created "for use" in litigation.

A. The issue in this case, which the court below acknowledged has not been addressed by this Court, is of profound importance to DRI and its members who draft legal strategy on a daily basis. The effect that narrow work product protection has on the legal profession is at odds with the principles underlying the privilege, and it undermines the ability of attorneys to provide effective legal advice to their clients.

DRI's members regularly rely on the work product privilege when preparing for litigation, and this Court has long recognized that the work product privilege serves the legal profession by permitting attorneys to diligently prepare a case and advise their

clients without fear of interruption by adverse parties. When there is doubt about what protection an attorney's preparatory materials will receive, however, the quality of case preparation and client counseling declines. Attorneys will be wary of memorializing in writing broad litigation strategies or risk analyses in advance of suit for fear that their work product will end up in the hands of opposing counsel.

Inadequate protection for work product will, in particular, have a deleterious effect on the manner in which corporations assess risk. Attorneys play an increasingly vital role in modern corporate culture, as corporations look to them for advice relating to both legal and business matters. The quality of an attorney's advice, and consequently the wisdom of the business decisions made by corporations, relies heavily on an attorney's ability to conduct and put in writing thorough analyses and to be completely candid with decisionmakers within the corporation. Only rigorous protection of these processes can ensure the success of important corporate activities, such as internal corporate investigations and corporate risk assessments. Weak attorney work product protection will force attorneys to temper their opinions and candor because documentation may wind up in the hands of adversaries. This harms not only the corporation, but also society's interest in corporate accountability.

B. Ten courts of appeals have articulated at least three different standards as to when documents

containing attorney opinions and analyses are privileged under Rule 26(b)(3)(A). This conflict in the courts of appeals creates significant uncertainty as to when documents containing an attorney's opinions or mental impressions are subject to discovery. The divergent standards used by the courts of appeals to determine whether documents, including those containing attorneys' mental impressions and legal analyses, are entitled to work product protection further undermines the ability of attorneys to completely fulfill their role as counselors and advisors. This Court should grant review to clarify the proper scope of work product protection and thus restore the ability of attorneys to fully discharge their role in our judicial system.

ARGUMENT

THE RULING BELOW INADEQUATELY PROTECTS ATTORNEY WORK PRODUCT FROM DISCOVERY AND CONFLICTS WITH THE DECISIONS OF NUMEROUS OTHER COURTS OF APPEALS

This Court has long recognized that the judicial system depends on effective legal advocacy which, in turn, relies on the ability of attorneys to have candid and confidential communications with their clients. *Hickman v. Taylor*, 329 U.S. 495, 512 (1947) ("the general policy against invading the privacy of an attorney's course of preparation is * * * well recognized and * * * essential to an orderly working of our system of legal procedure"). In recognizing the work product privilege, this Court held that the production

of materials created in anticipation of litigation should be "rare." *Id*. at 513; *see also Upjohn Co. v. United States*, 449 U.S. 383, 402 (1981) (noting the high standard that should be met before compelling disclosure of work product materials). These documents contain attorney thought processes on the merits of a case, including the strengths and weaknesses of potential and ongoing litigation.

As the court of appeals acknowledged, its ruling addressed a question that this Court has yet to answer: whether "a document [that] is not in any way prepared 'for' litigation but relates to a subject that might or might not occasion litigation" is discoverable under Rule 26(b)(3)(A). Pet. App. 9a. This is an important question to the everyday practice of law, and the court of appeals applied a standard that inadequately protects attorney work product and that is contrary to the decisions of other circuits. This Court's review is warranted.

A. If Left Standing, The Narrow "For Use" Standard Adopted By The Court Below Will Have Broad Negative Effects On The Workings Of The Judicial System

The district court in this case held that the documents at issue "were prepared 'because of' the prospect of litigation" and were therefore not discoverable under Rule 26(b)(3)(A) because they had been "prepared in anticipation of litigation." Pet. App. 9a. The court of appeals reversed that ruling, observing that "the district court did not say that

the work papers were prepared *for use* in possible litigation." Pet. App. 11a (emphasis in original). The court of appeals reasoned that "the focus of work product protection has been on materials prepared for use in litigation, whether the litigation was underway or merely anticipated." Pet. App. 15a.

The court below thus held that the relevant inquiry is whether the document was created "for use" in litigation. Pet. App. 11a. And a document that was not created "for use" in litigation is discoverable even if "the subject matter of the document relate[d] to a subject that might conceivably be litigated," Pet. App. 16a (emphasis omitted), or "the materials were prepared by lawyers or represent legal thinking," *id.* at 17a. If not reversed, the ruling will have "wide ramifications" affecting issues "essential to the daily practice of litigators across the country." Pet. App. 33a, 45a (Torruella, J., dissenting).

The effect of the ruling is far reaching. If an adverse party can have access to his adversary's critical legal analyses, attorneys on both sides of a case are less capable of zealously performing their duties. And when a client has no assurance that his attorney's analyses will not be discoverable by his adversary, a client is less likely to be forthright with his attorney. Providing parties access to the fruits of their opponents' legal analyses thus undermines the adversarial nature of our judicial system.

1. A narrow work product privilege limits the ability of attorneys to provide effective representation to their clients

DRI's members are committed and known for their zealous representation of their clients. This is consistent with the Model Rules of Professional Conduct requirement that attorneys must act "with zeal in advocacy upon the client's behalf." Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (2009). Courts have thus recognized that the Model Rules "facilitate[ ] zealous advocacy in the context of an adversarial system of justice by ensuring that the sweat of an attorney's brow is not appropriated by the opposing party." *In re Grand Jury Subpoena*, 274 F.3d 563, 574 (1st Cir. 2001). As discussed below, however, the court of appeals' ruling, by limiting attorneys' ability to document their thinking, hinders the ability of DRI's members to provide zealous representation. Where there is a significant possibility that work product containing potential litigation strategies and risk assessments will be discoverable, attorneys will feel less free to fearlessly consider all potential avenues relevant to their client's case.

a. DRI's members regularly rely on the work product privilege when preparing for litigation or the possibility of litigation. As this Court has recognized, and as DRI's members experience on a daily basis, the practice of committing strategy and mental impressions to paper strengthens attorneys' preparation by assuring precision and thoroughness

before attorneys impart advice to their clients. *See Hickman*, 329 U.S. at 511. The work product privilege obviates concerns that their written legal analyses about the merits (or demerits) of a particular case or potential case might be subject to discovery.

But if only those documents that are created "for use" in litigation are protected by the work product privilege, attorneys on both sides of a case cannot thoroughly and aggressively prepare. Under such a regime, attorneys, who often must opine on the legal consequences of past or future business decisions, will be reticent to memorialize these legal analyses or thoughts about the merits or strategies of a particular issue or course of action because such documents might end up in the hands of opposing counsel in a subsequent suit. Indeed, this Court has acknowledged that "[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." *Ibid.*; *see also Restatement (Third) of the Law Governing Lawyers* § 87 cmt. b (2000) (*Restatement*) ("A lawyer whose work product would be open to the other side might forgo useful preparatory procedures, for example, note-taking."). Such a result runs contrary to the professional standards by which DRI's members abide, which assume that an attorney will "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Hickman*, 329 U.S. at 511;

Pet. App. 32a (Torruella, J., dissenting) (explaining the "diminishing * * * quality of representation" that would result were attorneys discouraged to put information in writing). This will limit creative thinking by attorneys, who will feel constrained in their ability to examine all possible solutions to a problem, which in turn will hinder the advancement of the law.

This Court in *Hickman* recognized the potential problem that could result if "[a]n attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial." 329 U.S. at 511; *see also id.* at 516 (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."). Without the work product privilege, parties will have an "incentive * * * to rely solely on their opponent's preparation." *United States v. Nobles*, 422 U.S. 225, 254 n.16 (1975); *see also In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1301 (Fed. Cir.) ("The purpose of the doctrine is to * * * prevent one party from piggybacking on the adversary's preparation.") (citation omitted), *cert. denied*, 549 U.S. 1096 (2006); *cf. Restatement* § 87 cmt. b (noting that our adversarial process depends upon "opposing lawyers competitively develop[ing] their own sources of factual and legal information").

The standard announced by the court below will permit this very type of freeloading. Indeed, the

plaintiffs' bar has every incentive to seek out this type of analyses in courts that have taken a narrow view of the work product doctrine. *See*, *e.g.*, Matthew J. Barrett, *Opportunities for Obtaining and Using Litigation Reserves and Disclosures*, 63 OHIO ST. L. J. 1017, 1027 (2002) (detailing ways in which practitioners may access sensitive legal strategy documents). As one commentator has noted, recent legal developments permitting broader access to work product materials "present both important discovery opportunities for litigators, especially counsel for plaintiffs, and dangerous pitfalls for attorneys representing businesses" because these work product materials include legal planning and strategy documents kept by businesses. *Id.* at 1081.

b. In this atmosphere—where DRI's members must avoid opportunistic litigators who would attempt to obtain sensitive documents imparting litigation strategies—clear guidance as to the scope of work product protection is vital.

The standard adopted by the court below, however, provides attorneys with virtually no guidance. Instead, the court simply asserted a know-it-when-you-see-it test: "[e]very lawyer who tries cases knows the touch and feel of materials prepared *for* a current or possible (*i.e.*, 'in anticipation of') law suit." Pet. App. 17a (emphasis added). But that formulation leaves experienced litigators guessing as to what is protected. On the one hand, if the standard protects only those materials that will actually be "use[d]" at trial, it is too narrow to serve

the interests the Rule is meant to protect. And if the standard is meant to protect more than just those materials, it is uncertain how much more. For example, would a lawyer's analysis of a potential expert's report regarding an industrial accident be privileged, or would the answer depend on *when* (before versus during litigation) and for *what* reasons (because the expert might be a witness versus because the client was trying to prevent future accidents) the analysis was created? Without more certainty, DRI's members, who have daily, on-the-ground experience with this issue, cannot rely on such a know-it-when-you-see-it test, especially when the consequences of being wrong are the disclosure of significant legal analyses that can be manipulated by opposing counsel.

The standard announced by the court of appeals will have broad ramifications. Although this case arises in the factual context of tax accrual work papers, the reasoning below suggests no principled basis on which its ruling could be limited to that context. To the contrary, the court of appeals' opinion interpreted Rule 26 and this Court's precedent to articulate a narrow standard of protection for attorney work product. Pet. App. 15a-20a. And in applying that standard, it did not tailor it to the facts of this particular case. Pet. App. 11a-15a. The opinion below therefore indicates that its narrow work product standard applies in all civil cases.

c. Nor are these concerns about the disclosure of written materials containing attorney impressions

inchoate or theoretical. If left standing, the decision below will negatively affect the ability of the clients of DRI's members to assess litigation risks and conduct internal investigations.

As this Court has explained, "[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations * * * 'constantly go to lawyers to find out how to obey the law.'" *Upjohn*, 449 U.S. at 392 (citation omitted); *see also* Pet. App. 34a (Torruella, J., dissenting) ("Nearly every major business decision by a public company has a legal dimension that will require [legal] analysis"); Louis M. Brown et al., *The Legal Audit: Corporate Internal Investigation* § 1.1 (2003) (explaining that attorneys, rather than business executives, should be tasked with recognizing legal problems for a corporation). But without sufficient assurances that these risk assessments and internal investigations will not be discoverable, both attorneys and clients will be less likely to fully examine and memorialize the potential consequences of any corporate action.

i. Corporations, in fact, often are required to assess litigation risk. In certain situations, for example, Financial Accounting Standard No. 5 (Accounting for Contingencies) requires a company to assess potential liabilities. *See* Fin. Accounting Standards Bd., *Statement of Fin. Accounting Standards No. 5* (1975) (*SFAS 5*); *see generally* Barrett, *supra*, 1032-1047. These required assessments apply to liabilities arising from a wide range of activities,

such as product liability exposure, pending litigation, patent claims, and governmental investigations. *SFAS 5* at App. A. These requirements place corporations and attorneys in the perverse position of being compelled to conduct analyses in order to comply with federal law, while simultaneously risking that the analyses will eventually be discovered by adverse parties. *See* Ronald L. Buch, *The Touch and Feel of Work Product*, 124 TAX NOTES 915 (2009). "[N]othing in the policies underlying the work-product doctrine or the text of the Rule itself * * * justif[ies] subjecting a litigant to this array of undesirable choices." *United States v. Adlman*, 134 F.3d 1194, 1200 (2d Cir. 1998).

Indeed, the government, and the IRS in particular, is acutely aware of the important role that these risk assessments serve in corporate governance, and have argued that these types of documents should be protected as work product. In *Delaney, Migdail & Young v. Internal Revenue Service*, 826 F.2d 124 (D.C. Cir. 1987), the IRS was considering implementation of "a system of statistical sampling to audit large accounts." *Id.* at 125. To assess the wisdom of such a system, IRS attorneys analyzed the potential effects of the system and memorialized this analysis in memoranda that "advise[d] the agency of the types of legal challenges likely to be mounted against a proposed program, potential defenses available to the agency, and the likely outcome." *Id.* at 127. When these documents were sought in a Freedom of Information Act request, the IRS

advocated a broad reading of the work product privilege to prevent disclosure of these materials. The D.C. Circuit granted protection to the documents, explaining that the plaintiff was "seeking the agency's attorneys' assessment of the program's legal vulnerabilities in order to make sure [that the plaintiff did] not miss anything" in preparing its own case. *Ibid.* Yet the documents the IRS sought to shield from discovery in that case are the very type of documents that it now seeks to obtain through discovery in this case. *See* Pet. App. 20a (noting that Textron's workpapers would provide the IRS with "a blueprint to Textron's possible improper deductions"). As the D.C. Circuit noted in affording protection to the IRS documents, "[t]his is precisely the type of discovery the Court refused to permit in *Hickman*." *Delaney*, 826 F.2d at 127.

ii. Moreover, internal investigations have become a regular practice in corporations throughout the Nation, and the use of counsel in these investigations has become standard practice. Brown, *supra*, § 4:1; *see also* Am. College of Trial Lawyers (ACTL), *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, 46 AM. CRIM. L. REV. 73, 73 (2009) (noting the high number of internal investigations that public companies have recently conducted with the use of outside counsel). Corporations conduct investigations for a wide range of issues, ranging from small employment matters to potential violations of antitrust, environmental, or securities laws. ACTL,

supra, at 73. Indeed, in response to recent changes in securities laws, such as those introduced by the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7245, the Securities and Exchange Commission has promulgated rules that require attorneys to report material corporate violations of securities laws. *See* 17 C.F.R. § 205.3(b)(1). By definition, whether a violation is material enough to warrant reporting depends upon "a prudent and competent attorney['s]" analysis of the evidence. *Id.* § 205.2(e). Thus, discovery of these violations and the concomitant ability to comply with federal law is entirely dependent on the ability of attorneys to conduct thorough internal investigations in which they can document all of their findings and assure client candor. Society benefits from these investigations, as corporations use them to determine what action they should take to remedy any possible illegalities and to better serve the interests of their shareholders. To that end, society has an interest in a thorough investigation in which attorneys and other investigators feel free to fully explore and analyze any potential improprieties.

But internal investigations are often followed by external investigations by a government agency and/or by civil and criminal proceedings. ACTL, *supra*, at 76. The prospect of future litigation affects how DRI's members can conduct internal investigations, especially when there is a possibility that a narrow work product privilege could lead to discovery of some documents arising from that investigation.

Ibid. Under a narrow work product privilege, counsel must "anticipate that all documents created, facts uncovered, and witness statements made to them" could end up in the hands of the government or a private plaintiff. *Ibid.* Even when document creation is necessary, DRI's members may well omit information that otherwise might be included in a document, to the detriment of the critical and candid assessment that should be the desired result of any internal investigation. *Ibid.* This "cautious behavior" results in "an investigation which will accomplish only minimally the purposes for which it was instituted." Brown, *supra*, § 9:2.

Corporations attempting to be model corporate citizens should not be penalized for taking steps toward that goal. But that is precisely what is occurring as corporations and experienced attorneys are starting to view internal investigations as "extremely dangerous" undertakings due to the possibility that internal investigation documents once thought to be protected may now be discovered. *Id.* § 9:1.

2. The zealous representation of clients relies on the candor between client and counsel, which is threatened by the ruling below

The ability to assert work product protection over legal analyses and opinions also encourages candor between client and counsel. It is only through this candor that an attorney has the necessary

information to zealously formulate potential legal strategies often memorialized in memoranda or other documents. But if these documents are discoverable by adverse parties, clients will have reservations about fully disclosing information to their attorneys. *See Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) (noting the "obvious" "'chilling effect' that [a weakened work product privilege] will have on the truthful communications from the client to the attorney"). As a result, the attorney's contribution to the case, and to the advancement of the judicial process as a whole, will be undermined. *Upjohn*, 449 U.S. at 389 ("full and frank communication between attorneys and their clients * * * promote[s] broader public interests in the observance of law and administration of justice").

3. A narrow work product privilege disrupts the adversarial system by increasing the likelihood attorneys will be deposed or called to testify at trial and will be disqualified

Permitting the discovery of work product distorts the adversarial system by also increasing the possibility that a party's litigation counsel will be called as a witness or deponent to explain the facts or analysis contained in the documents. Indeed, it was due to these concerns that Justice Jackson recognized that preventing this practice was a reason to interpret broadly the work product privilege. *Hickman*, 329 U.S. at 517 (Jackson, J., concurring); *see also Restatement* § 87 cmt. b (explaining that the

work product privilege "reduces the possibility that a lawyer would have to testify").

DRI's concern in this regard is well founded. The American College of Trial Lawyers has warned that, as a result of decisions like the one by the court of appeals here, "[i]nvestigating lawyers should be aware that they could become witnesses in a criminal or civil proceeding." ACTL, *supra*, at 93. And the ruling below will exacerbate issues already faced by courts about when an attorney can be compelled to testify concerning work product information. The Eighth Circuit, for example, confronted this issue in *Shelton*, where the district court had issued a default judgment as a sanction against American Motors Corporation when one of its in-house counsel refused to testify, on work product grounds, about the existence of corporate documents. *Shelton*, 805 F.2d at 1326. In contrast to the ruling below, the Eighth Circuit reversed on work product privilege grounds and held that the attorney need not testify about the documents. *Id.* at 1327. The court explained that taking such a deposition "disrupts the adversarial system and lowers the standards of the profession [and] adds to the already burdensome time and costs of litigation." *Ibid.* This practice, the court explained, "detracts from the quality of client representation [because an attorney cannot] devote his or her time and efforts to preparing the client's case without fear of being interrogated." *Ibid.*

Not only is an attorney's ability to zealously represent his client in litigation undermined when he

must provide testimony, but when a party's attorney is identified as a witness there often is an accompanying motion to disqualify that attorney from the case. Model Rules of Prof'l Conduct R. 3.7 ("[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness"); *see also FDIC v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1317 (5th Cir. 1995) (disqualifying an attorney on request of defendant who indicated an intent to call the attorney as a witness); *Ramey v. District 141, Int'l Ass'n of Machinists & Aerospace Workers*, 378 F.3d 269, 283 (2d Cir. 2004) ("the remedy where an attorney is called to testify may be to disqualify the attorney in his representational capacity"). Thus, the client might be deprived of counsel of choice, including the case knowledge and strategy that lawyer has accumulated over the course of the representation.

B. Review Is Necessary Because The Division In The Courts Of Appeals As To When The Work Product Privilege Applies Creates Uncertainty That Negatively Affects The Everyday Decisions Of Attorneys And Their Clients

The decision below exacerbates an already existing conflict in the circuits in an area critical to the everyday practice of law. The existence of these divergent legal standards has an adverse effect on the advice that attorneys can provide and that clients can request. Due to this division in the courts of appeals, DRI's members face enormous difficulties in how they

analyze their clients' potential and current litigation matters, which often involves significant case planning and strategy, because they fear that these analyses might be discoverable by opposing parties. As this Court has recognized, "the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn*, 449 U.S. at 393.

As the court below acknowledged, its ruling conflicts with decisions of other federal courts. Pet. App. 18a. All told, ten courts of appeals have adopted what amounts to more than three divergent standards as to the circumstances in which a document prepared in anticipation of litigation is privileged as attorney work product under Rule 26(b)(3). As the petition makes clear (Pet. 12-20), a division of this magnitude alone warrants this Court's plenary review.

Eight other courts of appeals apply some formulation of the standard applied by the district court in this case, which the court of appeals below rejected. These eight courts all have held that the relevant inquiry under Rule 26(b)(3)(A) as to whether a document was created "in anticipation of litigation" is whether the documents in question were created "because of" the prospect of litigation. *See United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th

Cir. 2003); *Adlman*, 134 F.3d at 1202; *National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.*, 967 F.2d 980, 984 (4th Cir. 1992); *Senate of Puerto Rico v. Dep't of Justice*, 823 F.2d 574, 587 n.42 (D.C. Cir. 1987) (R.B. Ginsburg, J.); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), *cert. denied*, 484 U.S. 917 (1987); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-1119 (7th Cir. 1983); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979). Under this "because of" standard, these circuits afford work product protection to a document if it "would not have been prepared in substantially similar form but for the prospect" of litigation, without regard to whether the document would itself actually be used in the litigation. *Adlman*, 134 F.3d at 1195.

The Fifth Circuit has adopted yet a third standard. *See United States v. El Paso Co.*, 682 F.2d 530 (5th Cir. 1982), *cert. denied*, 466 U.S. 944 (1984). Under that court's precedent, for a document to have been created "in anticipation of litigation," a court must determine whether the primary motivation behind the document's creation was the prospect of litigation. *Id*. at 542-543.

Thus, in jurisdictions such as the Fifth Circuit or, now, the First Circuit, documents with attorney opinions or analyses are more likely to be discovered. *Adlman*, 134 F.3d at 1199-1200; Eric C. McNamar, *Business Planning As It Should Be: Why Adlman Should Be The Standard When Interpreting The Work Product Doctrine*, 34 VAL. U. L. REV. 201, 225-226

(2000). Under the "because of" standard employed by a majority of the courts of appeals, however, such analyses would be protected as work product because that standard recognizes that documents can serve the "dual purpose" of assisting a business decision and anticipating litigation. *Adlman*, 134 F.3d at 1200 ("The fact that a document's purpose is business-related appears irrelevant to the question whether it should be protected under Rule 26(b)(3)."); *see also Roxworthy*, 457 F.3d at 599; *In re Grand Jury Subpoena*, 357 F.3d at 908 ("The question of entitlement to work product protection cannot be decided simply by looking at one motive that contributed to a document's preparation.").

This ability to discover documents containing attorney analyses and impressions in the few circuits that have adopted a narrow view of the work product privilege will encourage forum shopping, especially since defendant corporations may fall under the jurisdiction of several federal courts of appeals. Large plaintiff class actions, where plaintiffs will not have the same sort of pre-litigation risk assessments, will more likely be filed in courts where the work product privilege is weaker and discovery can uncover litigation risk assessments that occurred before the filing of the suit.

Many of DRI's members thus must assume that the documents they create for their clients will be subject to the most narrow work product privilege set forth in the circuit conflict, even if their clients are located in jurisdictions that might provide greater

protection under Rule 26. Dan K. Webb et al., *Corporate Internal Investigations* § 3.06 (2009 ed.) (explaining that counsel should "[a]ssume any written report may ultimately be released to the public"). Those attorneys and clients who do not assume that a narrow work product privilege standard might apply may find themselves embroiled in discovery disputes over their key litigation strategy documents. And, as discussed above (*see* pp. 7-11 *supra*), counsel that take the more cautious approach and chooses not to memorialize key strategies on paper will often be handcuffed in their ability to provide critical legal advice to their clients.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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