

TANGIBLE “INTANGIBLES” AND OTHER MYSTERIES: A CRITIQUE OF THE D.C. CIRCUIT’S EXPANSION OF WORK PRODUCT DOCTRINE IN *UNITED STATES V. DELOITTE LLP*

Brian L. Blaylock*

I. INTRODUCTION

Despite the liberal discovery allowed under the Federal Rules of Civil Procedure,¹ the proper functioning of our legal system requires protection of attorney work product from adversaries.² Work product doctrine protects our adversarial system of justice by providing an area of privacy in which attorneys may prepare their clients’ cases, “free from unnecessary intrusion by opposing parties and their counsel.”³ As Justice Jackson explained in *Hickman v. Taylor*, “Discovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary.”⁴

However, to function properly, our legal system also requires that litigants have access to evidence of all discoverable, material facts.⁵ Accordingly, courts recognize that, in some cases, the only reasonable way for a litigant to obtain evidence of a material fact is to gain access to some portion of an opposing counsel’s files.⁶ Work product doctrine is therefore a qualified (rather than an absolute) privilege: where a litigant demonstrates that other ways of obtaining evidence of material facts would be unduly burdensome, a court may waive work product protection.⁷ However, even where the court allows discovery of an opposing counsel’s files, it must still prevent disclosure of the opposing

* Juris Doctor Candidate, May 2012, William S. Boyd School of Law, University of Nevada, Las Vegas.

¹ See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 512 (1947) (referring to the “liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure”).

² See *id.* at 510 (“In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.”).

³ *Id.*

⁴ *Id.* at 516 (Jackson, J., concurring).

⁵ See *id.* at 507 (majority opinion) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”).

⁶ See, e.g., *id.* at 511–12 (“Where relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had . . . [if one] establish[es] adequate reasons to justify production through a subpoena or court order.”).

⁷ See FED. R. CIV. P. 26(b)(3).

counsel's theories, opinions, and other mental impressions concerning the litigation.⁸ Such mental impressions are "often described as opinion work product [and are] . . . 'virtually undiscoverable.'"⁹ Thus, work product doctrine serves an important public policy function: by shielding the attorney's craft from discovery, it fosters our adversarial legal system.

The health of our financial system (indeed, of our economy), on the other hand, requires that businesses have continuing access to needed capital.¹⁰ Although economists and commentators have pointed to a variety of factors that precipitated the recent financial crisis and resultant economic downturn, many agree that the prolonged unavailability of capital¹¹ was a principal factor in delaying economic recovery. To obtain such capital, businesses often look to outside investors.¹²

The continuing availability of capital from outside investors relies on an efficient system by which investors can gauge the risk associated with a particular investment. Before investing in a company, successful investors seek relevant information, including evidence of the company's current financial position, to help investors evaluate the degree of risk that investing with the company will pose.¹³ This process of information-gathering would prove costly and inefficient were investors forced to contact each company and request an overview of its financial position before every potential investment.¹⁴

To increase the efficiency of investor information-gathering and promote investor confidence, federal securities laws require publicly-traded companies to file financial statements with the Securities and Exchange Commission ("SEC").¹⁵ SEC regulations further require that certified public accountants independently audit these financial statements.¹⁶ "The SEC requires the . . . [audit] in order to obviate the fear of loss from . . . inaccurate information, thereby encouraging public investment in the Nation's industries."¹⁷ Thus, an independent auditor serves an important public function by providing the investing public with a disinterested opinion regarding the accuracy of a com-

⁸ *Id.* at (b)(3)(B).

⁹ *United States v. Deloitte LLP*, 610 F.3d 129, 135 (D.C. Cir. 2010) (quoting *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997)).

¹⁰ See N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 24 (6th ed. 2011) ("Firms produce goods and services using inputs, such as . . . capital[, which] . . . [h]ouseholds own . . .").

¹¹ See, e.g., *Fidelity Will Close a Unit*, WALL ST. J., June 20, 2009, at 3 ("Fidelity Investments said it will shut down its . . . private-equity division . . . because of the difficulty of obtaining capital in the economic downturn.").

¹² See MANKIW, *supra* note 10, at 391 ("[E]arnings from capital . . . eventually are paid to households. Some . . . are paid in the form of interest [S]ome . . . in the form of dividends.").

¹³ JEFFREY M. PERLOFF, *MICROECONOMICS* 588 (4th ed. 2007) ("Collecting accurate information before acting is one of the most important ways . . . people can reduce risk . . .").

¹⁴ See, e.g., MANKIW, *supra* note 10, at 273 ("[T]he use of specialization to achieve economies of scale is one reason modern societies are as prosperous as they are.").

¹⁵ See *United States v. Arthur Young & Co.*, 465 U.S. 805, 810–11 (1984) (citing federal statutes).

¹⁶ See *id.* at 811 (citing federal regulations).

¹⁷ *Id.* at 819 n.15.

pany’s self-assessed financial condition, as reported in the company’s financial statements.¹⁸

However, an auditor’s opinion is only credible—and therefore only valuable—so long as the auditor maintains its independence from the company it audits.¹⁹ Moreover, an auditor’s actual independence is necessary, but not sufficient.²⁰ For an auditor’s opinion to promote investor confidence, investors must perceive the auditor as independent.²¹ Thus, because our nation’s economic stability relies on businesses having access to investors’ capital, which in turn requires that investors have credible information on which to gauge risk, the Supreme Court has recognized the strong public policy behind ensuring that auditors remain independent from the companies they audit.²²

The public policies behind work product doctrine and maintaining auditor independence can come into conflict during discovery disputes between the IRS and publicly-traded companies.²³ Oftentimes, the IRS seeks information that could reveal the company’s confidence that it can sustain a questionable tax return position through litigation.²⁴ Where such information appears in internal documents produced by the company or its attorney, work product doctrine nearly always shields these materials from discovery.²⁵ However, this information may also appear in documents produced by auditors, providing the IRS with an additional discovery target, which may not qualify for work product protection.²⁶

In such cases, the company will often seek to extend its work product protection to documents produced by an independent auditor.²⁷ However, by allowing a company to bring auditor-produced documents within its work product protection, the court may risk compromising perceived auditor independence by bringing the auditor “in” on the company’s side of its litigation with the IRS. Courts must therefore balance numerous competing public policies to ensure our adversarial system functions properly, while also maintaining public perception of auditor independence.

This Note will utilize the D.C. Circuit’s recent decision in *United States v. Deloitte LLP* to develop a bright-line rule that precludes publicly-traded companies from asserting work product protection over documents produced by an independent auditor. Part II discusses the historical development of work prod-

¹⁸ See *id.* at 817–18 (“By certifying the public reports that collectively depict a corporation’s financial status, the independent auditor assumes a *public* responsibility This ‘public watchdog’ function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust.”).

¹⁹ See *id.* at 819 n.15 (“It is . . . not enough that financial statements *be* accurate; the public must also *perceive* them as being accurate. Public faith in the reliability of a corporation’s financial statements depends upon the public perception of the outside auditor as an independent professional.”).

²⁰ See *id.*

²¹ See *id.*

²² See *id.* at 817–18.

²³ See, e.g., *United States v. Deloitte LLP*, 610 F.3d 129, 133 (D.C. Cir. 2010).

²⁴ See, e.g., *id.* at 134.

²⁵ See, e.g., *id.* at 133–34 (discussing the government’s concession that documents produced by the company or its outside counsel were work product).

²⁶ See, e.g., *Arthur Young*, 465 U.S. at 820–21.

²⁷ See, e.g., *Deloitte*, 610 F.3d at 134.

uct doctrine. Part III explains the relevant facts and holdings in *Deloitte*, in which the D.C. Circuit extended work product protection to documents produced by an independent auditor during its audit of a publicly-traded company. Part IV criticizes the D.C. Circuit's holding in light of its potential ramifications. Finally, Part V suggests that courts should never permit publicly-traded companies to extend work product protection to documents produced by independent auditors and explains why this bright-line rule is necessary.

II. HISTORICAL DEVELOPMENT OF WORK PRODUCT DOCTRINE

A. *Hickman v. Taylor*

Work product doctrine originated in the Supreme Court's opinion in *Hickman v. Taylor*.²⁸ In February 1943, a tug boat owned by Taylor's towing company sank while towing a railroad car float across the Delaware River.²⁹ Five of the tug boat's nine crew members drowned, including Hickman.³⁰ Later that year, Hickman's estate ("Hickman") sued Taylor and his business partners (collectively "the tug owners") for Hickman's death. Hickman filed suit in federal court under the Jones Act,³¹ which grants sailors who are injured or killed in the course of their employment the same rights as railway employees to bring negligence claims against their employer.³²

One year later, Hickman submitted numerous interrogatories under the Federal Rules of Civil Procedure, including one asking the tug owners to "[s]tate whether any statements of the [surviving crew] members . . . were taken in connection with the towing [accident]."³³ Hickman further asked the tug owners to provide "exact copies of all such statements if in writing, and if oral, [to] set forth in detail the exact provisions of any such oral statements."³⁴ Supplemental interrogatories asked the tug owners to describe "any oral or written statements, records, reports or other memoranda . . . concerning any matter relative to [the subject of the litigation]."³⁵

Through their attorney, Fortenbaugh, the tug owners answered nearly all Hickman's interrogatories, but refused to disclose or summarize the contents of Fortenbaugh's interviews of the survivors.³⁶ The tug owners accused Hickman of attempting to indirectly obtain Fortenbaugh's private files, claiming that answering Hickman's interrogatories "would involve practically turning over

²⁸ *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947).

²⁹ *Id.* at 498.

³⁰ *See id.*

³¹ *Id.*

³² *See* 46 U.S.C. § 30104 (2006) ("A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.").

³³ *Hickman*, 329 U.S. at 498 (internal quotation marks omitted).

³⁴ *Id.* at 499.

³⁵ *Id.*

³⁶ *Id.*

not only the complete files, but also the telephone records and, almost, the thoughts of counsel.”³⁷

Providing numerous rationales,³⁸ the Court held for Taylor, characterizing Hickman’s interrogatories as “an attempt, 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.”³⁹ The Court’s holding protected both tangible and intangible attorney work product, so Hickman could discover neither Fortenbaugh’s notes nor his recollections of his interviews with the surviving crewmembers.⁴⁰

B. Federal Rule of Civil Procedure 26(b)(3)

Subsequently, work product doctrine was partially codified as Federal Rule of Civil Procedure 26(b)(3), which protects from discovery “documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or its representative.”⁴¹ Thus, by its plain language, Rule 26(b)(3) applies only to documents or tangible items that have both a qualifying purpose (i.e., created “in anticipation of litigation or for trial”) and a qualifying author (i.e., created “by or for [a] party or its representative”).⁴² Rule 26(b)(3) further explains that qualifying representatives include a “party’s attorney, consultant, surety, indemnitor, insurer, or agent.”⁴³

In evaluating whether multi-purpose documents—such as documents created for both litigation and business purposes—qualify for protection under Rule 26(b)(3), the circuit courts apply at least two different standards.⁴⁴ The majority of circuits apply a fairly lenient standard, extending work product protection under Rule 26(b)(3) so long as a party or its representative created the document “because of” actual or anticipated litigation.⁴⁵ However, the Fifth Circuit applies a more rigorous standard, denying work product protection unless litigation was the “primary motivating purpose” behind a document’s creation.⁴⁶

Even a document that satisfies Rule 26(b)(3)’s requirements is not entirely shielded from discovery.⁴⁷ A party may waive work product protection.⁴⁸

³⁷ *Id.* (internal quotation marks omitted).

³⁸ *See id.* at 510–11.

³⁹ *Id.* at 510.

⁴⁰ *See id.* at 512 (denying Hickman access to “oral statements made by witnesses to Fortenbaugh, whether presently in the form of his mental impressions or memoranda”).

⁴¹ FED. R. CIV. P. 26(b)(3)(A).

⁴² *See id.*

⁴³ *Id.*

⁴⁴ Compare *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998) (applying the “because of” standard), with *United States v. El Paso Co.*, 682 F.2d 530, 542 (5th Cir. 1982) (applying the “primary motivating purpose” standard).

⁴⁵ *See, e.g., Adlman*, 134 F.3d at 1195.

⁴⁶ *See El Paso*, 682 F.2d at 542.

⁴⁷ *See* FED. R. CIV. P. 26(b)(3)(A).

⁴⁸ Like the attorney-client privilege, which a party may waive through voluntary disclosure to a third party, a party may similarly waive work product protection through third party disclosure. *See, e.g., United States v. Deloitte LLP*, 610 F.3d 129, 139–40 (D.C. Cir. 2010). However, the standard courts apply to determine whether a particular third party disclosure waives work product protection is different from that which they use to evaluate waiver of

Moreover, a court may order discovery of documents protected under Rule 26(b)(3) if a party demonstrates “it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”⁴⁹ However, where it grants discovery of another party’s documents, the court must still “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”⁵⁰ As explained in Part I, *supra*, such legal theories and conclusions are often termed “opinion work product” and are nearly undiscoverable.⁵¹

Although Rule 26(b)(3) protects only documents and other tangible items, intangible work product remains protected under *Hickman*,⁵² which prevents litigants from deposing opposing counsel on litigation matters outside the attorney-client privilege, such as “information which an attorney secures from a witness while acting for his client in anticipation of litigation.”⁵³

C. *United States v. Arthur Young & Co.*

In *United States v. Arthur Young & Co.*, the Supreme Court held that work product protection does not extend to a party’s independent auditor.⁵⁴ In that case, the IRS sought production of an auditor’s tax accrual workpapers (“TAWs”), which are documents recording the auditor’s examination and analysis of those portions of a company’s financial statements that deal with contingent tax liabilities.⁵⁵ As the Court explained,

[TAWs] may document the auditor’s interviews with corporate personnel, judgments on questions of potential tax liability, and suggestions for alternative treatments of certain transactions for tax purposes. [TAWs] also contain an overall evaluation of the sufficiency of the corporation’s reserve for contingent tax liabilities, including an

the attorney-client privilege. *See, e.g., id.* Courts apply these different standards because of the distinct purposes underlying the attorney-client privilege and work product doctrine. *See id.* Attorney-client privilege “protects the attorney-client relationship by safeguarding confidential communications.” *Id.* at 139. Therefore, *any* voluntary disclosure to a (non-privileged) third party waives attorney-client privilege because such disclosure “is inconsistent with the confidential attorney-client relationship.” *Id.* at 140.

Work product doctrine, on the other hand, “promotes the adversary process by insulating an attorney’s litigation preparation from discovery.” *Id.* at 139–40. Voluntary disclosure to a third party does not, therefore, automatically waive work product protection because third party disclosures “do[] not necessarily undercut the adversary process.” *Id.* at 140. However, disclosure to a third party *will* waive work product protection where it “is inconsistent with the maintenance of secrecy from the disclosing party’s adversary.” *Id.* (citations omitted) (internal quotation marks omitted). Thus, voluntary disclosure “to an adversary or a conduit to an adversary waives work-product protection.” *Id.* at 140.

⁴⁹ FED. R. CIV. P. 26(b)(3)(A)(ii).

⁵⁰ *Id.* at 26(b)(3)(B).

⁵¹ *See, e.g., Deloitte*, 610 F.3d at 135.

⁵² *See, e.g., id.* at 136 (“*Hickman* provides work-product protection for intangible work product independent of Rule 26(b)(3).”).

⁵³ *Hickman v. Taylor*, 329 U.S. 495, 508 (1947).

⁵⁴ *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (“Nor do we find persuasive the argument that a work-product immunity for accountants’ tax accrual workpapers is a fitting analogue to the attorney work-product doctrine established in *Hickman v. Taylor*.” (citation omitted)).

⁵⁵ *See id.* at 812–13.

item-by-item analysis of the corporation’s potential exposure to additional liability. In short, [TAWs] pinpoint the ‘soft spots’ on a corporation’s tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes.⁵⁶

Despite the sensitive nature of the information TAWs contain, the Court declined to extend work product protection to TAWs produced by independent auditors.⁵⁷ The Court first emphasized work product doctrine’s origin in “the private attorney’s role as the client’s confidential advisor and advocate, a loyal representative whose duty it is to present the client’s case in the most favorable possible light.”⁵⁸ An independent auditor, by contrast, “assumes a *public* responsibility . . . [and] owes ultimate allegiance to the corporation’s creditors and stockholders, as well as to the investing public.”⁵⁹ The Court further explained that, because they serve as “public watchdog[s],” auditors must “maintain total independence from the client at all times and . . . complete fidelity to the public trust.”⁶⁰ Finally, the Court recognized that insulating from discovery an independent auditor’s assessments of the client’s financial statements—including those portions dealing with contingent tax liabilities—would “ignore the significance of the accountant’s role as a disinterested analyst charged with public obligations.”⁶¹

Because *Arthur Young* specifically considered TAWs produced by an independent auditor, lower courts have reached contradictory results in considering whether work product doctrine protects TAWs produced by companies or other documents produced by auditors.⁶² Even before the Supreme Court decided *Arthur Young*, the Fifth Circuit—applying its “primary motivating purpose” standard—had already held that Rule 26(b)(3) does not protect company-produced TAWs because, in producing the TAWs, the company’s primary motivation was not litigation, but rather compliance with federal securities law.⁶³ In contrast, after *Arthur Young*, other circuits—applying the less rigorous “because of” standard—have indicated that work product protection extends to a company’s internal tax documents, so long as the company produced them because of the prospect of litigation.⁶⁴ More recently, however, the First Circuit, sitting en banc, held that, even under the “because of” standard, company-

⁵⁶ *Id.*

⁵⁷ *See id.* at 817.

⁵⁸ *Id.*

⁵⁹ *Id.* at 817–18.

⁶⁰ *Id.* at 818.

⁶¹ *Id.*

⁶² *Compare* *United States v. Textron Inc.*, 577 F.3d 21, 31–32 (1st Cir. 2009) (en banc) (holding work product doctrine does not shield a company’s internal TAWs), *with* *United States v. Deloitte LLP*, 610 F.3d 129, 138–39 (D.C. Cir. 2010) (holding work product doctrine shields those portions of auditor-produced documents that record a company’s work product).

⁶³ *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982).

⁶⁴ *See, e.g., United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998) (“We hold that a document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome of the anticipated litigation.”).

produced TAWs did not qualify as work product because TAWs served no litigation function and, therefore, were not produced because of litigation.⁶⁵

Given the importance of the conflicting policy concerns implicated⁶⁶ and the relative lack of Supreme Court guidance since *Arthur Young*, it is perhaps understandable that lower courts have disagreed over whether to extend *Arthur Young*'s denial of work product protection beyond TAWs produced by independent auditors. However, in *United States v. Deloitte LLP*, a panel of the D.C. Circuit sharply expanded work product protection by holding that Dow Chemical Company ("Dow"), during its litigation with the IRS, could claim protection for a document produced by its independent auditor, Deloitte.⁶⁷ Specifically, the panel held that before a trial court could order production of a document Deloitte prepared, it must first review the document in camera and prevent disclosure of any Dow work product.⁶⁸ The D.C. Circuit's holding is erroneous because it dispenses with any distinction between tangible and intangible work product and allows companies to claim work product protection for portions of documents that fall unambiguously outside Rule 26(b)(3)'s scope.

III. *UNITED STATES V. DELOITTE LLP*

A. *Background*

In *United States v. Deloitte LLP*, the United States asked the D.C. Circuit to reverse a district court order denying its motion to compel Deloitte "to produce three documents in connection with ongoing tax litigation between Dow [Chemical Company] and the government."⁶⁹ The litigation underlying the discovery dispute concerned the tax treatment of two partnerships ("Chemtech I" and "Chemtech II") owned by Dow and two of its subsidiaries.⁷⁰ In 2005, Dow filed a civil suit in U.S. District Court, challenging IRS adjustments to partnership returns filed by Chemtech I and Chemtech II.⁷¹ During discovery, the government subpoenaed numerous documents from Dow's independent auditor, Deloitte.⁷² Deloitte produced most of the documents requested by the government, but refused to produce three documents that Dow identified as attorney work product.⁷³ The government then filed a motion asking the district court to compel Deloitte to produce the three withheld documents.⁷⁴

Dow's privilege log and its director of taxes described the three withheld documents as follows:⁷⁵

⁶⁵ See *Textron*, 577 F.3d at 31–32.

⁶⁶ See *supra* Part I for an explanation of the importance and sometimes contradictory natures of the public policy concerns underlying the work product doctrine and auditor-independence.

⁶⁷ See *Deloitte*, 610 F.3d at 138–39.

⁶⁸ *Id.* at 139.

⁶⁹ *Id.* at 132–33.

⁷⁰ *Id.* at 133.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

The first document is a 1993 draft memorandum prepared by Deloitte that summarizes a meeting between Dow employees, Dow’s outside counsel, and Deloitte employees about the possibility of litigation over the Chemtech I partnership, and the necessity of accounting for such a possibility in an ongoing audit The second is a 1998 memorandum and flow chart prepared by two Dow employees—an accountant and an in-house attorney. The third is a 2005 tax opinion prepared by Dow’s outside counsel.⁷⁶

This Note will refer to the 1993 memorandum (which Deloitte authored) as the “Memo” or “Deloitte Memo.” The 1998 memorandum and 2005 tax opinion (which Dow’s employees and outside counsel prepared) will be referred to, collectively, as the “Dow Documents.”

B. *The District Court’s Decision*

Without conducting an *in camera* review, the district court denied the government’s motion to compel discovery as to all three disputed documents.⁷⁷ The court concluded “the Deloitte [Memo] was work product because it was ‘prepared because of the prospect of litigation with the IRS over the tax treatment of Chemtech [I].’”⁷⁸ Notwithstanding that Dow’s independent auditor authored the Deloitte Memo, the court determined the Memo nevertheless qualified as “Dow’s work product because ‘its contents record[ed] the thoughts of Dow’s counsel regarding the prospect of litigation.’”⁷⁹

Furthermore, the district court rejected the government’s argument that Dow waived work product protection for both the Deloitte Memo and the Dow Documents by disclosing them to Deloitte.⁸⁰ The court acknowledged that a third party disclosure would waive Dow’s work product protection if such disclosure was inconsistent with maintaining secrecy from Dow’s adversary.⁸¹ However, because (1) Deloitte was not a potential adversary and (2) Dow could reasonably expect Deloitte to maintain confidentiality, the court held Dow’s disclosure to Deloitte was not inconsistent with maintaining secrecy from the IRS and, therefore, did not waive work product protection.⁸² The government appealed the district court’s ruling to the D.C. Circuit, and Dow intervened to assert work product protection.⁸³

C. *The D.C. Circuit’s Decision*

On appeal, the government advanced very different arguments for the Deloitte Memo than for the Dow Documents because of the differing circumstances surrounding each document’s creation.⁸⁴ While conceding the Dow Documents were work product, the government again argued that Dow’s dis-

⁷⁶ *Id.*

⁷⁷ *Id.* at 134.

⁷⁸ *Id.* (quoting *United States v. Deloitte & Touche USA LLP*, 623 F. Supp. 2d 39, 40 n.1 (D.D.C. 2009)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 134.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *See id.* (contrasting the government’s arguments on appeal regarding the Deloitte Memo with those regarding the Dow Documents).

closure to Deloitte constituted a waiver of work product protection.⁸⁵ The D.C. Circuit ultimately affirmed the district court's decision that Dow's disclosure to its independent auditor did not waive work product protection.⁸⁶ Because Parts IV and V of this Note focus on the D.C. Circuit's treatment of the Deloitte Memo, neither the Dow Documents nor the court's treatment of the government's waiver argument require further discussion.

Unlike its approach with the Dow Documents, the government made two categorical arguments that the Deloitte Memo could not qualify as work product under Rule 26(b)(3).⁸⁷ First, because the Memo was prepared by Dow's independent auditor, the government argued the Memo could not qualify as protected work product because it did not satisfy Rule 26(b)(3)'s "author" requirement.⁸⁸ Second, because Deloitte created the Memo in the course of completing Dow's audit, the government also argued the Memo was not prepared "in anticipation of litigation or for trial" and, therefore, failed Rule 26(b)(3)'s "purpose" requirement.⁸⁹

1. Explaining that Hickman's protection of intangible work product could also extend to a document, the D.C. Circuit rejected the government's first categorical argument.

Citing *United States v. Arthur Young & Co.*, the government first argued that, as an independent auditor, Deloitte had public responsibilities and allegiances that precluded it from qualifying as Dow's Rule 26(b)(3) representative.⁹⁰ Dow countered "that the 'representative' for purposes of Rule 26(b)(3) [was] its counsel, whose thoughts and opinions [were] recorded in the [Deloitte Memo]."⁹¹ Dow also argued the Deloitte Memo was work product because its content matched that of the Dow Documents, which the government conceded were work product.⁹²

The D.C. Circuit began its analysis by assuming, *arguendo*, that the government was correct and the Deloitte Memo did not meet Rule 26(b)(3)'s author requirement.⁹³ The court then explained that, although the Deloitte Memo was a document, the government was wrong to focus solely on Rule 26(b)(3)'s requirements because the document might still qualify as intangible work product, protected under *Hickman*.⁹⁴

Evaluating the document under *Hickman*, the D.C. Circuit considered "whether the document contains . . . the thoughts and opinions of counsel

⁸⁵ *See id.* ("Turning to the Dow Documents, the government concedes they are attorney work product, but argues that Dow waived work-product protection when it gave them to Deloitte.").

⁸⁶ *Id.* at 133 ("[W]e affirm the district court's decision that Dow did not waive work-product protection when it disclosed [the Dow Documents] to Deloitte.").

⁸⁷ *See id.* at 135.

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.* at 135–36.

⁹¹ *Id.* at 136.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

developed in anticipation of litigation.”⁹⁵ Without further analysis, the circuit court then repeated the district court’s finding that, despite its having been authored by Deloitte, the Deloitte Memo contained Dow’s work product.⁹⁶ Next, without citation, the D.C. Circuit stated that *Hickman*’s intangible “work product privilege does not depend on whether the thoughts and opinions were communicated orally or in writing, but on whether they were prepared in anticipation of litigation.”⁹⁷ Having thus dispensed with any requirement that intangible work product actually be intangible, the court then concluded that “Deloitte’s preparation of the document d[id] not exclude the possibility that it contains Dow’s work product.”⁹⁸

2. *Explaining that content, rather than function, determined whether portions of a document qualified as intangible work product, the D.C. Circuit also rejected the government’s second categorical argument.*

Still focusing on Rule 26(b)(3)’s requirements, the government further argued the Deloitte Memo could not be work product because Deloitte prepared it to complete Dow’s audit, not for or in anticipation of litigation.⁹⁹ In response, the court first described the circuit split over the proper test for determining whether a document fulfills Rule 26(b)(3)’s purpose requirement.¹⁰⁰ Like most circuit courts, the D.C. Circuit applies the “because of” test, which asks “‘whether . . . the document can fairly be said to have been prepared or obtained because of the prospect of litigation.’”¹⁰¹ While acknowledging its proffered standard specifically addressed a “document,” the court then explained, again without citation, that the standard “applies equally to [intangible] work product.”¹⁰² Accordingly, to determine whether the Deloitte Memo was intangible work product, the court considered whether the document contained “information prepared by Dow or its representatives because of the prospect of litigation.”¹⁰³

To bolster its argument under Rule 26(b)(3), the government claimed at least three circuit court opinions—including a prior opinion of the D.C. Circuit—demonstrated that documents prepared as part of an independent audit were not work product because they did not serve a litigation function.¹⁰⁴ However, by focusing its inquiry on the Deloitte Memo’s content, rather than its function, the D.C. Circuit distinguished each of the government’s cases in

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* The court did not actually explain whether the “work product privilege” to which it referred was that under Rule 26(b)(3), under *Hickman*, or both. However, because the court had already accepted arguing the government’s contention that Rule 26(b)(3) could not apply to a document authored by an independent auditor, the most reasonable interpretation of the court’s statement is that it refers to *Hickman*’s protection of intangible work product.

⁹⁸ *Id.*

⁹⁹ *See id.*

¹⁰⁰ *Id.* at 136–37.

¹⁰¹ *Id.* at 137 (quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998)).

¹⁰² *Id.* at 137.

¹⁰³ *Id.*

¹⁰⁴ *See id.* at 137–38.

turn.¹⁰⁵ The court therefore rejected the government's second categorical argument and held that, notwithstanding the Deloitte Memo's lack of any litigation function, *Hickman* would protect those portions of the document containing information prepared for litigation.¹⁰⁶

3. *Finding insufficient evidentiary basis to hold the Deloitte Memo was entirely work product, the D.C. Circuit remanded to the district court the question of whether any portion of the document was not intangible work product.*

By rejecting the government's two categorical arguments, the D.C. Circuit established the Deloitte Memo could be protected work product; to establish whether the document was, in fact, work product, the circuit court looked to the district court's record.¹⁰⁷ The circuit court determined, however, that the district court did not have a sufficient evidentiary basis to support its holding that the Deloitte Memo was entirely work product.¹⁰⁸ The D.C. Circuit noted that factors surrounding the document's creation (such as Deloitte's creating the document in the course of completing Dow's audit) "could make it likely" the document contained information other than protected work product.¹⁰⁹ The court acknowledged the Deloitte Memo might contain "other facts, other thoughts, [and] other analyses by non-attorneys which may not . . . warrant protection under the work-product doctrine."¹¹⁰ This possibility led the circuit court to remand the question to the district court to "independently assess[] whether the document was entirely work product, or whether a partial or redacted version" could be disclosed.¹¹¹ The D.C. Circuit therefore vacated the district court's earlier decision that the Deloitte Memo was wholly work product and remanded the issue, instructing the district court to "examine the document in camera to determine whether it is entirely work product."¹¹²

IV. CRITIQUE OF THE D.C. CIRCUIT'S EXPANSION OF WORK PRODUCT PROTECTION IN *DELOITTE*

By ordering the district court to determine whether the Deloitte Memo was entirely work product, the D.C. Circuit tacitly held that *Hickman* would protect any portion of the Deloitte Memo that a district judge considered to be the mental impressions of Dow's counsel.¹¹³ The D.C. Circuit's decision is erroneous for at least four reasons. First, by expanding *Hickman*'s protection of intangible work product to include portions of the Deloitte Memo, the D.C. Circuit conflates "tangible" and "intangible" work product. Second, by extending work

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 138 ("In short, a document can contain protected work-product material even though it serves multiple purposes, so long as the protected material was prepared because of the prospect of litigation.").

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 138–39.

¹¹⁰ *Id.* at 139.

¹¹¹ *Id.*

¹¹² *Id.* (citation omitted) (internal italicization omitted).

¹¹³ *Id.* at 136, 139.

product protection to an auditor-produced document, *Deloitte* conflicts sharply with the Supreme Court’s decision in *Arthur Young*. Third, by protecting as work product portions of documents with no litigation function, the D.C. Circuit’s opinion hampers litigation’s truth-seeking ability without any concomitant advance in fostering effective advocacy. Fourth, and finally, because *Deloitte* requires application of the “because of” standard to portions of documents that unambiguously fail Rule 26(b)(3)’s requirements, *Deloitte* will subject trial courts to interminable, unnecessary in camera reviews and waste judicial resources.

A. *By extending Hickman’s protection of intangible work product to portions of a tangible document, Deloitte conflates “tangible” and “intangible” work product.*

Although the D.C. Circuit correctly asserted that *Hickman* protects intangible work product independent of Rule 26(b)(3),¹¹⁴ the court’s application of *Hickman* to portions of the Deloitte Memo is erroneous. Courts have consistently limited *Hickman*’s protection of intangible work product to the unwritten thoughts, recollections, and mental impressions of a party or its representative.¹¹⁵ In *Hickman*, for example, the Court’s protection of intangible work product prevented Hickman from compelling Fortenbaugh to write out or testify as to his recollections of witness interviews.¹¹⁶ Thus, the *Hickman* Court’s application of intangible work product protection—protecting an attorney’s unwritten ideas, thoughts, and recollections—accords with traditional notions (and dictionary definitions) of “intangible.”¹¹⁷

In *Deloitte*, however, the D.C. Circuit expanded *Hickman*’s protection of “intangible” work product to include portions of tangible, auditor-produced documents.¹¹⁸ The circuit court attempted to justify this result by explaining that *Hickman* did not protect the Deloitte Memo itself, but rather any mental impressions of Dow’s attorneys the document contained.¹¹⁹ However, the D.C. Circuit’s analysis ignores that all documents represent ideas that were, at some time, intangible. Accordingly, the intangible origin of a document’s subject matter does not make the document, itself, intangible. Reducing intangible ideas or recollections to writing converts them into tangible documents, which, in turn, should either qualify for Rule 26(b)(3)’s protection or not. *Deloitte*’s holding is therefore wrong because it renders the distinction between “tangible” and “intangible” work product—a distinction that figures prominently in both Rule 26(b)(3) and *Hickman*—meaningless.

By its plain language, Rule 26(b)(3) applies only to “documents and tangible things.”¹²⁰ By including “tangible things” with “documents” in defining the Rule’s scope, the Rule’s drafters strongly indicated that they understood a doc-

¹¹⁴ *Id.* at 136.

¹¹⁵ *See, e.g., Hickman v. Taylor*, 329 U.S. 495, 512–13 (1947).

¹¹⁶ *Id.*

¹¹⁷ *See, e.g., THE MERRIAM-WEBSTER DICTIONARY* 391 (Frederick C. Mish et al. eds., 1997) (defining “intangible” as an adjective meaning “incapable of being touched”).

¹¹⁸ *See Deloitte*, 610 F.3d at 136, 142–43.

¹¹⁹ *See id.* at 136, 143.

¹²⁰ *See* FED. R. CIV. P. 26(b)(3).

ument to be, itself, a tangible thing. Moreover, the Rule's language plainly states its drafters' intent to confine Rule 26(b)(3)'s application to such tangibles. In *Hickman*, by contrast, the Court referred to (and protected) both tangible and intangible attorney work product.¹²¹ The Court's use of both "tangible" and "intangible" would have been unnecessary had the Court understood an attorney's mental impressions to remain intangible work product after being recorded in documents. In other words, if the *Hickman* Court had understood "intangible" work product to include written records of an attorney's mental impressions, then specifically protecting "tangible" work product would be redundant because any manifestation of the attorney's mental impressions would already be protected as "intangible." Therefore, the most reasonable explanation for *Hickman*'s reference to both tangible and intangible work product is that the Court gave each term its ordinary meaning and intended to protect both the attorney's documents and thoughts.

Thus, both Rule 26(b)(3) and *Hickman* acknowledge the distinction between tangible and intangible work product. *Deloitte*, however, eliminates any distinction between "tangible" and "intangible" work product by applying *Hickman*'s protection of intangible work product to portions of the very tangible Deloitte Memo. The D.C. Circuit's opinion is therefore erroneous because it contradicts both *Hickman* and Rule 26(b)(3).

Rather than dispensing with the distinction between tangible and intangible work product, the D.C. Circuit should have given *Hickman*'s protection of "intangibles" its plain meaning. *Hickman* would continue to prevent discovery of attorneys' unrecorded thoughts, recollections, and mental impressions, while Rule 26(b)(3) protects documents and other tangible items prepared by (or for) a party or its representative for (or in anticipation of) litigation.

B. By extending work product protection to an auditor-produced document, Deloitte conflicts with the Supreme Court's decision in Arthur Young.

In *Deloitte*, the D.C. Circuit allowed Dow to claim work product protection for portions of the Deloitte Memo, even though Dow acknowledged that its independent auditor authored the document. The D.C. Circuit justified this result by extending *Hickman*'s protection of intangible work product to portions of the document's content, rather than applying Rule 26(b)(3) to the document itself.¹²² However, the D.C. Circuit's analysis does not square with the Supreme Court's decision in *Arthur Young*.¹²³

In response to the government's first categorical argument—that the Deloitte Memo could not qualify as work product under Rule 26(b)(3) because Deloitte was not Dow's representative—the D.C. Circuit acknowledged *Arthur*

¹²¹ See *Hickman*, 329 U.S. at 511 (stating work product is reflected in "countless . . . tangible and intangible ways"); see also *id.* at 510 (stating both "the files and the mental impressions of an attorney" should be shielded from discovery).

¹²² See *Deloitte*, 610 F.3d at 136 ("Even if . . . the Deloitte [Memo] falls outside . . . Rule 26(b)(3), this does not conclusively establish that it is not work product . . . Under *Hickman* . . . the question is not who created the document or how they are related to the party asserting work-product protection, but whether the document contains work product . . .").

¹²³ For an overview of *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), see *supra* Part II.

Young, “in which the Supreme Court refused to recognize an accountant work-product privilege.”¹²⁴ The D.C. Circuit went on to quote *Arthur Young’s* language contrasting the role of an attorney with that of an independent auditor¹²⁵ and even accepted, arguendo, the government’s contention “that the Deloitte [Memo] falls outside the definition given by Rule 26(b)(3).”¹²⁶ However, by focusing its attention solely on that portion of the *Arthur Young* opinion that refused to extend work product protection to independent auditors, the D.C. Circuit failed to account for the broader implications of the Supreme Court’s holding and rationale.

In *Arthur Young*, before it ordered discovery of auditor-produced TAWs,¹²⁷ the Court provided an excellent description of the documents’ function and content. The Court first described the independent auditor’s responsibility to “issue[] an opinion as to whether the [corporation’s] financial statements, taken as a whole, fairly present the financial position and operations of the corporation for the relevant period.”¹²⁸ The Court then explained that, as part of its task, the auditor must “evaluate the adequacy and reasonableness of the corporation’s reserve account for contingent tax liabilities.”¹²⁹ To conduct this evaluation, the auditor must consult with myriad sources of information, from both within and without the corporation, including the “opinions, speculations, and projections of management with regard to unclear, aggressive, or questionable tax positions . . . on prior tax returns.”¹³⁰

The auditor’s TAWs “record this process of examination and analysis.”¹³¹ The TAWs may therefore contain sensitive, even damaging tax information, including information from “the auditor’s interviews with corporate personnel, judgments on questions of potential tax liability, and suggestions for alternative treatments of certain transactions for tax purposes.”¹³² Indeed, the Court acknowledged that, because they contained such highly sensitive information, auditor-produced TAWs could “pinpoint the ‘soft spots’ on a corporation’s tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes.”¹³³ Thus, in *Arthur Young*, the Supreme Court ordered discovery of auditor-produced TAWs with full knowledge that such discovery would furnish the IRS with potentially damaging information that could easily disadvantage a corporation engaged in a tax dispute with the IRS.

Conversely, in *Deloitte*, the D.C. Circuit extended work product protection to the auditor-produced Deloitte Memo. The court described the Memo as “a 1993 draft memorandum prepared by Deloitte that summarizes a meeting between Dow employees . . . about the possibility of litigation over the

¹²⁴ *Deloitte*, 610 F.3d at 135.

¹²⁵ *See id.* at 135–36.

¹²⁶ *Id.* at 136.

¹²⁷ Short for “tax accrual workpapers.”

¹²⁸ *United States v. Arthur Young & Co.*, 465 U.S. 805, 811 (1984) (footnote omitted) (citation omitted).

¹²⁹ *Id.* at 812.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 812–13.

¹³³ *Id.* at 813.

Chemtech I partnership, and the necessity of accounting for such a possibility in an ongoing audit.”¹³⁴ Thus, the D.C. Circuit’s description of the Memo’s origin (a meeting between a corporation and its independent auditor regarding a question of potential tax liability) and content (information gathered by the auditor at that meeting) closely tracked the Supreme Court’s description of auditor-produced TAWs in *Arthur Young*. *Deloitte* is therefore erroneous because it fails to adequately distinguish between auditor-produced TAWs, to which the Supreme Court expressly refused to extend work product protection in *Arthur Young*, and the auditor-produced Deloitte Memo, to which the D.C. Circuit extended work product protection.

C. By allowing portions of documents that fail Rule 26(b)(3)’s requirements to qualify as protected work product, Deloitte undervalues and interferes with the truth-seeking function of our adversarial system of justice.

In *Deloitte*, the D.C. Circuit was careful to base its extension of work product protection on *Hickman*’s protection of intangible work product, rather than on Rule 26(b)(3)’s protection of documents and other tangible items. The court had little choice: because *Arthur Young* already established that a company’s independent auditor cannot serve as its representative for Rule 26(b)(3) purposes,¹³⁵ the Deloitte Memo fell unambiguously outside Rule 26(b)(3)’s protection. However, the D.C. Circuit’s focus on *Hickman*’s protection of intangibles changes neither the effect nor the error of its holding: by extending work product protection to portions of a document that fails Rule 26(b)(3)’s requirements, *Deloitte* would allow portions of any document to qualify as protected work product. Thus, the D.C. Circuit’s opinion extends work product protection to (portions of) documents that serve no litigation function and were not authored by or for a party or its representative. *Deloitte* is therefore erroneous because it restricts litigation’s truth-seeking function but does not serve work product protection’s underlying purpose—to foster effective advocacy.

As explained in Part I, *supra*, work product protection represents a carefully crafted compromise between two important, but often countervailing, public policies that underlie our adversarial system of justice: truth-seeking (which requires that litigants have access to all material facts) and advocacy (which requires that attorneys have an area of privacy in which to prepare clients’ cases).¹³⁶ The *Hickman* Court acknowledged the challenge it faced in

¹³⁴ *United States v. Deloitte LLP*, 610 F.3d 129, 133 (D.C. Cir. 2010).

¹³⁵ *See Arthur Young*, 465 U.S. at 817 (“[W]ork-product doctrine was founded upon the private attorney’s role as the client’s confidential adviser and advocate, a loyal representative whose duty it is to present the client’s case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation’s financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client.”).

¹³⁶ *Compare Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”), *with id.* at 511 (“Proper preparation of a client’s case demands that [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare . . . legal theories and plan his strategy without undue and needless interference.”).

balancing these competing values, calling it “a delicate and difficult task.”¹³⁷ In the end, the Supreme Court—and, later, Rule 26(b)(3)’s drafters—balanced these competing policy concerns by crafting a narrow exception for attorney work product within the otherwise broad system of discovery under the Federal Rules of Civil Procedure.

The narrowness of this exception is reflected in both Supreme Court precedent and in Rule 26(b)(3)’s text. In *Hickman*, the Court carefully limited its holding, protecting only attorney work product from discovery¹³⁸ and further qualifying that protection by acknowledging that, under certain circumstances, even an attorney’s files were properly discoverable.¹³⁹

Moreover, since *Hickman*, the Court has declined to extend work product protection to materials and parties not connected with litigation, most notably in *Arthur Young*, where the Court expressly refused to extend work product protection to documents created by an independent auditor. In that case, the Court first explained that *Hickman*’s protection of attorney work product “was founded upon the private attorney’s role as the client’s confidential adviser and advocate.”¹⁴⁰ The Court then contrasted the attorney’s role as advocate with the “public watchdog” function of the independent auditor.¹⁴¹ Finally, the Court refused to extend work product protection to independent auditors, explaining that to allow such an extension “would be to ignore the significance of the accountant’s role as a disinterested analyst charged with public obligations.”¹⁴²

Rule 26(b)(3)’s drafters were similarly careful in restricting the Rule’s scope, providing only a narrow shield from discovery for very specific types of documents and tangible things, as reflected in the Rule’s “purpose” and “author” requirements. Only documents “prepared in anticipation of litigation or for trial by or for [a] party or its representative” qualify for Rule 26(b)(3)’s protection.¹⁴³ Thus, by the Rule’s plain language, its requirements are conjunctive. In other words, even documents containing information prepared in anticipation of litigation are discoverable unless authored by or for a party or its representative.¹⁴⁴ Similarly, a document prepared by or for a party or its representative remains subject to adversarial discovery unless it serves a litigation function.¹⁴⁵

To balance the competing needs of public policy, both the Supreme Court and Rule 26(b)(3)’s drafters have carefully limited work product protection to applications that serve its underlying purpose by protecting materials connected

¹³⁷ *Id.* at 497 (“Examination into a person’s files and records, including those resulting from the professional activities of an attorney, must be judged with care At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task.”).

¹³⁸ *See id.* at 511 (confining the Court’s opinion to the “[w]ork product of the lawyer”).

¹³⁹ *See id.* (“Where relevant and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may properly be had.”).

¹⁴⁰ *Arthur Young*, 465 U.S. at 817.

¹⁴¹ *Id.* at 817–18.

¹⁴² *Id.* at 818.

¹⁴³ FED. R. CIV. P. 26(b)(3).

¹⁴⁴ *See, e.g., Arthur Young*, 465 U.S. at 821.

¹⁴⁵ *See, e.g., United States v. Textron Inc.*, 577 F.3d 21, 31–32 (1st Cir. 2009) (en banc).

with litigation preparation. These limits on the scope of work product protection allow the doctrine to foster effective advocacy without unduly hampering litigation's truth-seeking function. Accordingly, any extension of work product protection beyond the limits set out in *Hickman* and Rule 26(b)(3) risks upsetting the existing balance between the countervailing public policies of advocacy and truth-seeking.

In *Deloitte*, the D.C. Circuit extended work product protection to portions of a document that served no litigation function and was not prepared by or for a party or its representative. *Deloitte*'s expansion did not, therefore, serve work product doctrine's underlying purpose because it did nothing to foster effective advocacy. The D.C. Circuit's decision did, however, hamper litigation's ability to reveal the truth behind the disputed matter, as it denied the government access to a document containing relevant information. The work product expansion in *Deloitte*, therefore, sharply undermined the public policy interest in litigation's truth-seeking function, without any concomitant increase in advancing effective advocacy. Thus, because it upsets the balance set between countervailing public policies in Supreme Court precedent and Rule 26(b)(3), the D.C. Circuit's expansion of work product doctrine in *Deloitte* is erroneous.

D. By requiring trial courts to determine whether any portion of a document contains information prepared "because of" litigation, Deloitte will subject trial courts to interminable in camera reviews and waste judicial resources.

D.C. Circuit precedent establishes the "because of" standard as the appropriate tool for determining whether a mixed-purpose document satisfies Rule 26(b)(3)'s requirement that the document had been prepared "in anticipation of litigation or for trial."¹⁴⁶ However, as the government argued and the court accepted arguendo, the *Deloitte* Memo fell outside Rule 26(b)(3)'s protection because it was not created "by or for another party or its representative."¹⁴⁷ Moreover, courts have consistently limited the "because of" standard's application to evaluating whether entire documents satisfy Rule 26(b)(3)'s purpose requirement.¹⁴⁸

Nevertheless, in *Deloitte*, the D.C. Circuit applied the "because of" standard to portions of the *Deloitte* Memo's content, notwithstanding the court's own assumption that Rule 26(b)(3) was inapplicable.¹⁴⁹ Specifically, the court considered whether any portion of the *Deloitte* Memo's contents "record[ed] information prepared by Dow or its representatives because of the prospect of

¹⁴⁶ See *United States v. Deloitte LLP*, 610 F.3d 129, 137 (D.C. Cir. 2010) (citing *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998)).

¹⁴⁷ FED. R. CIV. P. 26(b)(3). *Deloitte*'s role as a "public watchdog" precluded it from acting as Dow's representative for Rule 26(b)(3) purposes. See *Arthur Young*, 465 U.S. at 817–18 ("By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public.").

¹⁴⁸ See, e.g., *Textron*, 577 F.3d at 29–30.

¹⁴⁹ See *Deloitte*, 610 F.3d at 136–37.

litigation.”¹⁵⁰ The court reasoned that such application was appropriate because, although the Deloitte Memo was a tangible document, portions of it could still qualify as intangible work product, protected under *Hickman*.¹⁵¹ However, like other circuits, the D.C. Circuit had previously confined its application of the “because of” standard to evaluating the purpose with which entire documents were created or obtained.¹⁵² Moreover, aside from its bald assertion that the “because of” standard was “equally” applicable to intangible work product, the court provided neither explanation nor support for its decision to depart from both its own and other circuits’ precedent.¹⁵³ Through its entirely unprecedented application of the “because of” standard,¹⁵⁴ the D.C. Circuit fundamentally shifted the standard’s focus from an entire document to any portion of a document.¹⁵⁵ The court’s decision in *Deloitte* is therefore flawed because it leaves open the possibility that, Rule 26(b)(3)’s requirements notwithstanding, portions of any document can qualify as protected work product.

By obviating Rule 26(b)(3)’s requirements and applying the “because of” standard to individual elements of a document’s content, *Deloitte* unreasonably expands work product protection and places a tremendous new burden on trial courts to conduct in camera reviews of documents outside Rule 26(b)(3). Before *Deloitte*, a court’s work product evaluation of a document’s purpose was subject to two important limits: (1) courts only considered documents that otherwise satisfied Rule 26(b)(3)’s requirements, and (2) courts only considered the purpose for which the entire document was created. After *Deloitte*, however, a trial court may be required to conduct an in camera review of a document that clearly fails Rule 26(b)(3)’s requirements, and it also must consider the purpose behind each element of the document’s content.¹⁵⁶ Allocating judicial resources to combing through individual elements of auditor-produced documents is particularly wasteful because such documents unambiguously fail both Rule 26(b)(3)’s purpose and author requirements. Thus, because it wastes judicial resources and allows work product protection for portions of documents (like the Deloitte Memo) that serve no litigation function, the D.C. Circuit’s application of the “because of” standard in *Deloitte* distorts the work product doctrine’s purpose and is erroneous.

¹⁵⁰ *Id.* at 137.

¹⁵¹ *See id.* at 136.

¹⁵² *See id.* at 137 (“Like most circuits, we apply the ‘because of’ test, asking ‘whether, in light of the nature of the *document* and the factual situation in the particular case, the *document* can fairly be said to have been prepared or obtained because of the prospect of litigation.’”) (quoting *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998)) (emphasis added).

¹⁵³ *See id.*

¹⁵⁴ The D.C. Circuit’s application of the “because of” standard to portions of the Deloitte Memo is particularly troubling because the court does not acknowledge its novelty. The D.C. Circuit could of course elect, as a matter of first impression, to apply the “because of” standard to documents outside Rule 26(b)(3) or to intangible work product. However, because the court did not characterize its application as a matter of first impression, it also failed to provide any further explanation or discussion of how lower courts should apply this entirely new legal standard.

¹⁵⁵ *See Deloitte*, 610 F.3d at 138–39.

¹⁵⁶ *See id.* at 139.

V. A PROPOSED NEW STANDARD

A better standard would deny work product protection for any document authored by an independent auditor. Such a standard is preferable because it promotes efficiency for the courts, protects perceived auditor independence for investors, and provides certainty of results for litigants. Moreover, a bright-line standard need not diminish work product protection because auditor-produced documents need not include clients' work product.

Under *Deloitte*, portions of documents may qualify as intangible work product, even though the documents themselves fail Rule 26(b)(3)'s requirements. *Deloitte* therefore requires trial courts to conduct potentially interminable in camera reviews of auditor-produced documents to determine which portions, if any, require redaction. In contrast, categorically denying work product protection for auditor-produced documents would entirely relieve courts of this burden, thereby increasing judicial efficiency.

A bright line rule denying work product protection would also avoid any appearance of an auditor becoming involved in a client's litigation and would provide certainty of results for litigants. Keeping auditors out of their client's litigation serves the public interest by protecting investors' perception of auditor independence, while certainty of results allows parties to better predict future outcomes and tailor their conduct accordingly.

Finally, excluding auditor-produced documents need not impair companies' work product protection. Although companies routinely share privileged information with auditors, such information would only become discoverable if replicated in an auditor-produced document. However, confidential company-produced information need not appear in auditor-produced documents. Rather, an auditor's documents need only reflect the auditor's opinions and mental impressions regarding the company's financial statements and underlying financial condition. Because auditors are not their clients' representatives and do not produce documents for litigation purposes, auditors' opinions do not—and should never—qualify for work product protection.

Indeed, categorically denying work product protection for auditor-produced documents could actually lead to greater protection of companies' protected information while increasing auditor independence. Once put on notice, auditors would have greater incentive to carefully limit the contents of their documents to their own opinions, rather than those of their clients. Such an arrangement would ultimately serve the public policies underlying both auditor independence and work product doctrine.

VI. CONCLUSION

Although work product doctrine serves an important public policy function by protecting our adversarial legal system, auditor independence also serves an important public interest by fostering investor confidence. By extending work product protection to portions of an auditor-produced document, the D.C. Circuit erred in *United States v. Deloitte LLP*. Auditor-produced documents should never qualify for work product protection.