The Protected Status of Opinion Work Product: A Misconduct Exception

Andrea L. Borgford
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Abstract: Opinion work product generally has remained immune from discovery, although two increasingly problematic exceptions have developed to counter this immunity. The vague "at-issue" exception permits discovery of documented mental impressions when those mental impressions are central to the subject matter of the suit. The overly narrow "crime-fraud" exception opens opinion work product to discovery when it has been developed in furtherance of a crime or fraud. Because these redundant yet inadequate exceptions share common elements and goals, courts should streamline this important area of discovery law by condensing them into a new misconduct exception.

Federal discovery rules provide a qualified protection to an attorney's work product. Rule 26(b)(3) of the Federal Rules of Civil Procedure ("Rules") requires a party to show "substantial need" and "undue hardship" in order to discover an adversary's material prepared in anticipation of litigation. Although Rule 26(b)(3) also protects an attorney's mental impressions and conclusions, it is unclear to what extent it shields such "opinion work product" from discovery. Because opinion work product is the philosophical centerpiece behind the protection of work product, it has been referred to as "hard-core" work product.

Federal courts have set forth a spectrum of safeguards for hard-core work product, ranging from a partial to an absolute immunity from discovery. The structure and strength of these protections have changed with each federal appellate decision evaluating opinion work product. Recent judicial trends offer far fewer protections to opinion work product than those enunciated by earlier courts.

1. As used in this Comment, the term "work product" refers to that material, factual or otherwise, collected by an attorney or agent in anticipation of litigation. See generally § CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, §§ 2022–2027 (1970 ed. & Revised Supp. 1992).

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

3. "Opinion work product" will refer to work product which reflects an attorney's mental impressions, strategies, conclusions, evaluations of witness demeanor, opinions as to case strength or weakness, and legal theories of the case. See § WRIGHT & MILLER, supra note 1 § 2026; see also 4 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 26.64 [3.-2] (2d ed. 1991).

This Comment will examine the methods and rationales which have evolved to address opinion work product after the 1970 amendment to Rule 26(b)(3). Specifically, this Comment will analyze approaches to the discoverability of opinion work product and suggest a bright-line synthesis of the exceptions currently threatening to overtake the rule. Part I examines the history and development of work product and hard-core work product, or opinion work product, and the exceptions to opinion work product's general immunity from discovery. Part II criticizes the exceptions which currently allow discovery of opinion work product and suggests a “misconduct exception” for the few situations in which courts should permit discovery.

I. PROTECTING OPINION WORK PRODUCT

In the landmark 1947 case of Hickman v. Taylor, the Supreme Court protected an attorney's case preparation from routine discovery, enunciating the “work product doctrine.” Later incorporated into Rule 26(b)(3), the work product doctrine limits the process of free discovery by requiring a party to demonstrate both substantial need for the documents in question and undue hardship if the request is denied. Courts have required an even greater showing to access opinion work product. Two exceptions, the “at-issue” exception and the “crime-fraud” exception, have arisen against the backdrop of that general immunity.

A. The Development of and Rationale for the Work Product Doctrine: Hickman and Rule 26(b)(3)

At common law, an attorney's strategic investment in the compilation of case materials received virtually absolute protection from discovery. Attorneys refined issues by exchanging rebuttals and surrebuttals filled with ever-narrowing syllogisms, in hopes of arriving at ultimate issues.

6. Id. at 510.
7. FED. R. CIV. P. 26(b)(3) advisory committee's note.
8. Chief Judge Cardozo's statement illustrates early attitudes toward discovery of work product: “[n]o precedent can be found even in civil causes for compelling disclosure, in advance of the trial, of the office notes or memoranda prepared by an attorney after consultation with his witnesses, and summarizing his understanding of the testimony that is likely or expected.” People ex rel. Lemon v. Supreme Court, 156 N.E. 84, 85 (N.Y. 1927), overruled on other grounds by Morgenthau v. Erlbaum, 451 N.E. 2d 150 (1981).
9. See 8 WRIGHT & MILLER, supra note 1, § 1202 (discussing formulation of issues through pleading process before advent of Federal Rules).
This lengthy process rewarded surprise and secrecy, and encouraged the "sporting theory of justice." The Federal Rules of Civil Procedure strove to eliminate many of those more dilatory approaches and replace them with streamlined procedures. Perhaps nowhere was this evolution so drastic as in the law of discovery. Because the Rules contained no provision explicitly protecting work product, courts reached conflicting decisions regarding the discovery of materials prepared by an advocate in anticipation of litigation.

Shortly after the Supreme Court rejected an amendment to Rule 30(b) which would have barred any discovery of opinion work product, the Court decided *Hickman v. Taylor*. *Hickman*’s unique facts provided the Court with an opportunity to guide lower federal courts on the scope of

10. See 8 id. § 2001 n.20 (1992 Revised Supp.).
11. See generally 8 id. § 2001, at 15 (1970 ed.). Federal discovery procedures have three purposes:

[First,] to narrow the issues, in order that at the trial it may be necessary to produce evidence only on a residue of matters that are found to be actually disputed and controverted . . . .

[Second,] to obtain evidence for use at the trial . . . .

[Third,] to secure information about the existence of evidence that may be used at the trial and to ascertain how and from whom it may be procured . . . .

8 id. § 2001.

12. See 8 id. § 2001–2003. These early discovery procedures were codified at Rules 26 through 37, each rule outlining a specific procedure.

13. It was not until 1970 that Rule 26(b)(3) was amended to include protections for work product. Although the pre-1970 Rule 26(b)(3) addressed the scope of depositions, rather than the general scope of discovery, the advisory committee reorganized and broadened the discovery rules to include protections for work product in 1970. See 48 F.R.D. 487 (1970).

14. The advisory committee proposed this amendment to Rule 30(b) in 1946:

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories or, except as provided in Rule 35, the conclusions of an expert.


15. 329 U.S. 495 (1947). One commentator suggests that the Court preferred to address the discovery of work product (and opinion work product) through evolving case law rather than strict rule. Charles R. Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026, 1031 (1950), cited in 8 WRIGHT & MILLER, supra note 1, § 2021 n.75. Likewise, the advisory committee has commented that "[i]n deciding the *Hickman* case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule." FED. R. Civ. P. 26(b)(3) advisory committee’s note.
protection afforded an adversary's case preparation materials. After determining that attorney-client privilege did not protect the materials compiled by defendants' attorney, the Supreme Court nonetheless forbade their discovery because no necessity or justification supported such an arbitrary incursion into attorney files.

The Court determined that an adversary must satisfy two conditions to gain production of documents prepared in anticipation of litigation. First, a party must show substantial "necessity" for the contested documents. Second, a party must demonstrate that denial of production would cause undue "hardship" or injustice.

In the same protective fashion, the Court strongly disapproved of production of mental impressions, differentiating between work product containing mental impressions and other more factual work product. The Court implied that opinion work product might never be subject to discovery. This important distinction later was incorporated into Rule 26(b)(3).

Relying on the reasoning in Hickman, the present Rule 26(b)(3) operates to limit liberal discovery so that parties do not simply engage in "fishing expeditions," appropriating an adversary's output and labor.

While other discovery rules seek to maximize free access to

16. In Hickman, owners of a sunken tug retained a law firm to represent them in the event of litigation. Their attorney took statements from survivors who additionally testified to the facts of the accident in a recorded public hearing. Hickman's administrator brought suit against the tug owners several months later. Hickman, 329 U.S. at 498-99. During the discovery process, the plaintiff requested that the defendants produce any oral or written statements taken from surviving witnesses of the maritime accident. The defendants' attorney refused to disclose any such documents or oral statements, contending that attorney-client privilege prohibited discovery. Id. at 499-500.

17. The Court stated that the discovery request was "an attempt, without purported necessity or justification" to obtain written materials prepared "by an adverse party's counsel in the course of his legal duties." Id. at 510.

18. Id. at 509-10.

19. Id.

20. The witnesses' oral statements would have implicated counsel's mental impressions because counsel would have had to remember and relate them. Justice Murphy firmly declared that "we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production" of those mental impressions. Id. at 512.

21. See id. Additionally, the court implied that factual work product is discoverable only when it is central to the suit. Where work product "is essential to the preparation of [an adversary's] case, discovery may properly be had." Id. at 511.

22. See id.


24. Hickman, 329 U.S. at 507. See 8 Wright & Miller, supra note 1, § 2022; see also Fed. R. Civ. P. 26(b)(3) advisory committee's note (adopting Hickman test for substantial need and undue hardship, and thereby implicitly incorporating Hickman's adversarial rationale).
information, Rule 26(b)(3) limits access to information embodied in opinions. The *Hickman* Court sought to reconcile the dueling purposes of liberal discovery and the adversarial system it serves by setting forth strong procedural barriers to the disclosure of an attorney's case preparations and strategies. Seeking to protect an attorney's physical and intellectual property, the duty of loyalty to clients, and the underpinnings of the adversarial process, the Court articulated a qualified immunity for work product. Yet, the Court simultaneously sought to maximize the judicial economy and free access to information intended by the Rules.

The Supreme Court subsequently authorized amendment of Rule 26(b)(3) in 1970 to clarify and standardize protections for the work product of lawyers and non-lawyers alike. The amended Rule 26(b)(3) replicated the *Hickman* Court's standard of substantial need and undue hardship. Rule 26(b)(3) and case law since have clarified guidelines for

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25. For example, Rule 33 allows a party access to information through interrogatories. For a discussion of the difference between attorney conclusions accessible through interrogatories and those mental impressions generally inaccessible to discovery, see 4 MOORE, supra note 3, ¶ 26.64 and see generally 4A id. ¶ 33.


30. Id. at 501.


discovery of factual work product. The extent of protections nonetheless remains unclear for work product containing opinions, strategies, and other mental impressions.

B. The Uncertain Evolution of Protections for Opinion Work Product

Hard-core work product has generated a continuing series of decisions questioning its protected status under Rule 26(b)(3). The Rule states emphatically that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories" of lawyers or their representatives. Nonetheless, courts have stumbled over whether a party must demonstrate a greater showing of need and undue hardship than that required by factual work product, or whether attorney opinions are discoverable at all.

The Supreme Court clarified that mental impressions must receive greater protection than ordinary factual work product in *Upjohn Co. v. United States.* In keeping with the Rule's ambiguities, however, the Court failed to provide clear guidelines regarding what showing of necessity or hardship justifies access to an adversary's opinion work.

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33. See generally 8 WRIGHT & MILLER, supra note 1, § 2022. Although Rule 26(b)(3) applies only to documents and other tangible things prepared in anticipation of litigation, courts protect attorney work product in any form. See Shelton v. American Motors Corp., 805 F.2d 1323, 1327-30 (8th Cir. 1986) (protecting attorney mental impressions as work product where they were sought from attorney himself through deposition, rather than discovery of a document); see also Buford v. Holladay, 133 F.R.D. 487, 492 (S.D. Miss. 1990) (holding that opinion work product is protected regardless of form, whether documented or oral). Since 1970, courts have added to the basic principles enunciated in *Hickman* and Rule 26(b)(3), clarifying, for example, when work product from terminated litigation can be discovered in subsequent litigation. See generally Caroline T. Mitchell, Note, The Work Product Doctrine in Subsequent Litigation, 83 COLUM. L. REV. 412 (1983).

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

35. Traditionally, courts provided at least the same protections to opinion work product as to standard factual work product, although before *Upjohn Co. v. United States,* 449 U.S. 383, 400-01 (1981), some courts gave opinion work product no additional, special protection. See, e.g., Donovan v. Fitzsimmons, 90 F.R.D. 583, 588 (N.D. Ill. 1981) (holding that movant need only show substantial need and undue hardship to view opponent's opinion work product); see also United States v. Brown, 478 F.2d 1038, 1041 (7th Cir. 1973) (holding that movant need only show "good cause" to obtain discovery of opinion work product).


37. 449 U.S. at 401 (1981). The Court classified an attorney's memoranda of a witness's oral statements as undiscoverable opinion work product, underscoring the protected status of opinion work product and noting that the advisory committee regarded it as "deserving special protection." *Id.* at 400.
product. Not surprisingly, at least two broad approaches to opinion work product have evolved since the enactment of Rule 26(b)(3) and the subsequent *Upjohn* decision. Some courts have protected opinion work product absolutely. Other courts recognize exceptions in limited or extraordinary circumstances. The crime-fraud exception opens opinion work product to discovery when it has been created in furtherance of a crime or fraud. Likewise, the at-issue exception grants discovery of documented mental impressions when those impressions become facts central to the suit.

1. Absolute Immunity

Early after the 1970 amendment to Rule 26, the Fourth Circuit in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz* addressed the Rule's inherent ambiguities by absolutely protecting all opinion work product. Relying on the imperative language in Rule 26(b)(3) stating that courts "shall" protect opinion work product, the *Duplan* court concluded that no showing of substantial need or inability to obtain elsewhere without undue hardship could justify mandating an attorney to turn over her or his thoughts to opposing counsel. The court reasoned that if such opinion work product were not protected, attorneys simply would fail to record important thoughts in writing, thereby impairing the representation of clients and weakening the adversary system. To avoid

38. *Id.* at 401.


40. 509 F.2d 730, 735 (4th Cir. 1974), *cert. denied*, 420 U.S. 977 (1975) [hereinafter *Duplan*].

41. Courts have criticized this approach in situations where fact and opinion are intertwined. See *Bio-Rad Lab. v. Pharmacia, Inc.*, 130 F.R.D. 116, 122-23 (N.D. Cal. 1990) (allowing discovery where counsel stated that subject matter and mental impressions were inextricably intertwined).


44. *Duplan*, 509 F.2d at 735 (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1946)).
this outcome, the *Duplan* court protected opinion work product absolutely.\(^{45}\)


Other courts backed away from *Duplan’s* absolute protection and allowed discovery of mental impressions in limited or exceptional circumstances.\(^{46}\) These courts created two exceptions to the rule of absolute immunity. Courts allowed discovery of mental impressions central to the subject matter of the suit under an at-issue exception to the protected status of opinion work product. Additionally, courts enunciated a crime-fraud exception, permitting discovery of opinion work product created in furtherance of a crime or fraud. The at-issue and crime-fraud exceptions separately address the circumstance where one party exclusively controls mental impressions that have become facts constituting elements of a cause of action.

a. **The At-Issue Exception**

Opinions may be discoverable if the party resisting discovery has put mental impressions at issue in a suit.\(^{47}\) For example, a moving party might discover documents\(^{48}\) containing an attorney’s advice when an adversary claims she relied on that counsel’s advice as a reason for delaying bringing suit.\(^{49}\) A party may also discover mental impressions when an attorney’s opinions on the merits of a patent become the subject

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45. Id. at 736.

46. Few appellate decisions exist which discuss opinion work product. District courts have enunciated most of the law of discovery, often in unpublished opinions.

47. See, e.g., Bird v. Penn Cent. Co., 61 F.R.D. 43, 47 (E.D. Penn. 1973). Professor Moore states that “[w]hile Rule 26(b)(3) provides that protection against discovery of the attorney’s or representative’s ‘mental impressions, conclusions, opinions, or legal theories’ shall be provided, such protection would not screen information directly at issue.” 4 MOORE, supra note 3, ¶26.64[3.-2] (emphasis added).

48. The court first must assess whether documents are protected as work product, however. See generally Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 355–56 (4th Cir. 1992) (holding that court’s first step must be to determine whether documents were created in anticipation of litigation). Documents or tangible things must be prepared in anticipation of litigation by an attorney or other representative to qualify for even the limited protection offered by the work product doctrine. FED. R. CIV. P. 26(b)(3).

49. See, e.g., Bird, 61 F.R.D. at 47.
mature of a second suit.\textsuperscript{50} Compelling need for the documents must be demonstrated to the court.\textsuperscript{51}

The rationale for the at-issue exception developed from waiver principles similar to those principles debated by courts addressing the implications of disclosure of work product to experts.\textsuperscript{52} Under that rationale, a party waives certain privacy interests by bringing suit because underlying facts must be available to an adversary. In effect, the at-issue exception evolved from evidentiary rules\textsuperscript{53} prohibiting a party from affirmatively pleading reliance on attorney advice as a defense, yet refusing to disclose that advice. For example, courts held that one relying on attorney advice as an element of a claim or defense, and thereby putting it at issue, had waived the amorphous privileges and immunities surrounding that advice.\textsuperscript{54} Accordingly, Federal Rule of Evidence 612 states that documents employed to refresh a witness's memory consequently become available to an adversary.\textsuperscript{55} Some courts have dismissed the contention that Rule 612 operates to lift the shields against discovery of mental impressions.\textsuperscript{56} In the same vein, courts generally have rejected the assertion that attorneys waive hard-core work product protections when documents containing mental impressions are shown to expert witnesses,\textsuperscript{57} although several courts have held otherwise.\textsuperscript{58}

\textsuperscript{50} See, e.g., Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976).
\textsuperscript{53} See, e.g., FED. R. EVID. 612.
\textsuperscript{54} See supra notes 47, 52.
\textsuperscript{56} See, e.g., Sporck v. Peil, 759 F.2d 312 (3d Cir.) (holding that Rule 612 never allows discovery of those attorney mental impressions implicated in the selection of documents with which an attorney has refreshed a deponent's memory), cert. denied, 474 U.S. 903 (1985).
\textsuperscript{57} See supra note 52.
The Ninth Circuit recently expanded the at-issue exception further, permitting it to be employed affirmatively as a sword. In the recent case of *Holmgren v. State Farm Mutual Automobile Insurance Company*, the court applied the at-issue exception to bad-faith insurance settlement litigation. Holmgren, a party injured by State Farm's insured, sued State Farm under Montana law. She claimed that State Farm had handled her settlement in bad faith. She sought and gained discovery of in-house memoranda in which an adjuster admitted that State Farm's insured had caused a specified, extensive amount of monetary damages. After State Farm settled for far below this amount, Holmgren instituted a bad-faith settlement suit.

The *Holmgren* court specifically rejected the policy of absolute immunity set forth in *Duplan*. The court held that opinion work product may be discovered when it satisfies two conditions. First, the documented mental impressions must be at issue, or central to the subject matter under dispute. Second, the party must show compelling need for those documented opinions. The panel described this showing to be "beyond the substantial need/undue hardship test required under Rule 26(b)(3) for non-opinion work product." Though noting that opinion work product deserves special protection, the *Holmgren* court, like many other courts, defined those protections in terms of exceptions to the rule of immunity.

**b. The Crime-Fraud Exception**

The crime-fraud exception is narrower in scope than the at-issue exception. To access opinion work product using the crime-fraud exception, the...
exception, a party must make a prima facie demonstration that the adversary created the documents in furtherance of a crime or fraud. Additionally, as the Eighth Circuit decision In re Murphy noted, the moving party must show that the documents in question bear a close relationship to the fraud or crime. Essentially, therefore, the movant must make the type of showing necessary under the at-issue exception in addition to a showing of crime or fraud. A movant thus must show more than compelling need and unavailability elsewhere to discover opinion work product through the narrow aperture provided by the crime-fraud exception.

Like the at-issue exception to opinion work product immunity, the crime-fraud exception developed from principles of waiver. As officers of the court, attorneys waive any interest in the confidentiality of documents containing their mental impressions when those documents are used in the commission or contemplation of a crime or fraud. When

\[\text{see also In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982) (holding that attorney's innocence would not prevent discovery of opinion work product created, unknowingly, in furtherance of client's crime). But see In re Special September 1978 Grand Jury (II), 640 F.2d 49 (7th Cir. 1980) (holding that attorney's mental impressions would remain undiscoverable to avoid invasion of privacy, but remanded to district court to determine whether extraordinary need existed). In general, although the work product doctrine applies to grand jury proceedings, it may carry fewer protections because of the grand jury's "authority and need to accomplish its investigatorial duty." In re Grand Jury Proceedings, 73 F.R.D. 647, 653 (M.D. Fla. 1977); see also In re Murphy, 560 F.2d 326, 336 n.19 (8th Cir. 1977).}


71. In re Murphy, 560 F.2d at 338.

72. \text{Id. See also infra Section II(B).}

73. In re Doe, 662 F.2d at 1080 (stating that "not only must the government make a prima facie showing of fraud, but must show a greater need for the opinion work product material than was necessary in order to obtain the fact work product material").


75. Hickman underscored the tension between an attorney's diverging loyalties to the client, to the court, and to her or his own privacy. Justice Murphy noted that:

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


76. See In re Doe, 662 F.2d at 1079.
opinion work product shields such behavior from discovery, it becomes a fraud upon the court; courts have refused to allow attorneys to profit from the fortuitous concealment of their crimes by the work product doctrine. Thus, the crime-fraud exception bolsters the adversarial process by encouraging fair but limited access to hard-core work product.

c. Other Approaches to Opinion Work Product

In addition to the crime-fraud and at-issue exceptions, applicable in exceptional circumstances, courts have created unique procedural and substantive methods for addressing the discoverability of mental impressions. For example, consistent with advisory committee recommendations, courts have viewed opinion work product in camera and ordered the abstraction of documents containing opinion work product. Courts have ordered opinions, mental impressions and conclusions stricken from produced documents. Somewhat inconsistently, other courts have permitted discovery of mental impressions and conclusions by labelling them work product rather than opinion work product, or by removing them from the confines of the work product doctrine altogether.

77. Id.
79. See supra note 78.
82. See, e.g., Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595-96 (3d Cir. 1984). For the suggestions of the advisory committee regarding partial disclosure of documents, see Fed. R. Civ. P. 26(b)(3) advisory committee's note. Additionally, reminiscent of pre-Hickman holdings, some courts have prohibited discovery of relevant opinion work product where such material would be neither admissible at trial, nor reasonably calculated to lead to admissible material. See, e.g., Smedley v. Travelers Ins. Co., 53 F.R.D. 591, 594 (D.N.H. 1971).
83. See In re San Juan Dupont Plaza Hotel Fire Litig., 859 F.2d 1007, 1018-21 (1st Cir. 1988) (holding, contrary to the Eighth and Third Circuits, that attorney selection of documents is ordinary work product rather than opinion work product).
84. See, e.g., Snowden v. Connaught Lab., Inc. 137 F.R.D. 325, 332 (D. Kan. 1991) (holding that attorney mental impressions fall outside work product protections where they appear in documents filed with the court).
These approaches exemplify the diverging procedural and substantive remedies to the problems posed by hard-core work product. While most courts carefully note that opinion work product deserves some type of special protection from discovery, the decisional lines between work product and opinion work product merge.85

II. REDEFINING THE OPINION WORK PRODUCT DOCTRINE:
A MISCONDUCT EXCEPTION

Because absolute immunity has not proven functional, courts must offer some sort of exception to opinion work product’s immunity. The at-issue and crime-fraud exceptions, however, encourage a perplexing view of opinion work product. Each exception contains elements common to the other, although neither exception alone sufficiently addresses the needs of parties seeking or defending against discovery. A misconduct exception incorporating the elements of each rule would lessen redundancy and clarify the dimensions of opinion work product. This misconduct exception should require movants to demonstrate compelling need for the opinion work product, and to make a prima facie demonstration of crime, fraud, misrepresentation, bad faith or other misconduct as a threshold showing, after which a judicial examination in camera may begin.

A. Opinion Work Product Should Not Be Absolutely Immune from Discovery.

An uncertain and changing standard may cause attorneys to set fewer sensitive issues in writing as they struggle with the reliability of protections for their memoranda and thoughts.86 Courts should articulate a single, clear standard governing the discovery of opinion work product. Although a rule of absolute, exceptionless immunity theoretically might inspire uniform decisions on opinion work product, that rule has failed to meet the needs of attorneys or the judicial system, neither serving the goals of Hickman v. Taylor nor maintaining the adversarial process.

85. State courts also have refused to follow a blanket standard of absolute immunity from discovery. For example, the Arizona Supreme Court determined that discovery of mental impressions could be had in subsequent litigation where they were at issue, though discovery of opinion work product in present litigation was prohibited. Brown v. Superior Court, 670 P.2d 725, 735 n.8 (Ariz. 1983), vacated in part, Gosewich v. American Honda, 737 P.2d 376 (Ariz. 1987).

Although *Hickman* offers strong protections for an attorney’s routine strategies, impressions, and case preparation methods, it implies that where those impressions are probative evidence in a suit, they may be subject to discovery. The Supreme Court noted that denying discovery to plaintiff Hickman would not hide material, non-privileged facts essential to the preparation of his case. Impliedly that some instances might justify the production of mental impressions, Justice Jackson in his concurring opinion stated that actual evidence should be subject to discovery. Similarly, the Supreme Court declined in *Upjohn Co.* to extend absolute protection to opinion work product.

Thus, while courts that have recognized an absolute immunity argue that anything less would undermine the adversary system and prove inconsistent with the work product doctrine, problems remain with such an absolute bar. Courts and commentators have criticized *Duplan*’s absolute bar on the discovery of mental impressions because it leads to harsh results where fact and opinion are intertwined. *Duplan*’s precedential value has diminished even in the Fourth Circuit, as inconsistent decisions have adopted various exceptions without explicitly overruling *Duplan*’s absolute bar.

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87. *Id.*

88. *Id.* at 511–13. The Court noted that “[i]f there should be a rare situation justifying production of these matters (oral statements implicating mental impressions), petitioner’s case is not of that type.” *Id.* at 513.

89. *Id.* at 515 (Jackson, J., concurring) (stating that “[i]t seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case.” (emphasis added)).

90. *Upjohn Co.* v. United States, 449 U.S. 383, 401–02 (1981) (commenting that the Court was “not prepared . . . to say that such [opinion work product] material is always protected by the work-product rule”).

91. See supra notes 43–45 and accompanying text.


 Courts similarly have misread Rule 26(b)(3) to bar all discovery of opinion work product. Neither the Rule nor the advisory committee's notes require a blanket protection of all opinion work product. While the notes and Rule, when read together, mandate a court to steadfastly and consistently protect hard-core work product, the committee acknowledged that a court might be forced to disclose a document after deleting some parts containing mental impressions. Moreover, neither the Rule nor the notes address the situation in which those mental impressions are operative facts in a fraud, crime, or misconduct-oriented suit. Finally, Rule 26(b)(3) employs affirmative rather than negative language to protect opinion work product. The Rule states that courts “shall protect” opinions rather than stating that courts “shall not” order discovery of mental impressions, a far more restrictive measure. Rule 26(b)(3) therefore does not prevent all discovery of opinion work product.

**B. The At-Issue and Crime-Fraud Exceptions Fail To Protect Opinion Work Product Appropriately**

The crime-fraud and at-issue exceptions fail to address adequately the spectrum of possibilities for discovery of opinion work product. Neither exception operating independently would meet the needs of the judicial system. Yet, in conjunction, the repetitive exceptions easily promote confusion. Courts apply the at-issue and crime-fraud exceptions to guard against the same types of behavior. While the at-issue exception does not state misconduct as an element, in practice courts permit discovery of hard-core work product only when misconduct has occurred. Additionally, both exceptions operate from a philosophical basis of waiver. When a party utilizes the discovery system to hide evidence of attorney or agent wrongdoing committed in anticipation of litigation, courts consider the party to have waived an interest in the privacy of

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95. See FED. R. CIV. P. 26(b)(3) advisory committee's note (stating that “the courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision, the courts will sometimes find it necessary to order disclosure of a document but with portions deleted”).
96. Id.
97. Id.
98. This Comment uses the label “misconduct” to refer to crime, fraud, misrepresentation, attorney malpractice, and intentional wrongdoing.
those documents. Finally, both exceptions exist simultaneously in some circuits. Because both exceptions cover similar ground, each exception becomes less clear, less useful, and less judicially economical.

The crime-fraud exception fails to include certain forms of severe misconduct which require proof of attorney mental impressions. For example, an injured party under the following fact pattern could not access opinion work product using the crime-fraud exception. Knowing of a conflict of interest between clients, an attorney nonetheless represents one client to the disadvantage of the other. The only proof of the attorney’s wrongdoing exists in handwritten memoranda in the attorney’s files. In this case, a plaintiff could not use the crime-fraud exception to access the opinion work product evidence of bad faith or malpractice if the misconduct does not constitute criminal or fraudulent activity. By itself, the crime-fraud exception fails to provide adequately for discovery of opinion work product when discovery is warranted.

The at-issue exception also fails to meet the needs of the discovery system, either independently or in conjunction with the crime-fraud exception. The concrete elements of the at-issue exception do not explicitly prohibit an offensive strike. This provides a potential loophole for the invasion of attorney privacy. The exception allows discovery when a movant can demonstrate that mental impressions are at issue and the need for the documents containing them is compelling. On the face of the rule, therefore, a plaintiff in a shareholders’ derivative suit could add opposing corporate counsel as defendant, alleging breach


100. For example, in the Fourth Circuit both the at-issue and crime-fraud exceptions apparently exist simultaneously. See In re Doe, 662 F. 2d at 1078–82 (applying crime-fraud exception); Charlotte Motor Speedway, Inc. v. International Ins. Co., 125 F.R.D. 127, 130–31 (M.D.N.C. 1989) (applying at-issue exception). Notwithstanding the Fourth Circuit’s adoption of these exceptions, the Fourth Circuit recently reiterated the stance that opinion work product enjoys absolute immunity. See Sandberg v. Virginia Bankshares, Inc., 979 F.2d 332, 355–56 (4th Cir. 1992) (stating without discussion that opinion work product is absolutely immune from discovery). Although the Ninth Circuit trend is somewhat confusing, the crime-fraud and at-issue exceptions similarly exist side-by-side. See Holmgren v. State Farm Mut. Auto. Ins. Co., 976 F.2d 573, 577 (9th Cir. 1992) (adopting at-issue exception); In re National Mortage Equity Corp. Mortage Pool Certificates Litig., 116 F.R.D. 297, 302 (C.D. Cal. 1987) (limiting application of crime-fraud exception to situations where attorney knew of or participated in crime or fraud).

101. See Holmgren, 976 F.2d at 577 (setting forth elements of at-issue exception).


103. See Holmgren, 976 F.2d at 577.
of duty of care, and thereby access opinion work product created in anticipation of that litigation. Read without the gloss of equity, one party may manipulate the at-issue exception to gain broad discovery of materials containing an adversary's mental impressions.

Given this broad reading facially provided by the at-issue exception, the at-issue exception proves inconsistent with the federal policies enunciated in *Hickman v. Taylor*. The *Hickman* Court sought to guard attorney mental impressions closely and thereby secure the adversarial process. An exception encouraging anything more than infrequent discovery of mental impressions directly conflicts with *Hickman*’s protective admonitions. It remains unclear whether a mere allegation satisfies the requisite showing of compelling need, or whether a movant must make a prima facie case of compelling need. No court has clarified “compelling need.” The recent Ninth Circuit case of *Holmgren* found compelling need when pertinent information was unavailable elsewhere. Yet if opposing counsel need only add an allegation of bad faith to the pleadings to open the door to discovery, attorney thoughts might be subjected to more frequent search. Consequently, many attorneys, agents, sureties, and indemnitees might cease to write down impressions, as *Hickman* warned. If allegations of bad faith were to become routine additions to pleadings, the resulting expansion of discovery might weaken the adversary system which *Hickman* sought to

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104. See, e.g., Panter v. Marshall Field & Co., 80 F.R.D. 718, 724–26 (N.D. Ill. 1978) (failing to define compelling need, but holding nonetheless that plaintiff shareholders had demonstrated compelling need for documents containing corporate counsel’s advice, a “critical issue” in the suit).
106. Id. at 511.
107. Id. at 510 (holding that “[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.”).
109. See Maryland Am. Gen. Ins. Co. v. Blackmon, 639 S.W.2d 455, 457–58 (Tex. 1982) (holding under Texas discovery rules that a mere allegation of bad faith is insufficient to pierce discovery protections). The court noted that if a mere allegation were a sufficient showing, every complaint would as a matter of course contain an allegation of bad faith. Id.
110. 329 U.S. at 511 (stating that because much would remain unwritten, “[i]nadequacy, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial”).
111. If discovery of opinion work product were to become common, attorneys might feel compelled to seek discovery of opposing counsel’s mental impressions to avoid malpractice claims. Additionally, parties defending against discovery requests reasonably might fear the imposition of Rule 37 sanctions if their responses were deemed incomplete or evasive. See Fed. R. Civ. P. 37.
uphold. The broad at-issue exception fails to provide adequate protection for opinion work product for these reasons.

Neither the at-issue nor crime-fraud exceptions to the general immunity of opinion work product individually safeguard attorney mental impressions adequately, though together they are redundant. Although courts tend to apply the at-issue exception sparingly, its vagueness lends the exception to undue expansion, while its useful elements are duplicated in the crime-fraud exception. The crime-fraud exception stops short of allowing discovery of opinion work product created in furtherance of attorney or agent misconduct. A solution to the inadequacy and repetitiveness of the exceptions is to consolidate their elements into a single, clear exception to the immunity afforded mental impressions.

C. The At-Issue and Crime-Fraud Exceptions Should Be Consolidated and Narrowed into a Misconduct Exception.

Because a narrow application of the at-issue exception merely mimics the goals and substantive elements of the crime-fraud exception, courts should condense these two exceptions into one exception that more consistently serves the purposes of the discovery rules. This misconduct exception should allow discovery when 1) a prima facie showing indicates 2) that opinion work product has been created in furtherance of misconduct, crime, or fraud, and 3) that the movant has compelling need of the documents.

The misconduct exception should utilize the threshold protections provided by the crime-fraud exception to safeguard opinion work product. Before a movant may view opinion work product, courts should require a prima facie showing of fraud, crime, or misconduct relevant to the subject matter of the suit. A mere allegation of crime, fraud, or bad

112. In addition, if many parties resisted discovery predicated on the at-issue exception, judicial resources more often would be spent to oversee discovery. The discovery process, which is oriented toward self-execution, would then require increasing court involvement in the arena of opinion work product as parties sought to define their rights. See generally 4 MOORE, supra note 3, ¶ 26.


114. See supra note 69 and accompanying text, describing crime-fraud exception.

115. See supra note 69 and accompanying text.

116. See supra notes 11 and 26 and accompanying text, describing purposes of discovery rules.

faith should be insufficient to warrant judicial involvement in the sifting of opposing counsel’s documents.\textsuperscript{118}

Once the court is satisfied with a prima facie showing that these documented impressions are operative facts in a crime, fraud, or attorney misconduct action, the court should require a showing of compelling need for the documents before examining them in camera. Requiring a movant to demonstrate compelling need both serves the protective policies enunciated in \textit{Hickman} and encourages parties rather than judges to bear the greater burden of solving discovery disputes. The higher threshold of compelling need ensures that fewer unwarranted discovery disputes encompass judicial time. After these showings, the court should examine the documents in camera.\textsuperscript{119} Only after such safeguards, and in limited situations, should courts allow a movant actual discovery of opinion work product.

The primary advantage to condensing these exceptions rests in the streamlining effect of consolidation. Because the at-issue and crime-fraud exceptions serve the same fact-gathering purposes of the discovery rules,\textsuperscript{120} they lose little positive impact through consolidation. When a documented mental impression or conclusion becomes a fact demonstrating misconduct, courts allow discovery based on its central importance to the suit, whether the implement of that discovery is the crime-fraud exception or the at-issue exception. A misconduct exception, therefore, builds upon the precedent of the crime-fraud and at-issue exceptions while providing clearer guidance to parties and courts. Not only is a clear, narrow standard likely to accurately pinpoint the type of opinion work product subject to discovery, but a clear standard maximizes judicial efficiency. Similarly, amending Rule 26(b)(3) to narrowly incorporate a limited exception to opinion work product protections might create greater uniformity among circuits. Such an amendment would not disrupt the case-by-case nature of work product adjudications, an approach preferred by the Supreme Court in \textit{Hickman}.\textsuperscript{121} Rather, it could provide clearer guidance to judges.

\textsuperscript{118} See supra notes 110–112 and accompanying text.

\textsuperscript{119} See \textit{In re} Murphy, 560 F.2d 326, 336 n.20 (8th Cir. 1977) (noting that the high level of immunity enjoyed by opinion work product does not lessen a court’s ability to examine such material in camera). If possible, consistent with the advisory committee’s notes to Rule 26(b)(3), the court should excise the mental impressions, or abstract or redact the documents. However, abstraction is unlikely to serve any purpose if those impressions are operative facts in a suit.

\textsuperscript{120} See supra note 11, discussing purposes of discovery rules.

\textsuperscript{121} See supra note 15.
examining documents in camera which contain mental impressions and conclusions. 122

III. CONCLUSION

Courts should consolidate the redundant and confusing at-issue and crime-fraud exceptions into a new misconduct exception to the immunity afforded opinion work product. A single misconduct exception better serves the goals of liberal discovery, yet maintains the adversarial process. Courts should eliminate the overinclusive at-issue exception and draw upon the protections provided by the crime-fraud exception to shape a single, uniform rule governing the discoverability of opinion work product.

122. Such a rule would fit easily into the model of judicial economy exemplified by Rule 16's pretrial conferences and the self-executing nature of most of the discovery rules. When it is clear to all counsel that a strong preliminary showing of a certain nature must be made before the court may examine documents containing mental impressions, counsel are less likely to move to compel discovery of documents containing opinion work product. Attorneys reasonably might fear Rule 11 sanctions if allegations of crime, fraud, or misconduct are determined frivolous. See Fed. R. Civ. P. 11.