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## Taking the Business Out of Work Product

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## TAKING THE BUSINESS OUT OF WORK PRODUCT

*Michele DeStefano Beardslee\**

*Over the past fifteen years, a common set of questions has surfaced in different areas of scholarship about the breadth of the corporate attorney's role: Should the corporate attorney provide business advice when providing legal advice? Should the corporate attorney provide counsel related to other disciplines such as public relations, social responsibility, morals, accounting, and/or investment banking? Should the corporate attorney prevent corporate wrongdoing? Questions like these resound in the scholarship addressing the risks and benefits of multi-disciplinary partnerships, gatekeeping, moral counseling, ancillary services, and the application of the attorney-client privilege. When looked at in combination, these segregated discussions equate to an unidentified but burgeoning debate about the proper role of the corporate attorney and whether a distinction can or should be made between doing business and practicing law.*

*This debate also exists in court opinions assessing the reach of recent SEC regulations, the work product doctrine, and the attorney-client privilege. Indeed, the application of the doctrine assessing these issues provides a lens through which to view the tensions created by the increasingly transdisciplinary and globalized role of the corporate attorney and the changing contours of litigation. To that end, by analyzing a sampling of federal court opinions that address the work product doctrine in the context of work related to public relations, this Article seeks to show that variations in how the doctrine is applied reflect disagreement about how expansive the role of today's corporate attorney and the definition of litigation should be. Further, given that judges can make decisions about work product protection based on their often narrow view of the proper role of an attorney as opposed to a businessperson, this Article argues that distinguishing between business and law when analyzing the work product doctrine is not only arbitrary and impossible in the corporate law context, but also inappropriate. This is clear when considering the history and purpose of the work product doctrine and the current application of the corporate attorney-client privilege.*

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\* Associate Professor of Law, University of Miami, School of Law. I thank Michael Bossone, Sergio Campos, Michael Graham, Bruce Green, Dennis Lynch, Austen L. Parrish, Andrew Perlman, Margaret Raymond, Robert Eli Rosen, and Gregory C. Sisk for advice and feedback. Also, I thank Peter Cunha for his research assistance.

Therefore, the more elementary goal of this Article is to offer a refined approach to the work product doctrine in the corporate law context to better align it with the reality of corporate practice, corporate litigation, and the expanded role of the corporate lawyer in today's society. Although this Article offers a preliminary recommendation for a new work product test, its primary recommendation is that courts take the business prong out of the work product analysis entirely so that (1) courts do not attempt to make a distinction between business and law when analyzing whether work is protectable and (2) the application of the doctrine does not hinge on a judge's view of how expansive corporate practice or litigation is or should be. The more ambitious goal of this Article, however, is to urge those in the legal profession to begin a comprehensive discussion about the proper role of the corporate attorney and to consider whether, as the responsibilities and expectations of corporate lawyers grow, and as our definition of litigation expands, the law's protective doctrines should follow suit.

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INTRODUCTION

Although it may not be identified as such, a debate about the proper role of the corporate attorney has burgeoned over the past fifteen years. Arguably, the literature analyzing whether lawyers should be able to form multi-disciplinary partnerships; whether general counsels should act as gatekeepers; whether the attorney-client privilege should attach to communications with in-house counsel or apply to corporations at all; whether the attorney-client privilege should protect communications with third party consultants; and whether lawyers should provide moral counseling or ancillary services like public relations (PR) advice or financial consulting can all be encapsulated into one overarching debate about the proper role of the corporate attorney and whether a distinction can or should be made between the business of law and the business of business.<sup>1</sup>

This debate is exemplified in the application of the work product doctrine. To date, however, scholars have not focused on this aspect of the doctrine. Instead, work product doctrine scholarship typically centers on analyzing the historical policy goals of the doctrine and the pros and cons of a broad versus a narrow shield.<sup>2</sup> This Article, however, takes a different tack and has different objectives. Through the exploration of a sample of federal opinions that address the work product doctrine in the context of PR work,<sup>3</sup> this Article seeks to make two showings. First, in analyzing the work product doctrine in the corporate context, courts attempt to make a distinction between business and law that is not only arbitrary and impossible to apply but also inappropriate given both the doctrine’s history and the current application of the corporate attorney-client privilege.

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1. *See infra* Part I.  
 2. For just such an analysis, see generally Claudine Pease-Wingenter, *Prophetic or Misguided?: The Fifth Circuit’s (Increasingly) Unpopular Approach to the Work Product Doctrine*, 29 REV. LITIG. 121, 125–40 (2009).  
 3. A search of Westlaw and LexisNexis turned up twenty-four cases that addressed work product in the context of public relations (PR), advertising, or marketing. In thirteen of these cases, judges provided work product protection to the work related to legal PR and in five of these cases, judges determined that the attorney-client privilege applied to the communications involving PR. This Article considers most of these cases in its analysis.

Second, courts base the work product decision on their view of corporate practice, corporate litigation, and the role of the corporate attorney—which, in the legal PR context, appears to be quite narrow. Both of these contentions appear true regardless of which of the two main work product tests a court applies.<sup>4</sup> In application, both tests—the narrow primary purpose test and the more broad “because of test”—enable courts to deny work product protection when a motivating factor behind the work is assisting the party in making what the court believes is a business (as opposed to legal) decision.<sup>5</sup> Admittedly, this Article grows from a belief that the role of the corporate attorney has grown (both normatively and practically) over the past twenty years<sup>6</sup> (along with our definition of litigation) and that the doctrine should follow suit. However, even if a more narrow view of the role of the corporate attorney is appropriate, arguably work product protection should not hinge on a particular judge’s vision of the corporate attorney’s job or corporate litigation.<sup>7</sup>

Although this Article attempts to make two showings with respect to the current work product doctrine and provide a refined approach that is better aligned with the breadth of corporate practice today, the more ambitious goal is to begin a more open and comprehensive discussion about the proper role of the corporate attorney and who or what should be determining those boundaries. What tasks and services should corporate lawyers provide when protecting the corporate client from a possible suit or defending the client in litigation? What normative commitments should they make towards safeguarding the integrity of the legal system? Should courts be enabled through equivocal doctrine to influence the world view of a corporate attorney’s job as it relates to client service? Or should the profession seek to define (confine or enlarge) that view, and if so, should that definition be based on an assessment of the realities of corporate practice and litigation or society’s ethical expectations of lawyers, or should it be more aspirational? In considering these questions, it is important to bear in mind that corporate lawyers are often expected to, and do, provide moral, social and political advice and play the role of gatekeeper and a quasi-public role in safeguarding integrity.<sup>8</sup> In sum, the key questions are: As the responsibilities and expectations of corporate lawyers expand and our definition of litigation grows, should not our view of what it means to

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4. To determine whether work should be deemed work product, courts presently apply one of two tests. One test affords protection only when the primary motivating purpose behind the work was to assist in impending or pending litigation. The other test affords protection when the work can be said to have been prepared “because of” the impending or pending litigation. *See infra* Part II.B.2.b (describing tests and explaining that in at least one case the U.S. Court of Appeals for the First Circuit appears to have adopted a test that is neither the “primary purpose” nor “because of” test).

5. *See infra* Part II.

6. *See infra* Part I.

7. It is true that work product is not the best vehicle to achieve recognition of the expanded role of corporate lawyers. However, work product should not act as a severe limiting principle either. Further, the point is that work product doctrine cases addressing work related to legal PR reflect the larger debate about the role of corporate lawyers.

8. *See infra* Part I.

be a corporate attorney expand? And should not our protective doctrines expand as well?

Part I of this Article reviews the types of business, legal, and professional services corporate attorneys provide to their clients. It then briefly reviews the literature analyzing multi-disciplinary partnerships, gatekeeping, moral counseling, and the attorney-client privilege in an attempt to demonstrate that an unidentified burgeoning debate exists over what the proper role of the corporate lawyer should be and whether corporate lawyers should engage in only the business of law or also in the business of business (i.e., the business of providing advice that inextricably incorporates other disciplines and considerations). Part II provides a brief overview of the historical underpinnings and general contours of the work product doctrine. Utilizing recent court decisions addressing whether work product protection should be applied to work related to public relations, Part III provides a snapshot of how the work product doctrine is applied in the corporate context. It seeks to demonstrate that when applying either of the two predominate work product tests: (1) courts often attempt to make (the ever elusive) distinction between business and law, and (2) work product protection can hinge on the court's view of the role of the corporate attorney or corporate litigation—which is sometimes quite narrow.

Finally, Part IV provides an analysis of the problems inherent in the work product doctrine based on its application in the PR context, the doctrine's historical underpinnings, and the current state of the legal profession and corporate legal market and litigation. Further, it attempts to develop a more refined approach to the work product doctrine to better align it with the reality of corporate practice and the expanded role of the corporate lawyer and breadth of litigation in today's society. To that end, it suggests an elimination of the ordinary course of business exception and a revision of the doctrine that eliminates the need or ability to differentiate business from law so that the application of the doctrine does not hinge on the judge's view of how expansive corporate practice or litigation should be. Although this Article is less concerned with pinpointing the "right" solution than uncovering the issues with the current doctrine, this part reviews some possible solutions and attempts to develop the outline of a new test altogether. It suggests that courts should not protect all documents prepared "because of" anticipated litigation nor attempt to limit protection to work that was prepared "primarily" for litigation. Rather, protection should be reserved for those tangible and intangible materials that are designed to, can, or ultimately do facilitate case management and/or litigation-related activities and decisions—whether they assist in preparing materials for trial, or making decisions about whether to file a claim, implement a certain litigation tactic, etc. This approach would not only hew more closely to the history and purpose behind the work product doctrine, but might also serve several pragmatic ends. It could reduce the amount of time courts spend distinguishing between business and legal decisions, an arguably meaningless and inefficient endeavor. Further, this approach might prevent

an overly narrow or broad view of corporate practice and the contours of litigation from being outcome determinative.

This part concludes with a call to action. It urges a comprehensive discussion about the proper role of the corporate attorney and a consideration of whether, as the regulations, responsibilities, and expectations of corporate attorneys continue to include what might have been dubbed “extra legal” and/or “public” duties years ago, the doctrines that shield attorneys’ work and communications should follow suit.

### I. THE ROLE OF THE CONTEMPORARY CORPORATE ATTORNEY

Given the increasing complexity of corporate life, corporate law, government regulations, international laws and treaties, and the legal employment marketplace, the role of the corporate lawyer has changed dramatically over the past fifty years.<sup>9</sup> There is no consensus, however, over how expansive the corporate attorney’s role should be. The next section begins by reviewing the changing marketplace in which corporate attorneys service clients and the impact the changing environment has had on the corporate attorney’s work, required skills, and expectations. It then concludes by illustrating the burgeoning debate over the corporate attorney’s role.

#### A. *The Changing Reality for the Corporate Attorney and the Illusive Distinction Between Business and Law*

While at one time corporate lawyers made their money by providing *legal* advice about clearly *legal* matters and defending clients in the courtroom,<sup>10</sup> today corporate lawyers—even corporate litigators—spend most of their time outside the courtroom<sup>11</sup> providing advice and services that, at best, can be described as a mixture of law and business—and a

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9. See James W. Jones, *The Challenge of Change: The Practice of Law in the Year 2000*, 41 VAND. L. REV. 683, 683–85 (1988) (identifying many of the changes that have affected the structure of the legal profession between 1968 and 1988, including “increasing complexity” of corporate America and of “the matters that lawyers must handle on behalf of their clients”); Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201, 209 (2010) (“The augmentation and amplification of law in our society has played a leading role in bringing about that transformation in the scope of corporate law practice.”); see also Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client’s Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 17 (2003) (contending that “[t]he two principle influences that will affect the practice of [business] law are the same ones that will affect virtually all aspects and sectors of economic activity—globalization of commerce and the transition from a manufacturing to a knowledge economy.”).

10. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 483–85 (3d ed. 2005); Charles L. Brieant, *Is It the End of the Legal World as We Know it?*, 20 PACE L. REV. 21, 23 (1999); cf. GEOFFREY C. HAZARD, JR. ET AL., 2 THE LAW OF LAWYERING § 48.2, at 48-4 (3d ed. 2004) (“In the traditional view of lawyering, lawyers provide legal services (and nothing else) . . . . In reality, such a rigid separation has never been supportable, . . . and there is no clear divide between a core of ‘legal’ service and services that are ‘ancillary’ or ‘law-related.’”).

11. For example, consider that over ninety-five percent of criminal cases in 2006 concluded before trial. See *infra* note 314.

blurry mixture at that.<sup>12</sup> Indeed, as Richard Painter states, “[L]egal risks in many of today’s highly regulated industries like banking, insurance, airlines, and waste management have become business risks.”<sup>13</sup>

Today, lawyers provide an array of services to clients, including preparing deeds, structuring and negotiating deals,<sup>14</sup> overseeing takeover bids and mergers and acquisitions, analyzing corporate transactions, managing legal public relations,<sup>15</sup> leading corporate compliance departments,<sup>16</sup> and assessing risks around disclosures on 10-Ks. This is especially true in the international corporate law context.<sup>17</sup> Partly because they have the skill sets that make them good at this wide range of mixed legal/business tasks, today’s lawyers—not necessarily acting as lawyers—act as businessmen. They take on what are traditionally considered non-lawyer roles. They are brokers, investment bankers,<sup>18</sup> or founders of new

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12. Jones, *supra* note 9, at 684–85 (explaining that it used to be easy to distinguish between legal and business matters but that distinction is now “quite blurred”); *id.* (“[A] lawyer is almost as likely to be focusing on economic, scientific, financial, or political questions as on strictly legal issues.”); Sisk & Abbate, *supra* note 9, at 203. Ironically, as far back as 1950, some courts believed it was the lawyer’s “duty” to consider “relevant social, economic, political and philosophical considerations” when providing legal advice. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950). Even if not considered a duty, it was definitely considered acceptable practice to provide what might have been described as nonlegal business advice. *See, e.g.*, ABA Comm. on Prof’l Ethics, Informal Op. 844 (1965) (finding that it was not unethical for a “lawyer, with no personal interest in the insurance and not recommending any particular insurance company or agent, advising the client as to the desirability of procuring insurance, if his professional relationship with the client has previously included giving business advice”).

13. Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 525 (1994).

14. Brieant, *supra* note 10, at 23–24.

15. *See generally* Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys*, 22 GEO. J. LEGAL ETHICS 1259 (2009).

16. *See, e.g.*, E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 6–8 (2006) (describing general counsels’ increasing involvement in planning and managing compliance); Michele DeStefano Beardslee et al., *Hiring Teams, Firms and Lawyers: Evidence on the Evolving Relationships in the Corporate Legal Market* 22 (Conference on Empirical Legal Studies Paper, 2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1442066](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1442066). Note that it is debatable whether overseeing compliance is, or will be in the future, considered something the general counsel does as a lawyer. *See generally* Michele DeStefano Beardslee, *The Government’s Unofficial Stance on Compliance Departments: To Comply or Not to Comply?* (Jan. 2011) (unpublished manuscript) (on file with author) [hereinafter Beardslee, *The Government’s Unofficial Stance*].

17. *See* John Flood & Fabian Sosa, *Lawyers, Law Firms, and the Stabilization of Transnational Business*, 28 NW. J. INT’L L. & BUS. 489, 518 (2008) (explaining that corporate clients facing global issues “expect[] a wide range of services from [their] law firm which includes legal and non-legal aspects”). As Flood and Sosa explain, conducting a merger with, or acquisition of, another corporate entity includes assessing legal and tax issues but also “evaluating the trustworthiness of the [other] company.” *Id.*

18. *See, e.g.*, Peter Lattman, *Investment Bankers Vs. Corporate Lawyers: Join the Debate*, WALL ST. J. L. BLOG (Nov. 21, 2006, 11:30 AM), <http://blogs.wsj.com/law/2006/11/21/investment-bankers-vs-corporate-lawyers-join-the-debate>.



companies.<sup>19</sup> They oversee government affairs departments.<sup>20</sup> They are chief ethics advisors.<sup>21</sup> They lead and manage PR departments and human resources along with other departments.<sup>22</sup> Indeed, there is a growing trend among large publicly traded corporations to select a lawyer to lead the company in the position of Chief Executive Officer.<sup>23</sup> Responding to this new demand, some law schools have begun to focus more on business skills than they have in the past.<sup>24</sup>

Corporate clients today want and need lawyers to provide holistic legal advice, that is, legal advice that takes into account business concerns and sometimes, legal advice couched in business terms.<sup>25</sup> As one federal judge

19. The founder of Series Seed is an attorney, Ted Wang. *See About the Series Seed Documents*, SERIES SEED (Feb. 24, 2010, 5:53 PM), <http://www.seriesseed.com/posts/2010/02/about-the-series-seed-documents.html>. This is also true of the founder and CEO of Axiom, Mark Harris. *See Litigating For Less*, FAST COMPANY (Dec. 9, 2003), [http://www.fastcompany.com/fast50\\_04/winners/harris.html](http://www.fastcompany.com/fast50_04/winners/harris.html).

20. In a recent survey sent to general counsels of the entire S&P 500 that elicited a twenty-eight percent response rate, fifty-five percent reported overseeing the Government Relations department, and nine percent reported overseeing both the Public Relations and Government Relations departments. For a detailed description of the survey methodology and findings, see Beardslee, *supra* note 15, at Part V.

21. For example, the general counsel of the Department of the Air Force is the chief legal officer and chief ethics officer. THE DEPARTMENT OF THE AIR FORCE GENERAL COUNSEL, <http://www.safgc.hq.af.mil/> (last visited Mar. 23, 2011). The deputy general counsel of AOL is also the chief ethics and compliance officer. Jaelyn Jaeger, *AOL Names Chief Ethics & Compliance Officer*, COMPLIANCE WEEK (Nov. 4, 2010), <http://www.complianceweek.com/aol-names-chief-ethics-compliance-officer/article/191977/>. Lawyers are also playing the role of chief ethics officers and compliance officers at law firms. *See generally* Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002).

22. *See* Beardslee, *supra* note 15, at 1287 (reporting that twelve percent of general counsel respondents oversee the public relations department); Veasey & Di Guglielmo, *supra* note 16, at 6–8; *see also* Robert Eli Rosen, *Educating Law Students to Be Business Leaders*, 9 INT'L J. LEGAL PROF. 27, 27 (2002) (contending that law schools should be teaching business skills to law students because a good percentage of them will be managers of corporations).

23. This is true of Bank of America, Continental Airlines, Citigroup, Pfizer, Home Depot, American Express, and Kroger Co. *See, e.g.*, Mark Curriden, *CEO, Esq.: Why Lawyers Are Being Asked To Lead Some of the Nation's Largest Corporations*, ABA JOURNAL (May 1, 2010, 3:50 AM), [http://www.abajournal.com/magazine/article/ceo\\_esq/](http://www.abajournal.com/magazine/article/ceo_esq/) (noting that “[n]ine of the Fortune 50 companies now have a lawyer as chief executive, up from three just a decade ago”); *see also* Rosen, *supra* note 22, at 29 (reporting a study showing that corporate chief executives are just as likely to have a graduate degree in law as they are to have one in business).

24. Emma Schwartz, *Getting Business School Skills While in Law School*, U.S. NEWS (Mar. 26, 2008), <http://www.usnews.com/articles/education/best-graduate-schools/2008/03/26/getting-business-school-skills-while-in-law-school.html>; *Top Law Schools Are Listening to What Law Firms Want*, VAULT (Sept. 23, 2010, 2:16:37 PM), [http://www.vault.com/wps/portal/usa/blogs/entry-detail/index?blog\\_id=1461&entryid=11881](http://www.vault.com/wps/portal/usa/blogs/entry-detail/index?blog_id=1461&entryid=11881).

25. Howard B. Miller, *Law Risk Management and the General Counsel*, 46 EMORY L.J. 1223, 1223 (1997) (“The general counsel, comfortable in the worlds of business management and law, can translate and mediate between the concepts of business risk and the vocabulary of the law.”); Veasey & Di Guglielmo, *supra* note 16, at 7 (“General counsel perform the increasingly important function of assessing legal risks and translating those risks into business terms in order to facilitate decision making concerning those risks.”); *see also* Michele D. Beardslee, *If Multidisciplinary Partnerships Are Introduced Into the United*

explained, “In today’s world, an attorney’s acumen is sought at every turn, even average attorneys mix legal advice with business, economic, and political.”<sup>26</sup> There is evidence that corporate clients want both inside and outside lawyers to approach their work in an interdisciplinary way.<sup>27</sup> Arguably as a reaction to this need, outside law firms have structured arrangements, such as ancillary businesses, to provide related (and supposedly) non-legal services to their clients including public relations, investment banking, environmental consulting, management consulting, and financial services.<sup>28</sup>

This, of course, has blurred the distinction between law and business even further.<sup>29</sup> Given recent decisions in the United Kingdom and

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*States, What Could or Should Be the Role of the General Counsel?*, 9 FORDHAM J. CORP. & FIN. L. 1, 32 (2003).

26. *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 126 (N.D.N.Y. 2007); *see also In re Cnty. of Erie*, 473 F.3d 413, 420 (2d. Cir. 2007); *MSF Holding Ltd. v. Fiduciary Trust Co. Int’l*, No. 03 Civ. 1818PKLJCF, 2005 WL 3338510, at \*1 (S.D.N.Y. Dec. 7, 2005) (explaining that in-house counsel often play the role of legal and business advisor).

27. *See* Neil W. Hamilton, *Counseling the Post-Enron Corporation Using the Lawyer’s Independent Professional Judgment*, PROF. LAW., Winter 2003, at 24, 25 (reporting survey results demonstrating that senior managers value lawyers that have “good judgment,” provide “practical advice to avoid problems” and “give[] straight advice”); Sisk & Abbate, *supra* note 9, at 210 (“When disconnected from particular business realities and values, the lawyer’s counsel is of little practical value to the client and cannot serve to guide the business as a responsible and honorable economic actor.”); *id.* at 205 (“[L]egal counsel frequently is of value only when integrated with the lawyer’s evaluation of other factors of practical, economic, emotional, or moral importance to the client.”); Michael A. Knoerzer, *Attorney-Client Privilege and Work Product Doctrine*, BRIEF, Winter 2002, at 40, 41 (“[Inhouse c]orporate attorneys often wear several hats, serving as both legal counsel and corporate officers. The responsibilities of outside attorneys representing corporations have also significantly expanded beyond the traditional role as legal counsel. Successful enterprises increasingly look to attorneys for not only legal but business advice as well.”); Written Submission of the American Corporate Counsel Association to the ABA Task Force on Corporate Responsibility 11 (Nov. 11, 2002) [hereinafter ACCA Survey], <http://www.acc.com/legalresources/resource.cfm?show=16245> (reporting that senior corporate executives look to lawyers to provide counsel in addition to legal counsel, e.g., to be “a sounding board or confidante” to the CEO, senior executives, and board; “a member of the strategic planning team;” “a human resources advisor;” “ethics advisor;” or “business or contract negotiator”); *see also* Beardslee, *supra* note 15, at 1299 & nn. 238–40; Greg Billhartz, Note, *Can’t We All Just Get Along? Competing For Client Confidences: The Integration of the Accounting and Legal Professions*, 17 ST. LOUIS U. PUB. L. REV. 427, 435 (1998) (“[Corporate] attorneys have been forced to diversify to meet the demands of their clients. Today, lawyers are almost as likely to be involved with economic, scientific, financial or political issues as mere legal ones.”).

28. Gardner, *supra* note 9, at 53 (“To respond to the needs of such clients and to growing competition from nonlawyers—and consistent with a trend that is already well under way—law firms will develop an increasingly wide array of ancillary non-legal services.”); Jones, *supra* note 9, at 688–89; Phyllis Weiss Haserot, *Multiprofessional Mixes are Proliferating*, NAT’L L.J., Oct. 19, 1987, at 16; *Working Notes: Deliberations of the ABA Committee on Research About the Future of the Legal Profession on the Current Status of the Legal Profession*, 17 ME. B.J. 48, 56 (2002) [hereinafter *ABA Working Notes*] (explaining that firms are expanding by developing ancillary services).

29. *NXIVM Corp.*, 241 F.R.D. at 126 (“Many attorneys have actually established dual professional practices in order to provide a multitude of relevant advice, not necessarily confined to law advice. Some thoughtful lawyers establish professions independent of the

Australia enabling outside equity investment in law firms by non-lawyer investors,<sup>30</sup> along with increased competition from other types of professional service firms and legal services firms (e.g. legal process outsourcing agencies), and increased pressure from clients for holistic and global services, there is new momentum behind change in law firm structure today.<sup>31</sup> Although new alliances are emerging,<sup>32</sup> there will likely be even more types of actual and virtual strategic alliances between lawyers, firms, and other types of legal service providers around the world.

Moreover, even those lawyers who are currently providing a mixture of business and legal services to meet clients' needs will likely be challenged to innovate the kind and delivery of services they provide. As Richard Susskind suggests in *The End of Lawyers?*, because information technology will enable tasks that used to be seen as intricate, unique, and valuable to be routinized, lawyers will have to provide bespoke work that adds real value.<sup>33</sup> Lawyers will have to innovate to meet the changing demands of clients in a 2.0 world, where there is an array of options for legal services.<sup>34</sup>

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practice of law. And oftentimes the line of demarcation as to the nature of the advice is blurred.”).

30. John Flood, *Will There Be Fallout from Clementi? The Global Repercussions for the Legal Profession After the UK Legal Services Act 2007*, 8 ARCHIVE OF EUR. INTEGRATION, no. 6, Apr. 2008, at 1, available at <http://aei.pitt.edu/9010/01/FloodLong08ClementiEdi.pdf>; Milton C. Regan, Jr., *Lawyers, Symbols, and Money: Outside Investment in Law Firms*, 27 PENN ST. INT'L L. REV. 407, 407 (2008) (“Two recent developments have startled some people who follow the legal profession. The first was in May 2007, when the Australian law firm of Slater & Gordon engaged in an initial public offering (‘IPO’) and became listed on the Australian stock exchange. The second occurred at the end of October 2007, when the United Kingdom (‘UK’) passed legislation allowing non-lawyer investors to acquire interests in law firms in England and Wales.”); see also Legal Services Act, 2007, c. 29, § 89, sch. 18 (Eng.), available at <http://www.legislation.gov.uk/ukpga/2007/29/data.pdf>; Alexia Garamfalvi, *In a First, Law Firm Goes Public*, LEGAL TIMES, May 22, 2007, available at <http://www.law.com/jsp/article.jsp?id=1179751700602>.

31. Sisk & Abbate, *supra* note 9, at 209; *ABA Working Notes*, *supra* note 28, at 55; see also Gardner, *supra* note 9, at 17 (“Globalization will also introduce pressures that are more specific to the legal profession, including an accelerating trend toward specialization, growing resistance to ‘unauthorized practice of law’ regulations, and incentives to develop multidisciplinary practices.”).

32. See Milton C. Regan, Jr., *Professional Responsibility and the Corporate Lawyer*, 13 GEO. J. LEGAL ETHICS 197, 203–04 (2000) (“A parent firm may be in one country, its subsidiaries in several others, and its joint venture partners or licensees in still others.”). For example, in 1999, Roger & Wells, Clifford Chance, and Pünder, Volhard, Weber & Aster merged. See John E. Morris, *The New World Order*, AM. LAW., Aug. 1999, at 92. See generally Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737 (1994); David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994); Kathryn Hayes Tucker, *Virtual Law Firms Stay Afloat in Tough Times*, LAW.COM (May 26, 2009), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202430945937>.

33. See generally RICHARD SUSSKIND, *THE END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* 2–3 (2008).

34. See generally *id.*; Gardner, *supra* note 9, at 18 (“[T]he twenty-first century will demand that business law practitioners shift their focus from efficiency to producing effective legal services that add value directly to the client’s business activities. The attorney’s value-adding service will, in part, entail enabling the client to make better

The legal profession, however, has not reached consensus on the appropriate role of the corporate attorney as it relates to providing a mixture of legal and business services.<sup>35</sup> Some view the idea of a broadened role as a moneymaking initiative that is denigrating to the image of the legal profession.<sup>36</sup> This group, unlike Geoffrey C. Hazard, Jr. and W. William Hodes, believes there is a “supportable,” “rigid separation,” and a “clear divide between a core of ‘legal’ service and services that are ‘ancillary’ or ‘law-related.’”<sup>37</sup> Others are less unequivocal. They question whether “the profession [can] benefit from the experiences of business while still maintaining its professional values.”<sup>38</sup> Then there is the group that wholeheartedly embraces the enlarged view of corporate practice and, as a result, has a broader vision of corporate litigation and what being a corporate lawyer means. Those in this group believe that “[s]weeping changes in the modern competitive and global economy, forms and means of doing business, and regulatory environment have made it essential for lawyers who advise corporations and other business associations to evolve in their role and offer a broader array of legal and law-related services.”<sup>39</sup> They recognize that what may have been traditionally classified as “nonlegal tasks such as negotiating contracts, analyzing potential corporate transactions, and investigating potential claims,”<sup>40</sup> are no longer classifiable as “nonlegal” when they are performed by a corporate lawyer today. This is because, to put it simply—once a lawyer always a lawyer.<sup>41</sup> As Gregory

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business decisions by using the thinking and analysis behind the attorney’s legal advice, rather than merely providing the advice itself. This new business method will require that business lawyers and their firms develop a culture of innovation and make a continual commitment to create new knowledge that will contribute value to a client’s enterprise.”).

35. See Jones, *supra* note 9, at 692.

36. See COMM’N ON PROFESSIONALISM, ABA, “. . . IN THE SPIRIT OF PUBLIC SERVICE:” A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 3 (1986), [http://www.abanet.org/cpr/professionalism/Stanley\\_Commission\\_Report.pdf](http://www.abanet.org/cpr/professionalism/Stanley_Commission_Report.pdf).

37. 2 HAZARD, JR. ET AL., *supra* note 10, § 48.2, at 48-4.

38. ABA Working Notes, *supra* note 28, at 58.

39. Sisk & Abbate, *supra* note 9, at 209; see also THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 136 (2010) (contending that successful lawyers “will be those who can make themselves the best available go-to person in a combined law-and-substantive field”); Billhartz, *supra* note 27, at 428 (“The legal profession, on the other hand, has sought to expand the definition of ‘legal services’ to include management consulting services, and then to protect such practices from encroachment by enforcing various professional rules and guidelines under the guise of unauthorized practice of law prohibitions.”); cf. Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers”*, 2008 J. PROF. LAW. 189, 189 (viewing lawyers as service providers and the legal profession as “included in a broader group of ‘service providers,’ all of whom can be regulated together”).

40. Knoerzer, *supra* note 27, at 41.

41. To that end, it is not clear to the Author that corporate lawyers who have practiced as lawyers for some significant amount of time can ever truly claim that they are no longer acting as lawyers. This view is based in part on over twenty in-depth interviews with general counsels and chief compliance officers at large S&P 500 corporations. For further discussion, see Beardslee, *The Government’s Unofficial Stance*, *supra* note 16. That said, there are a lot of lawyers that have taken off their lawyer hat in the business world to become other types of business consultants including PR consultants, real estate consultants, and even “law” consultants. See Tanina Rostain, *The Emergence of “Law Consultants,”* 75

Sisk and Pamela Abbate point out, “[T]he lawyer evaluates each matter from a distinctly legal perspective, identifying the legal implications, verifying compliance with regulatory regimes, looking for the advantages and disadvantages offered or posed by legal standards, and assessing the legal risks.”<sup>42</sup> At the other extreme are those corporate attorneys, identified by James W. Jones, that view themselves as general “professional problem solvers”—i.e., business counselors that happen to have a legal degree.<sup>43</sup>

This debate is not simply about whether lawyers should consider other disciplines in their analysis and provide advice that takes account of the legal and business concerns. Instead, as Milton C. Regan points out, it is also about the extent to which corporate attorneys should utilize other disciplines and factors to counsel clients to refrain from “exploiting every possible legal advantage, for the sake of both the client’s long-term interest and that of society as a whole.”<sup>44</sup> There is also evidence that lawyers are being relied on by clients and the public at large to play such a quasi-public role—to be gatekeepers.<sup>45</sup> For example, corporate attorneys (especially in-

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FORDHAM L. REV. 1397, 1405–06 (2006) (explaining that former lawyers are now consulting in a wide variety of legal subjects including ethics, employment law, compliance, and risk management). These former lawyers, now acting as non-lawyers, might still be providing some type of legal advice or their clients might have that expectation, but Tanina Rostein points out that these now non-practicing lawyers are no longer held to the legal ethics rules like other lawyers. *Id.* at 1398, 1412. Further, she argues, there are regulatory incentives to hiring a law consultant as opposed to counsel. *Id.* at 1412.

42. Sisk & Abbate, *supra* note 9, at 210.

43. Jones, *supra* note 9, at 693 (warning that “one obviously can push this notion too far”); *see also* Gardner, *supra* note 9, at 39 (“To generalize, a business lawyer plans strategies, negotiates deals, resolves disputes, structures transactions to mitigate risks by anticipating contingencies, and advises clients of possible consequences and costs of particular decisions or actions. To generalize further, good attorneys solve clients’ problems.” (citations omitted)); *id.* at 41 (explaining that problem solving is how corporate lawyers add value); Hamilton, *supra* note 27, at 28 (“[A]n attorney representing a corporate organization must have, in addition to knowledge of corporate law, a basic understanding of the business, its goals, its culture, and its business ethics in order to counsel the directors and senior management regarding the best interests of the organization in the situation presented.”).

44. Regan, Jr., *supra* note 32, at 207; *see also* Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third-Rate Doctrine for Third-Party Consultants*, 62 SMU L. REV. 727, 736–42 (2009) (contending that consultation with third party specialists is sometimes essential to the provision of comprehensive legal advice and services); Sisk & Abbate, *supra* note 9, at 205 (“[L]egal counsel frequently is of value only when integrated with the lawyer’s evaluation of other factors of practical, economic, emotional, or moral importance to the client.”); ACCA Survey, *supra* note 27, at 11 (including “ethics advisor” in the list of roles that senior management find important for lawyers to play). Interestingly, the American Bar Association was formed, and the Canon of Ethics promulgated, as efforts to support the perception that law is a profession and not just a business. *See generally* JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 50–53, 62–73 (1976).

45. Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 GEO. J. LEGAL ETHICS 1119, 1170–71 (2010) (reviewing the contexts in which lawyers are expected to play a gatekeeping role); Regan, Jr., *supra* note 32, at 207; Tanina Rostain, *General Counsel in the Age of Compliance: Preliminary Findings and New Research Questions*, 21 GEO. J. LEGAL ETHICS 465, 473–74 (2008) (finding that general counsels in her study played a gatekeeping role and

house general counsels) manage legal public relations around corporate controversies to help corporate clients prevail on legal matters, as well as to protect their reputation and market share.<sup>46</sup> Yet some corporate clients also rely on those same attorneys to help them find the right balance between protecting their own agenda and safeguarding public interests.<sup>47</sup>

An example of this is in SEC regulations that require lawyers to report up (and eventually out) when they discover “credible evidence” of a “material” disclosure violation,<sup>48</sup> that is, when there is “a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”<sup>49</sup> In further support is the trend in legal practice and regulation to require lawyers to be more cognizant of the social externalities of their corporate clients’ actions and subject lawyers to more liability.<sup>50</sup> To that end, the debate about whether lawyers should be in the business of law or the business of business has both public and private features<sup>51</sup> and is not—nor should it be—only concerned with the practicum of the contemporary corporate attorney, but also the potentially normative dimension of corporate lawyers’ work. That the legal profession has not reached consensus on the role of the corporate attorney (both with respect to whether lawyers should provide a mixture of business and law services and whether lawyers should be safeguarding the corporate and public trust) is made clear in many different segments of scholarship including those addressing multi-disciplinary partnerships, gatekeeping, moral counseling, the corporate attorney-client privilege,<sup>52</sup> and, as will be analyzed in depth in Parts II and III of this Article, the work product doctrine.

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managed the decision around what legal risks the company should take); *cf.* Christine E. Parker et al., *The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation*, 22 GEO. J. LEGAL ETHICS 201, 205 (2009) (reporting evidence that “[c]lients who are committed to compliance hire lawyers to help promote compliance in their organizations, and those who are committed to resistance hire lawyers to resist compliance” and that “to the extent lawyers influence clients, it is towards game-playing, not commitment to compliance or resistance to compliance”).

46. *See generally* Beardslee, *supra* note 15.

47. Beardslee, *supra* note 45, at 1167.

48. Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (2006); 17 C.F.R. § 205.2(e) (2010).

49. *Basic, Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

50. Regan, Jr., *supra* note 32, at 204–06 (describing the increase in common law theories, stricter disclosure and compliance obligations, and other regulations, such as malpractice, breach of fiduciary duties, negligent representations, and bankruptcy disclosure rules, that hold lawyers more accountable and to a wider range of constituents).

51. *Cf. id.* at 207 (noting how the quasi-public role of lawyers impacts their client interactions).

52. *See infra* Part I.B.

B. *The Burgeoning Debate Over the Role of the Corporate Attorney*

1. Multi-Disciplinary Partnerships

In 1999, the ABA Commission originally recommended that Model Rule of Professional Conduct 5.4 be revised to allow attorneys to create multi-disciplinary partnerships (MDPs) with non-lawyers, that is, to allow lawyers to share fees with non-lawyers and offer non-legal and legal services.<sup>53</sup> However, in July of 2000, the ABA House of Delegates rejected the ABA Commission's recommendation.<sup>54</sup> For a while, it appeared that the dispute over MDPs had stalled, but recent developments in the United Kingdom and Australia allowing outside investment in law firms have breathed new life into it.<sup>55</sup> The arguments for and against allowing MDPs are tangled up with the debate about corporate lawyers' role and whether lawyers should be providing advice that might be considered either business, legal, or both. Those in favor of MDPs essentially argue that lawyers need to follow the times and their clients' needs.<sup>56</sup> They point out that the legal profession's ethics rules permit ancillary businesses and strategic alliances<sup>57</sup> but, more than that, they emphasize that MDPs already exist in other countries<sup>58</sup> and that they provide corporate clients the type of service they need today.<sup>59</sup> They emphasize the impossibility of distinguishing what is law from what is business.<sup>60</sup> Those against MDPs

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53. *Report and Recommendation of the District of Columbia Bar Special Committee on Multidisciplinary Practice*, D.C. BAR, [http://www.dcbar.org/inside\\_the\\_bar/structure/reports/special\\_committee\\_on\\_multidisciplinary\\_practice/background.cfm](http://www.dcbar.org/inside_the_bar/structure/reports/special_committee_on_multidisciplinary_practice/background.cfm) (last visited Mar. 23, 2011) (explaining that the ABA Commission also proposed revising Model Rule 1.10 to allow for more expansive disqualification based on conflicts with any client of the multidisciplinary partnership (MDP)).

54. Edward J. Cleary, *Multidisciplinary Practice: One Year Later*, BENCH & B. MINN., Sept. 2000, available at [http://www2.mnbar.org/benchandbar/2000/sep00/mdp\\_profresp.htm](http://www2.mnbar.org/benchandbar/2000/sep00/mdp_profresp.htm). The current Model Rules of Professional Conduct prevent non-lawyers from sharing a law firm's ownership or profits. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2010). Motivating this decision were concerns around professional independence, confidentiality, and conflicts of interest. Beardslee, *supra* note 25, at 36–37; see also *ABA Working Notes*, *supra* note 28, at 52.

55. See *supra* note 30 and accompanying text.

56. See, e.g., Gardner, *supra* note 9, at 28 (explaining that enabling MDPs would allow lawyers to better service their clients, compete in the economic marketplace, and “serve the interests of the American economy as well”).

57. See, e.g., Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-Discipline Practices Should be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 248 (1997).

58. Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 227–34 (2000); Katherine L. Harrison, Comment, *Multidisciplinary Practices: Changing the Global View of the Legal Profession*, 21 U. PA. J. INT'L ECON. L. 879, 918–19 (2000).

59. Laurel S. Terry, *A Primer on MDPs: Should the “No” Rule Become a New Rule?*, 72 TEMP. L. REV. 869, 911 (1999) (noting that the ABA Commission on MDPs “concluded that there was client demand for MDPs on the part of both individual and corporate clients” as well as an “interest among lawyers in forming partnerships with nonlawyers”).

60. Carol A. Needham, *Permitting Lawyers To Participate in Multidisciplinary Practices: Business as Usual or the End of the Profession as We Know It?*, 84 MINN. L.

rely on arguments about the traditional role of the corporate attorney and emphasize that MDPs will create conflicts of interest and jeopardize the reputation of the legal profession, a lawyer's independent judgment, and the attorney-client privilege.<sup>61</sup> Ironically, these are the same arguments that were used—unsuccessfully—against allowing in-house counsel, ancillary businesses, and lawyers to join legal services organizations.<sup>62</sup>

## 2. Gatekeeping

According to Sung Hui Kim, a similar “war” exists in the literature addressing gatekeeping.<sup>63</sup> Scholars and lawyers alike are debating whether and in what circumstances lawyers should behave as gatekeepers—that is, act as agents that oversee work in a way designed to prevent or stop misconduct that could harm capital markets.<sup>64</sup> Some groups oppose any attempt by outsiders to impose gatekeeping duties on lawyers. For example, the ABA and many individual state bar associations have consistently resisted attempts to require gatekeeping responsibilities of lawyers.<sup>65</sup> Some of those opposing the gatekeeper role do so because they believe that corporate attorneys have essentially been set up to fail because they cannot adequately fill the role, given their ethical duties and relationships with clients.<sup>66</sup> They fundamentally believe attorneys should

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REV. 1315, 1327 (2000); *see also* Terry, *supra* note 59, at 873 (“[T]he definition of the ‘practice of law’ is frustratingly illusive. . . . [as] it is almost impossible to define with precision what constitutes the practice of law in the United States today . . . .” (first alteration in original) (quoting Written Remarks of James W. Jones, Vice Chairman and General Counsel, APCO Associates, Inc. (Feb. 6, 1999))).

61. *See* Daly, *supra* note 58, at 264; John H. Matheson & Peter D. Favorite, *Multidisciplinary Practice and the Future of the Legal Profession: Considering a Role for Independent Directors*, 32 LOY. U. CHI. L.J. 577, 599–605 (2001).

62. *See* Daly, *supra* note 58, at 271 (noting that “[f]or a long time, the legal profession seriously questioned whether in-house counsel could exercise the requisite degree of independence of professional judgment. Those questions have largely disappeared. Similar reservations were once expressed about the lawyers employed by legal services organizations, unions, and prepaid legal plans. Those reservations too have disappeared.”); Morello, *supra* note 57, at 222–23.

63. Sung Hui Kim, *Lawyer Exceptionalism in the Gatekeeping Wars*, 63 SMU L. REV. 73, 76 (2010).

64. *Id.* at 75–76. Scholars have defined the word gatekeeper in different ways. Commonly, the word “gatekeeper” refers to an agent that is either required to, or voluntarily attempts to, prevent or stop some type of corporate misconduct including the disclosure of misleading information that may influence investors. *See, e.g.*, JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE 2–3 (2006); Beardslee, *supra* note 45, at 1126 n.21; Kim, *supra* note 63, at 75; Reinier H. Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986).

65. For example, the ABA argued against what the Sarbanes-Oxley Act of 2002 § 307, 15 U.S.C. § 7245 (2006) essentially codified. *See* Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics and Enron*, in ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 625, 628 (Nancy B. Rapoport & Bala G. Dharan eds., 2004). For bar opposition to the ABA’s stance, *see id.* at 645. *See generally* Susan P. Koniak, *When the Hurlyburly’s Done: The Bar’s Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003).

66. *See* Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 986 (2005); Deborah L. Rhode, *Moral Counseling*, 75 FORDHAM L. REV. 1317, 1330 (2006) (explaining that one reason why lawyers abdicate



not be counselors, may not breach confidentiality, and, as agents of their clients, should act as advocates and zealously represent their clients at all times and in all contexts.<sup>67</sup> Others argue that corporate attorneys should be playing a gatekeeping role for their corporate clients despite the difficulties in doing so and the conflicting ethical and legal obligations.<sup>68</sup> They believe that attorneys, as opposed to other professionals, are uniquely suited to fill this role because of their ethical obligations such as the duty of candor and honesty to other parties and third persons and their historic place as

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social responsibility is that they believe “that casting lawyers in the role of ethical gatekeepers will discourage the trust and candor from clients that is essential to effective representation. The result will be less compliance counseling, not more.”). There is lack of consensus on whether inside or outside counsel are more able to play the role of gatekeeper. See Beardslee, *supra* note 45, at 1165 n.234 (describing this lack of consensus).

67. COFFEE, JR., *supra* note 64, at 192 (contending that the bar “prefers to view the attorney as an advocate, whose sole duty is the zealous representation of the client”); Letter from the Ass’n of the Bar of the City of N.Y., to Jonathan G. Katz, Sec’y, Sec. & Exch. Comm’n (Dec. 17, 2002) [hereinafter ABCNY Letter], available at <http://ftp.sec.gov/rules/proposed/s74502/elmilonas1.htm> (commenting on proposed SEC Rules implementing the Sarbanes-Oxley Act of 2002); see Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 718 (2005) (explaining that some of the litigators she interviewed “felt they had an affirmative moral obligation to zealously represent their clients, and the majority of them saw themselves as agents of their clients, not counselors” and believed they did not have “any obligation to attempt to constrain [their client’s] will”); Rhode, *supra* note 66, at 1330 (explaining that one of the primary objections lawyers raise to broader social responsibilities is that “[w]here clients’ rights are at stake, they deserve a zealous advocate, not a super ego or government watchdog. Lawyers’ function is to defend, not judge, those they represent . . . .”); Fred Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387, 1387–88 & n.4 (2004) (stating that naysayers believe that playing the role of gatekeeper is akin to playing the role of a secret agent); ABCNY Letter, *supra* (arguing against proposed regulations by the SEC that “impose obligations requiring or, in some circumstances, allowing an attorney to act against the client’s interest” because, in part, “[t]he rules as drafted, if aggressively enforced, could eviscerate the attorney’s traditional role as advocate, confidant and advisor”).

68. See, e.g., Beardslee, *supra* note 45, at 1126 n.21 (arguing that “[t]he corporate general counsel, in the role of media gatekeeper, should help separate the unwanted (the misleading), from the desired (the properly positioned) information in public communications about legal controversies”); Elizabeth Cosenza, *Rethinking Attorney Liability Under Rule 10b-5 in Light of the Supreme Court’s Decisions in Tellabs and Stoneridge*, 16 GEO. MASON L. REV. 1, 47–48 (2008) (arguing that the “the substantial participation standard” of liability is the best standard because it promotes “accurate and continuous disclosure” and enforces lawyers’ “traditional role as gatekeepers of the securities market”); Koniak, *supra* note 65, at 1274–75, 1279 (stating that while “noisy withdrawal” is a good idea, “a strong internal reporting requirement would be nearly as good” and ultimately concluding that “even a strong up-the-ladder rule is not enough. The enforcement gaps in the law governing lawyers need to be closed.”); see also ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 3, 284 (1993) (contending that inside lawyers should play the “lawyer-statesman” role); John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 COLUM. L. REV. 1293, 1305–07 (2003) (explaining the rationale for requiring lawyers to play a gatekeeping function); Ben W. Heineman, Jr., *Caught in the Middle*, CORP. COUNS., April 2007, available at [http://www.wilmerhale.com/files/Publication/92fd97ff-de9d-4501-9d29-90712709dd43/Presentation/PublicationAttachment/c49ca19c-86ca-41b8-a5bd-015eeb306339/Heineman\\_CaughtintheMiddle.pdf](http://www.wilmerhale.com/files/Publication/92fd97ff-de9d-4501-9d29-90712709dd43/Presentation/PublicationAttachment/c49ca19c-86ca-41b8-a5bd-015eeb306339/Heineman_CaughtintheMiddle.pdf) (arguing that inside lawyers need to act as guardians of a corporation’s integrity and reputation despite conflicting role as business partner and leader); Ben W. Heineman, Jr., *The Ideal of the Lawyer-Statesman*, ACC DOCKET, May 2004, at 58, 62.

“officer[s] of the court.”<sup>69</sup> They believe that corporate lawyers can serve as “autonomous agent[s] of social control and law enforcement” and argue that the most important characteristics of corporate lawyers is their ability to say something is not “right” even though it may be legally sound, to encourage corporate clients to think beyond short term interests, to be more honest, and to behave socially responsibly.<sup>70</sup>

### 3. Moral Counseling

Related to what Sung Hui Kim has referred to as the “gatekeeping wars”<sup>71</sup> is the disagreement over whether corporate lawyers should provide moral counseling to corporate clients. According to Deborah Rhode, the answer to that question “depends on who you ask.”<sup>72</sup> Some scholars, like William Simon, argue that lawyers should remain connected to ordinary morality and should counsel clients with the greater good in mind, in an attempt to promote justice.<sup>73</sup> Some, such as Rhode and Robert K. Vischer, contend that in the corporate context (among others) “lawyers have a moral responsibility to provide moral counseling, whether or not it can be packaged in pragmatic terms.”<sup>74</sup> “Rather than asking only whether a given

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69. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991) (quoting *Cohen v. Hurley*, 366 U.S. 117, 126 (1961)); *see also* MODEL CODE OF PROF'L RESPONSIBILITY pmbl. (1969) (“Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.”); MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (2010) (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”); *id.* R. 3.3 cmt. 2; Judith A. McMorrow et al., *Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decisions*, 32 HOFSTRA L. REV. 1425, 1440 (2004) (referring to case opinions that embrace the idea that lawyers should be “officers of the court”); *cf.* Zacharias, *supra* note 67, (contending that in fulfilling their traditional responsibilities, lawyers have always played the role of gatekeeper).

70. Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 410–11 (1985); *see also* Gardner, *supra* note 9, at 37 (“As corporate managers can be preoccupied with short-term problems and therefore may ignore legal advice not forcefully given, lawyers are called upon actively to encourage and promote measures designed to protect corporate interests.”).

71. *See* Kim, *supra* note 63, at 76.

72. Rhode, *supra* note 66, at 1317.

73. WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYER'S ETHICS* 138 (1998) (“Lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice.”); William H. Simon, *Role Differentiation and Lawyer's Ethics: A Critique of Some Academic Perspectives*, 23 GEO. J. LEGAL ETHICS 987, 1009 (2010) (arguing for lawyers' role based on “conduct [that] would best vindicate the relevant substantive norms and would best promote fair adjudication of the dispute”); *see also* DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 67 (2007); David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 GEO. J. LEGAL ETHICS 1101, 1116–17 (2010) (“My theory requires that lawyers be ‘relentlessly focused’ on morality only in the sense that they cannot hide behind their role or the adversary system to release themselves from moral obligations that they would have if they weren't lawyers. They need be no more relentlessly focused on morality than non-lawyers are.”).

74. Rhode, *supra* note 66, at 1319; Donald C. Langevoort, *Someplace Between Philosophy and Economics: Legitimacy and Good Corporate Lawyering*, 75 FORDHAM L. REV. 1615, 1618, 1624–28 (2006) (arguing that there is a value in substituting “legitimacy

course of conduct is arguably legal, lawyers should ask: ‘Is it fair?’ ‘Is it honest?’ ‘Is it socially legitimate?’ ‘Does it thwart the purpose of the law or pose unreasonable risks?’<sup>75</sup>

Others argue that it is not the proper role of the attorney to ask these questions. They envision the lawyer as the means by which clients access the law, and therefore, believe that the lawyer should play an “amoral” role—that is, they should remain agnostic as long as the client’s ends are within legal bounds.<sup>76</sup> Indeed, like those who attempt to draw a line between business and law, those who view moral counseling as outside the purview of a corporate lawyer’s role see a strong delineation between legality and morality, and believe that lawyers should only provide advice and information about the former and not the latter—unless the client specifically requests it.<sup>77</sup> These same individuals believe that counseling—above and beyond simply laying out the legal risks of options—is a business decision for the client.<sup>78</sup> Those ascribing to this view point to the legal profession’s ethical rules that seem to position the lawyer as an

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for morality” because, among other things, it “describe[s] a form of professional responsibility that does not devolve into simple legal risk calculation”); Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 269 (2006) (arguing that lawyers should present their own ethical views when providing moral advice).

75. Rhode, *supra* note 66, at 1333; *see also* Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 611 (1994); *cf.* Thomas D. Morgan, *Economic Reality Facing 21st Century Lawyers*, 69 WASH. L. REV. 625, 636 (1994) (arguing that “[t]he twenty-first century lawyer . . . [must] build community rather than foster division” and must “be committed to the rule of law and to fair and equitable legal processes”).

76. *Contra* Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 628–33 (explaining that lawyers should not play an “amoral” role and that, in some situations, lawyers can attempt to change clients’ behavior by relying on outside moral authority, moral dialogue, and conscientious objection); *see* Stephen Pepper, *Integrating Morality and Law in Legal Practice: A Reply to Professor Simon*, 23 GEO. J. LEGAL ETHICS 1011, 1012 (2010) (“I envision the lawyer as primarily a conduit for the law to the client, and morality as modulating the application of available law by lawyer and client. . . . The client’s access to and use of the law ought to be mediated, to some extent, through the moral sensibilities and perception of the lawyer.”); *cf.* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relations*, 85 YALE L.J. 1060, 1062, 1066 (1976) (emphasizing the importance of loyalty to the client and putting the client’s interests above “the wider collectivity”).

77. Vischer, *supra* note 74, at 227 (arguing that the lawyer’s essential obligation is to help the client achieve desired ends as long as the ends are within legal bounds based on a good faith interpretation of what is permitted by the law); W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1168–69 (2005) (explaining this view); *see, e.g.*, Kimberly Kirkland, *Ethical Infrastructures and De Facto Ethical Norms at Work in Large U.S. Law Firms: The Role of Ethics Counsel*, 11 LEGAL ETHICS 181, 194 (2008) (“Some of the ethics counsel I interviewed see their role as limited to providing a ‘read’ on the likely ethics consequences of a particular course of action. Once they have communicated their ‘read’, they step back and let others make the decision about how much risk the firm will take.”); *id.* at 197 (“I view my role as ethics partner as objective counselor—I don’t see myself as invoking morals.”) (quoting ethics counselor).

78. Kirkland, *supra* note 77, at 195 (stating that framing such decisions as ‘business decisions’ is a tactical move that helps “the firm’s efforts to retain profitable partners and attract lateral partners with lucrative books of business.”). For a discussion on framing, *see infra* notes 311–17 and accompanying text.

“amoral technician” who should strive to maximize any legal rights of the client<sup>79</sup> without regard to the lawyer’s own moral viewpoint.<sup>80</sup> As Rhode points out, “the claim that ‘it is not the lawyer’s role’” is an assertion, not an argument, and begs the question at issue: What should that role be?”<sup>81</sup>

#### 4. Corporate Attorney-Client Privilege

Arguably, in no area has the corporate lawyer’s role and the distinction between law and business been more debated than in the attorney-client privilege context. First, there is a long-standing dispute amongst scholars about whether the attorney-client privilege should apply to corporations at all, let alone to in-house counsel. For example, many scholars, like David Luban, argue that the attorney-client privilege cannot justifiably be applied to corporate entities.<sup>82</sup> They contend that a corporation’s business professionals will still communicate openly and fully with corporate counsel absent privilege protection because it is the only way to ensure good business decisions.<sup>83</sup> Other scholars and courts claim the opposite—that the attorney-client privilege is essential in the corporate context because without it business professionals would not be open with their attorneys, causing the latter to miss opportunities to persuade their clients, *ex ante*, to comply with the law or social norms that may be legally acceptable but socially or morally reprehensible.<sup>84</sup> Moreover, courts in Europe have questioned specifically whether and to what degree the

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79. See, e.g., MODEL CODE OF PROF’L RESPONSIBILITY EC 7-1 (1983) (providing that clients are “entitled to . . . seek any lawful objective through legally permissible means”). The Model Code was replaced by the Model Rules in 1983. See Vischer, *supra* note 74, at 227 n.19 (“The *Model Code* was promulgated by the American Bar Association in 1970 and adopted by all fifty-one jurisdictions, and the *Model Rules* were promulgated by the ABA in 1983 and displaced the *Model Code* in most states.”).

80. See generally Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

81. Rhode, *supra* note 66, at 1331.

82. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 206–34 (1988) (providing reasons why the privilege should not be applied to corporations).

83. See Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN’S L. REV. 191, 222–28 (1989); Paul R. Rice, *The Corporate Attorney-Client Privilege: Loss of Predictability Does Not Justify Crying Wolf* in Rostain, 55 BUS. LAW. 735, 739–42 (2000).

84. See *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 125 (N.D.N.Y. 2007) (“The free-flow of information and the twin tributary of advice are the hallmarks of the privilege. For all of this to occur, there must be a zone of safety for each to participate without apprehension that such sensitive information and advice would be shared with others without their consent.”); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 144 (D. Del. 1977) (“To the furnishing of such advice the fullest freedom and honesty of communications of pertinent facts is a prerequisite. To induce *clients* to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity.” (quoting *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950))); Rostain, *supra* note 41, at 1426 (“[T]he importance of the attorney-client privilege is premised on its capacity to further social values[,] . . . not only . . . to assist counsel in formulating legal advice . . . [but also] to create a zone of privacy . . . to convince corporate clients to abide by the law.” (internal quotation omitted)); *id.* at 1412–17 (explaining that the importance of a corporate attorney-client privilege has decreased because it either fails to apply or is waived in more and more situations).

attorney-client privilege should apply to in-house counsel.<sup>85</sup> In the recent *Akzo Nobel Chemicals* case before the European Union Court of Justice, the Advocate General decided that the attorney-client privilege should not apply to communications between in-house counsel and clients because as employees of the corporate client, they are not sufficiently independent to justify privilege protection.<sup>86</sup> Courts here in the U.S. have struggled with this issue as well,<sup>87</sup> fearing that corporations would include in-house attorneys in communications to later garner privilege protection and create a zone of secrecy.<sup>88</sup> Because of this concern, when determining whether to apply privilege protection to communications between in-house attorneys and clients, U.S. courts often require a higher showing than when the communication involves outside counsel.<sup>89</sup>

Scholars and courts also debate the extent to which the attorney-client privilege should protect communications that contain mixed business and legal advice. Currently, courts protect communications that mix business and law as long as they are “made primarily for the purpose of generating legal advice.”<sup>90</sup> Given this standard, unsurprisingly, courts attempt to delineate what is legal from what is business advice. The U.S. Court of Appeals for the Second Circuit recently furnished a typical example of this delineation: “Fundamentally, legal advice involves the interpretation and application of legal principles to guide future conduct or to assess past conduct. It requires a lawyer to rely on legal education and experience to inform judgment.”<sup>91</sup> But the problem with attempting to make such a

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85. See Case C-550/07, *Akzo Nobel Chems. Ltd. v. Comm’n*, 2010 E.C.R. I-1 ¶ 1, available at <http://www.acc.com/advocacy/upload/AG-Opinion-AKZO-042910.pdf>.

86. See *id.* ¶ 193.

87. See *First Chi. Int’l v. United Exch. Co.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989); *Hercules*, 434 F. Supp. at 143; see also Regan, Jr., *supra* note 32, at 202 (“The widely-noted rise in the visibility and prestige of inside counsel in the last two decades or so has fueled the continuing debate over the meaning of lawyers’ professional independence.”).

88. See *First Chi. Int’l*, 125 F.R.D. at 57; *Hercules*, 434 F. Supp. at 143.

89. See *In re Sealed Case*, 737 F.2d 94, 99 (D.C. Cir. 1984); *Borase v. M/A COM, Inc.*, 171 F.R.D. 10, 14 (D. Mass. 1997); *McCaugherty v. Siffermann*, 132 F.R.D. 234, 241 (N.D. Cal. 1990); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1727 (2005). This is generally because in-house counsel often hold legal and non-legal positions at corporations. See Ann M. Murphy, *Spin Control and the High-Profile Client—Should the Attorney-Client Privilege Extend to Communications With Public Relations Consultants?*, 55 SYRACUSE L. REV. 545, 581 (2005) (“[S]ome courts . . . have imposed a heavy burden on corporations seeking to protect communications with persons holding dual legal/nonlegal rules.”) (internal citations and quotations omitted); Carl Pacini et al., *Accountants, Attorney-Client Privilege, and the Kovel Rule: Waiver Through Inadvertent Disclosure Via Electronic Communication*, 28 DEL. J. CORP. L. 893, 901 (2003); Bufkin Alyse King, Comment, *Preserving the Attorney-Client Privilege in the Corporate Environment*, 53 ALA. L. REV. 621, 623 (2002). For a complete discussion, see Beardslee, *supra* note 44, at 751–53.

90. *McCaugherty*, 132 F.R.D. at 240; see also *United States v. Int’l Bus. Mach. Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950) (“[T]he privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.”).

91. *In re Cnty. of Erie*, 473 F.3d 413, 419–20 (2d. Cir. 2007) (internal citations omitted); *Ball v. U.S. Fid. & Guar. Co.*, No. M8-85, 1989 WL 135903, at \*1 (S.D.N.Y. Nov. 8, 1989)

distinction, as the Second Circuit admitted, is that legal advice “is broader, and is not demarcated by a bright line.”<sup>92</sup> Inevitably, the decision whether to apply the attorney-client privilege may rest on the court’s view of the role of the corporate attorney.

As will be discussed further in Part III, some courts have embraced the expanding role of the corporate lawyer and accept that there are areas that defy distinction between business and law in the attorney-client privilege context. These judges are willing to protect documents and/or communications that straddle the divide. One such federal judge remarked:

The complete lawyer may well promote and reinforce the legal advice given, weigh it, and lay out its ramifications by explaining: how the advice is feasible and can be implemented; the legal downsides, risks and costs of taking the advice or doing otherwise; what alternatives exist to present measures or the measures advised; what other persons are doing or thinking about the matter; or the collateral benefits, risks or costs in terms of expense, politics, insurance, commerce, morals, and appearances. So long as the predominant purpose of the communication is legal advice, these considerations and caveats are not other than legal advice or severable from it.<sup>93</sup>

Other judges, however, are not as open to this view. Although these judges recognize that “[a]ttorneys frequently give to their clients business or other advice,” they attempt to separate the business from the “essentially professional legal services”<sup>94</sup> and contend that “[w]hen an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged.”<sup>95</sup>

The debate over the corporate attorney’s role is also erupting in the doctrine addressing the extent to which courts should protect communications between attorneys, clients, and third-party consultants.<sup>96</sup> Those who argue that the corporate attorney-client privilege should be applied to communications with third party consultants in situations where the consultant is not merely serving as a translator argue for a broadened

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(reasoning that legal advice “involve[s] the judgment of a lawyer in his capacity as a lawyer”).

92. *In re Cnty. of Erie*, 473 F.3d at 420; see *McCaugherty*, 132 F.R.D. at 238; *United Shoe Mach. Corp.*, 89 F. Supp. at 359 (stating that the modern-day lawyer advises his client on what is both permissible and desirable, involving several subjects, and that privilege is not nullified just because of the presence of nonlegal considerations in a legal communication). For this reason, scholars like Gregory Sisk and Pamela Abbate have sought to find an alternative test to determine when the corporate attorney-client privilege should apply. See Sisk & Abbate, *supra* note 9, at 221 (recommending a “genuine and material legal purpose test” by which the privilege should attach if “the request for legal advice or assistance was ‘genuine’ and the legal dimension was ‘material’”).

93. *In re Cnty. of Erie*, 473 F.3d at 420.

94. *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963).

95. *In re Cnty. of Erie*, 473 F.3d at 421 (citing *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998)).

96. See generally Beardslee, *supra* note 44.

view of the corporate attorney.<sup>97</sup> The converse is also true: those who argue that the corporate attorney-client privilege should not be applied to communications with third party consultants unless they are merely serving as translators support a more narrow view of the role of the corporate attorney.<sup>98</sup>

### 5. Summary

When looked at in combination, these four areas exemplify a tension between those that view corporate practice more expansively and holistically and those that take a more narrow view and believe there can and should be a demarcation between law and other disciplines, i.e., between legal counseling and business, moral, or political counseling. At present, an easy solution to this debate is unimaginable. However, this debate, which attempts to draw a line between law and other disciplines, particularly law and business, has no business in the work product context. Before delving into why this is so, the next section provides a general overview of the work product doctrine including its history and general configuration.

## II. OVERVIEW OF THE WORK PRODUCT DOCTRINE

Although this part is generally devoted to providing a brief history of the work product doctrine and an overview of how it is applied in federal court today,<sup>99</sup> it also seeks to highlight some of the aspects of the work product doctrine that illustrate the growing debate about the corporate attorney's role and that support this Article's ultimate recommendations.<sup>100</sup>

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97. See, e.g., Steven B. Hantler et al., *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 *COMMLAW CONCEPTUS* 7, 9 (2004) (arguing that attorney-client privilege and work product doctrine should extend to litigation communication specialists—as opposed to regular public relations consultants—in the context of high profile corporate litigation); Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 *PENN ST. L. REV.* 381 (2005) (documenting the numerous instances that result in a narrow construction of the attorney-client privilege and how this impedes the provision of legal assistance); Kim J. Gruetzmacher, Comment, *Privileged Communications With Accountants: The Demise of United States v. Kovel*, 86 *MARQ. L. REV.* 977, 994 (2003) (contending that attorneys need to have confidential communications with accountants to provide competent legal advice to clients about complex financial transactions, especially around tax shelters).

98. See Murphy, *supra* note 89, at 590, 591 (arguing that communications with PR consultants should not be protected).

99. For a more complete history of the work product doctrine, see Jeff A. Anderson et al., Special Project, *The Work Product Doctrine*, 68 *CORNELL L. REV.* 760, 764–88 (1983); Pease-Wingenter, *supra* note 2, at 125–40.

100. That said, this part assumes, in large part, that the reader is familiar with the general contours of the work product doctrine and the attorney-client privilege.

A. *Brief History of the Work Product Doctrine*

The birth of the modern work product doctrine traces back to 1937.<sup>101</sup> In that year, the newly crafted Federal Rules of Civil Procedure (FRCP) included broad discovery provisions that for the first time permitted attorneys to use discovery devices to learn about their adversary's case.<sup>102</sup> Although many courts assumed protection should continue for trial preparation materials, those materials were not explicitly protected from disclosure under the new Rules.<sup>103</sup> This eventually led to disagreement among the courts as to the appropriate scope of protection for materials made in preparation for trial.<sup>104</sup> The Advisory Committee to the FRCP drafted a revision to the rules to help clear up the confusion,<sup>105</sup> but near the same time the U.S. Supreme Court granted certiorari to *Hickman v. Taylor*,<sup>106</sup> the case that is credited as having first introduced the work product doctrine.<sup>107</sup>

*Hickman* involved the sinking of a tugboat that resulted in the death of five of the nine crew members.<sup>108</sup> The attorney representing the tugboat owner, "with an eye toward the anticipated litigation," conducted private interviews of survivors and witnesses.<sup>109</sup> The attorney for a representative of one of the deceased crewmembers sought discovery of these interviews.<sup>110</sup> The lower court ordered the tugboat attorney to disclose to his opponent all witness statements along with any written memoranda summarizing the oral statements.<sup>111</sup> The U.S. Court of Appeals for the Third Circuit reversed, holding that the requested materials were "work product of the lawyer" and, therefore protected.<sup>112</sup>

101. Anderson et al., *supra* note 99, at 766, 769–71; *see also* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 729 & n.216 (1998) (noting that the discovery rules articulated in the Federal Rules were effectively in their final form as of April 2007, prior to the final submission in November 2007).

102. Anderson et al., *supra* note 99, at 769–71; Pease-Wingenter, *supra* note 2, at 125–26 (explaining that prior to the adoption of the FRCP "there was not a need for work product doctrine protection because discovery devices . . . did not permit the disclosure of the adversary's case.").

103. Pease-Wingenter, *supra* note 2, at 126.

104. Anderson et al., *supra* note 99, at 771.

105. ADVISORY COMM. ON RULES FOR CIV. PROC., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 43 (1944) (proposing first draft of an amendment); ADVISORY COMM. ON RULES FOR CIV. PROC., SECOND PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 38–40 (1945) (proposing second draft of an amendment); *see also* Anderson et al., *supra* note 99, at 772–73.

106. 329 U.S. 495 (1947); *see also* Anderson et al., *supra* note 99, at 771–72.

107. Pease-Wingenter, *supra* note 2, at 125–26.

108. *Hickman*, 329 U.S. at 498.

109. *Id.*

110. *Id.* at 498–99.

111. *Hickman v. Taylor*, 4 F.R.D. 479, 483 (E.D. Pa. 1945) (en banc); *see also Hickman*, 329 U.S. at 499–500.

112. *Hickman v. Taylor*, 153 F.2d 212, 223 (3d Cir. 1945) (internal quotations omitted) (defining work product as "intangible things, the results of the lawyer's use of his tongue, his pen, and his head, for his client").



The Supreme Court largely agreed with the Third Circuit's definition of work product<sup>113</sup> and held that the requested materials did not have to be turned over because the request was for "written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties" that were "without [any] purported necessity or justification."<sup>114</sup> This type of "inquiry[] into the files and the mental impressions of the attorney," the Court explained, "contravenes the public policy underlying the orderly prosecution and defense of legal claims."<sup>115</sup> According to the Court, the "orderly prosecution and defense of legal claims" requires attorneys to both "promote justice and to protect their clients' interests."<sup>116</sup> Essential to the "[p]roper preparation of a client's case" is an environment in which attorneys can "assemble information, sift what [they] consider[] to be the relevant from the irrelevant facts, prepare [their] legal theories and plan [their] strategy without undue and needless interference" by the opposing side.<sup>117</sup> The Court was concerned that without such protection of these intangible and tangible outputs, attorneys would fail to put things in writing or would free-ride on the other sides' work which would be "demoralizing."<sup>118</sup> The Court further worried that the overall impact of such behavior would be that "the interests of the clients and the cause of justice would be poorly served."<sup>119</sup> The Court was clear, however, that not all work product was alike and that not "all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases."<sup>120</sup> Upon a showing of extreme necessity or hardship, a party could access the ordinary work product of an attorney such as "written statements secured from witnesses."<sup>121</sup> But "oral statements made by witnesses . . . whether

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113. *Hickman*, 329 U.S. at 511 ("This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the 'work product of the lawyer.'"). The Court, however, did not deem work product to be an extension of the privilege, but instead appeared to view work product as its own protective doctrine. *See id.* at 510 n.9 (explaining that its view is different than the English concept of privilege); *see also* Anderson et al., *supra* note 99, at 775.

114. *Hickman*, 329 U.S. at 510; *see also id.* at 515–16 (Jackson, J., concurring) (explaining that although "discovery should provide a party access to anything that is evidence in his case," here "the demand is not for the production of a transcript in existence but calls for the creation of a written statement not in being. But the statement by counsel of what a witness told him is not evidence when written. Plaintiff could not introduce it to prove his case.").

115. *Id.* at 510 (majority opinion).

116. *Id.* at 510–11.

117. *Id.* at 511.

118. *Id.*

119. *Id.*; *see also id.* at 516 (Jackson, J., concurring) ("Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.").

120. *Id.* at 511 (majority opinion).

121. *Id.* at 512.

presently in the form of his mental impressions or memoranda” receive heightened protection.<sup>122</sup>

The *Hickman* decision created some confusion.<sup>123</sup> First, courts debated what the decision defined as the real scope of work product protection. As mentioned above, the *Hickman* Court emphasized the need to protect materials “with an eye toward litigation”<sup>124</sup> or materials entailed in the “[p]roper preparation of a client’s case.”<sup>125</sup> Thus, in 1970, the Advisory Committee to the FRCP sought to codify and clarify the *Hickman* work product doctrine in Rule 26(b)(3).<sup>126</sup> Second, *Hickman* left unclear whether work product protection was limited to the work product only of lawyers.<sup>127</sup>

The 1970 version of the rule defined “eye toward litigation”<sup>128</sup> and materials in “proper preparation of a client’s case”<sup>129</sup> as materials “prepared in anticipation of litigation or for trial.”<sup>130</sup> It stated that work

122. *Id.* Since this decision, courts and the Federal Rules of Civil Procedure (FRCP) have sought to more clearly identify the two types of work product hinted at in *Hickman*: ordinary and opinion work product. *See, e.g.*, FED. R. CIV. P. 26(b)(3)(B) (distinguishing “mental impressions, . . . opinions, or legal theories” of an attorney from other types of work product and implying that they should receive increased protection); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 234 (2d Cir. 1993) (“An attorney’s protected thought processes include preparing legal theories, planning litigation strategies and trial tactics, and sifting through information.”); *In re Doe*, 662 F.2d 1073, 1076 n.2 (4th Cir. 1981) (finding that ordinary work product “refer[s] to those documents prepared by the attorney which do not contain the mental impressions, conclusions or opinions of the attorney. ‘Opinion work product’ is work product that contains those fruits of the attorney’s mental processes.”); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657-L, 2007 U.S. Dist. LEXIS 23164, at \*8–9 (E.D. La. Mar. 5, 2007) (“Moreover, work-product which is based on oral statements from witnesses is entitled to ‘special protection’ and is discoverable only in a ‘rare situation’ because such materials ‘are so much a product of the lawyer’s thinking.’” (citations omitted)); *Haugh v. Schroder Inv. Mgmt. N. Am., Inc.*, No. 02 CIV. 7955 (DLC), 2003 U.S. Dist. LEXIS 14586, at \*14 (S.D.N.Y. Aug. 25, 2003) (“Attorney work product can thus conceptually be divided into two classes: that which recites factual matters and that which reflects the attorney’s opinions, conclusions, mental impressions or legal theories. A heightened standard of protection must be accorded ‘opinion’ work product that reveals an attorney’s mental impressions and legal theories.”).

123. Highlighted here is confusion from *Hickman* that is most relevant to this Article. However, the opinion also left confusion around the requisite showing of necessity. *See* 1970 COMMENTS TO FEDERAL RULES OF CIVIL PROCEDURE 26, available at <http://www.law.cornell.edu/rules/frcp/ACRule26.htm>; Anderson et al., *supra* note 99, at 780; Pease-Wingenter, *supra* note 2, at 131–32.

124. *Hickman*, 329 U.S. at 511.

125. *Id.* at 511–12 (emphasizing the general policy against invading the privacy of an attorney’s course of *preparation*).

126. *See* FED. R. CIV. P. 26(b)(3); FED. R. CIV. P. 26 advisory committee’s note, 48 F.R.D. 487, 499–500 (1970); Pease-Wingenter, *supra* note 2, at 134–36.

127. *See* FED. R. CIV. P. 26 advisory committee’s note, 48 F.R.D. 487, 499–500 (1970) (citing cases with contradictory holdings and explaining that “[t]he courts are divided as to whether the work-product doctrine extends to the preparatory work only of lawyers. The *Hickman* case left this issue open since the statements in that case were taken by a lawyer.”); Anderson et al., *supra* note 99, at 780; Pease-Wingenter, *supra* note 2, at 131–32.

128. *Hickman*, 329 U.S. at 511.

129. *Id.* (emphasis added); *id.* at 512 (emphasizing the general policy against invading the privacy of an attorney’s course of *preparation*) (emphasis added).

130. FED. R. CIV. P. 26(b)(3) (emphasis added). Note that the terms “litigation” and “trial” have been interpreted to apply to administrative proceedings and arbitration. Pease-Wingenter, *supra* note 2, at 138–39 (explaining that “the key requirement seems to be that

product protection applies to materials created for trial and because of anticipated litigation, but was not limited to those materials that help the attorney prepare the client's actual trial.<sup>131</sup> Thus, it made clear that the words "case" and "litigation" encompassed more than just "trial."<sup>132</sup> True, their reach was not limitless. The advisory committee's notes from the 1970 amendment to the FRCP state that "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not" included.<sup>133</sup> That said, the original rule was broad.

To that end, in that first rendition of the rule (and in the version of the rule today), the work product doctrine extended to materials "prepared in anticipation of litigation or for trial *by or for another party or by or for that other party's representative* (including his attorney, consultant, surety, indemnitor, insurer, or agent)."<sup>134</sup> Thus, according to the 1970 version, one could successfully argue that materials produced by non-lawyers for a party—even when not directed by the attorney—could be protected.<sup>135</sup> Unsurprisingly, as will be discussed below, the differences between the case law and the codified rule have spawned debate and disagreement among the circuits on the scope of work product protection today.

### B. *The Work Product Doctrine Today*

Before moving to examples of the application of the work product doctrine to work related to PR, this section attempts to first summarize what most courts agree is the scope of the work product doctrine based on case law and interpretation of the FRCP<sup>136</sup> and second, to outline the general areas of debate in the literature and case law about the work product doctrine's coverage.

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the materials are prepared in anticipation of an adversarial setting"). *See infra* notes 138 and 313.

131. For further discussion of the "because of" standard, see *infra* Part III.B.

132. *See* Pease-Wingenter, *supra* note 2, at 154 (explaining that the word "'litigation' has a much broader meaning than 'trial'").

133. FED. R. CIV. P. 26 advisory committee's note, 48 F.R.D. 487, 501 (1970).

134. FED. R. CIV. P. 26(b)(3) (emphasis added).

135. The 1970 version of the rule also defined what type of showing is required to overcome work product protection. FED. R. CIV. P. 26 advisory committee's note, 48 F.R.D. 487, 499 (1970); Anderson et al., *supra* note 99, at 783.

136. In determining work product application, courts look to *Hickman*, FRCP 26(b)(3), and Federal Rules of Criminal Procedure 16(b)(2). RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87 cmt. e (2000) ("In the federal system, work-product immunity is recognized both under Rule 26(b)(3) of the Federal Rules of Civil Procedure and as a common-law rule following the decision in *Hickman v. Taylor*. In a few states work-product immunity is established by common law, but in most states it is defined by statute or court rule.").

## 1. The Basics

### a. What the Work Product Doctrine Generally Protects

In a nutshell, the work product doctrine protects intangible and tangible materials<sup>137</sup> from discovery that are developed in preparation of a client's case or to prepare for trial or some other adversarial proceeding.<sup>138</sup> According to the FRCP, these materials can be "prepared by or for a

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137. FRCP 16(b)(3) states that work product protection only applies to tangible materials and documents; however, it has been applied to protect intangible work product as well. *See, e.g.*, FED. R. EVID. 502(g)(2) ("'[W]ork-product protection' means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial."); *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) ("It is clear from *Hickman* that work product protection extends to both tangible and intangible work product."); *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973) (providing absolute protection to personal recollections, notes and memoranda related to attorney's discussion with witnesses). Indeed, *Hickman's* definition of work product included intangible items among the three types of materials to be protected: signed statements, interview memoranda, and attorney recollection. *Hickman v. Taylor*, 329 U.S. 495, 511–12 (1947); Anderson et al., *supra* note 99, at 841 (explaining that *Hickman* applied protection to intangibles and that "[b]ecause the 1970 amendment did not codify the *Hickman* treatment of intangible materials, the *Hickman* decision continues to govern the standards for unrecorded work product protection."). The Restatement also states that work product protection applies to both intangible and tangible materials. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87(1) (2000) ("Work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts, prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation."). Interestingly, FRCP 26 does not exempt intangible materials, largely reflecting "the fact that the underlying standard of Rule 26(b)(1) permits discovery of 'books, documents, or other tangible things.'" Pease-Wingenter, *supra* note 2, at 134. Courts have offered an array of justifications for protecting intangible materials: "Requiring an attorney to give his or her personal recollection of those interviews would create as great or greater threat to disclosing his thoughts, opinions and strategy as would disclosure of his written notes reflecting those interviews." *Dist. Council of New York City*, 1992 WL 208284, at \*7; *accord* Appeal of Hughes, 633 F.2d 282, 290 (3d Cir. 1980) (explaining that recollections of attorney's agent may reveal attorney's mental processes). That said, some state courts "confine absolute work product protection to written material reflecting the attorney's personal mental impressions and legal theories." Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 WASH. U. L.Q. 19, 21 (1990) (stating that work product does not protect communications between attorneys and non-testifying experts in many states); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87 cmt. f (2000) ("Tangible materials include documents, photographs, diagrams, sketches, questionnaires and surveys, financial and economic analyses, hand-written notes, and material in electronic and other technologically advanced forms, such as stenographic, mechanical, or electronic recordings or transmissions, computer data bases, tapes, and printouts. Intangible work product is equivalent work product in unwritten, oral or remembered form. For example, intangible work product can come into question by a discovery request for a lawyer's recollections derived from oral communications.").

138. However, some state courts confine "litigation" to refer "only to court proceedings" and, therefore, do not consider materials prepared for proceedings before an administrative agency that utilizes "quasi-judicial procedures" as being prepared for "litigation" even after the administrative proceedings have begun. *See, e.g.*, *Flores v. Fourth Court of Appeals*, 777 S.W.2d 38, 40 (Tex. 1989).

representative of a party, including his or her agent.”<sup>139</sup> The work product doctrine protects both opinion work product and non-opinion work product,<sup>140</sup> but protection for opinion work product is greater than that for non-opinion work product.<sup>141</sup> To gain access to non-opinion work product, the party seeking the information must show a substantial need for the document and undue hardship or prejudice that would result if they are denied such access.<sup>142</sup> For opinion work product, however, the party seeking access must make a much more persuasive showing.<sup>143</sup>

*b. Work Product Versus the Attorney-Client Privilege*<sup>144</sup>

Although courts consider the work product doctrine to be “distinct from and broader than the attorney-client privilege,”<sup>145</sup> the two doctrines are often “inseparable twin issues” because “[w]henever the attorney-client privilege is raised in on-going litigation, concomitantly the work product doctrine is virtually omnipresent.”<sup>146</sup> Thus, understanding how the attorney-client privilege both differs from and overlaps with the work product doctrine, is crucial to any analysis of the appropriate scope of one or the other.

Although the work product doctrine and the attorney-client privilege are strongly allied, they have different purposes and are justified on different public policy grounds.<sup>147</sup> According to many federal courts, the purpose of the work product doctrine is to create a “zone of privacy in which a lawyer

139. *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.*, 175 F.R.D. 431, 434 (W.D.N.Y. 1997); *see also NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 128 (N.D.N.Y. 2007) (“[P]repared by or for a party, or by or for his representative, may be cloaked by this doctrine as well.”); *In re Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213, 221 (S.D.N.Y. 2001).

140. *See NXIVM Corp.*, 241 F.R.D. at 126–27; *see also supra* note 122 (describing the two types of work product). For a detailed explanation of the types of work product and requisite showing to pierce work product protection, *see generally* Anderson et al., *supra* note 99.

141. *See NXIVM Corp.*, 241 F.R.D. at 126–27 (“At a minimum, such ‘opinion’ work product should remain protected until and unless a highly persuasive showing is made.”); *see also In re Grand Jury Proceedings*, 219 F.3d 175, 190–91 (2d Cir. 2000); *Haugh v. Schroder Inv. Mgmt. N. Am., Inc.*, No. 02 CIV. 7955 (DLC), 2003 U.S. Dist. LEXIS 14586, at \*14 (S.D.N.Y. Aug. 25, 2003).

142. *See NXIVM Corp.*, 241 F.R.D. at 126–27.

143. *See Hickman v. Taylor*, 329 U.S. 495, 512 (1947) (“[T]he general policy against invading the privacy of an attorney’s course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.”); *NXIVM Corp.*, 241 F.R.D. at 126–27.

144. This section only highlights the differences that are relevant to the subject of this Article. An example of another difference is that the attorney-client privilege is not a federal rule of civil procedure, and therefore the state’s attorney-client privilege law applies when dealing with a state law issue. *NXIVM Corp.*, 241 F.R.D. at 124.

145. *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975).

146. *NXIVM Corp.*, 241 F.R.D. at 126; *see also* Beardslee, *supra* note 44, at 755 n.146 (Resultantly, courts are often imprecise when applying the two doctrines, relying on one to support the other” and claiming that “[s]ome [courts] use work-product to side-step attorney-client privilege issues”).

147. *See Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 150–51 (D. Del. 1977).

can prepare and develop legal theories and strategy ‘with an eye toward litigation,’ free from unnecessary intrusion by his adversaries.”<sup>148</sup> As one court explained:

the purpose of the work product privilege is to prevent a potential adversary from gaining an unfair advantage over a party by obtaining documents prepared by the party or its counsel in anticipation of litigation which may reveal the party’s strategy or the party’s own assessment of the strengths and weaknesses of its case.<sup>149</sup>

The purpose of the attorney-client privilege is to encourage complete and frank discussion so that the lawyer can provide the client with fully informed, competent advice and assist the client in complying with the law.<sup>150</sup> Thus, the work product doctrine directly promotes the integrity of the adversary system, as opposed to the attorney-client privilege which only does so indirectly by protecting communications and encouraging full disclosure, thereby supporting the health and integrity of the attorney-client relationship, an integral component of the adversary system.<sup>151</sup>

In keeping with their purposes, the two doctrines protect different types of information and communication.<sup>152</sup> For the most part, the attorney-client privilege only protects those communications between lawyers and clients

148. *United States v. Adlman (Adlman II)*, 134 F.3d 1194, 1196 (2d Cir. 1998) (quoting *Hickman*, 329 U.S. at 510–11); see *Hickman*, 329 U.S. at 511 (noting that without such protection, “[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.”); *In re Grand Jury Subpoenas*, 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003); *Haugh v. Schroder Inv. Mgmt. N. Am., Inc.*, No. 02 CIV. 7955 (DLC), 2003 U.S. Dist. LEXIS 14586, at \*12–13 (S.D.N.Y. Aug. 25, 2003) (“The [work product] doctrine protects a lawyer’s ability to prepare his client’s case, protects against the disclosure of the attorney’s mental impressions, conclusions, strategies, or theories, and also avoids the unfairness that would occur if one party were allowed to appropriate the work of another.”).

149. *United States v. Textron Inc.*, 507 F. Supp. 2d 138, 152 (D.R.I. 2007), *overruled on other grounds*, 577 F.3d 21 (1st Cir. 2009); see *infra* note 229 and accompanying text.

150. See *supra* note 84 and accompanying text.

151. See *Westinghouse Elec. Corp. v. Republic of the Phil. (Westinghouse II)*, 951 F.2d 1414, 1428 (3d Cir. 1991); *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *Hercules*, 434 F. Supp. at 150 (“The purpose of the attorney-client privilege is to encourage full disclosure of information between an attorney and his client by guaranteeing the inviolability of their confidential communications. The ‘work product of the attorney’, on the other hand, is accorded protection for the purpose of preserving our adversary system of litigation by assuring an attorney that his private files shall, except in unusual circumstances, remain free from the encroachments of opposing counsel.” (quoting *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 (N.D. Ohio 1953))); see also *United States v. Zolin*, 491 U.S. 554, 562 (1989) (defining the central purpose of the privilege as “‘encourag[ing] full and frank communication between attorneys and their clients’” (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981))).

152. There are some similarities of course. Like the attorney-client privilege, the work product doctrine does not protect non-privileged facts. *NXIVM Corp.*, 241 F.R.D. at 127; *Adlman II*, 134 F.3d at 1197 (noting that in most instances an attorney’s work product “receive[s] special protection not accorded to factual material”). Also, the determination of whether either doctrine applies is done on a case-by-case basis. *Republic of the Philippines v. Westinghouse Elec. Corp. (Westinghouse I)*, 132 F.R.D. 384, 389 (D.N.J. 1990).

geared toward garnering legal advice.<sup>153</sup> Although courts will protect communications that mix business and law,<sup>154</sup> “[w]hen an attorney is consulted in a capacity other than as a lawyer, as (for example) a policy advisor, media expert, business consultant, banker, referee or friend, that consultation is not privileged.”<sup>155</sup> Thus, the attorney-client privilege doctrine always requires courts to make the tenuous distinction between legal and business advice in the corporate context. The work product doctrine, on the other hand, arguably does not. It protects work produced in anticipation of litigation or for trial regardless of whether those materials contain legal advice or are primarily for the provision of legal advice.<sup>156</sup> This is true under both work product tests. If the work was created “because of” anticipated litigation or for trial or if the primary motivation behind it was to assist in pending or anticipated litigation, it is protected.<sup>157</sup>

The work product doctrine is generally designed to be less easily waived than is the attorney-client privilege.<sup>158</sup> Although there are a few key exceptions, for the most part, the attorney-client privilege does not apply or is considered waived when information, otherwise confidential, is shared with third parties.<sup>159</sup> This is because one of the primary reasons for the attorney-client privilege is to promote the exchange of information between attorney and client.<sup>160</sup> If that information is easily shared with a third party,

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153. See *Zenith Radio Corp. v. Radio Corp. of Am.*, 121 F. Supp. 792, 794 (D. Del. 1954) (“When he acts as an advisor, the attorney must give predominantly legal advice to retain his client’s privilege of non-disclosure, not solely, or even largely, business advice.”); see also *McCaugherty v. Siffermann*, 132 F.R.D. 234, 238 (N.D. Cal. 1990) (explaining that the communication must be “made primarily for the purpose of generating legal advice” in order for the attorney-client privilege to apply).

154. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950) (“[T]he privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.”); cf. *United States v. Int’l Bus. Mach. Corp.*, 66 F.R.D. 206, 212 (S.D.N.Y. 1974).

155. *In re Cnty. of Erie*, 473 F.3d 413, 421 (2d Cir. 2007) (citing *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998) (noting that in instances where attorneys consult on non-legal matters, those consultations are not privileged)); *Colton v. United States*, 306 F.2d 633, 638 (2d Cir. 1962) (“Attorneys frequently give to their clients business or other advice which, at least insofar as it can be separated from their essentially professional legal services, gives rise to no privilege whatever.”).

156. See *supra* note 137 and accompanying text. For a more complete description of what the work product covers and how it is applied, see *infra* Parts II.B.2, III.

157. See *infra* Part II.B.2. That said, as will be explored further, the work product doctrine enables courts to determine protection based on a distinction between law and business, that is, whether the work was for legal as opposed to business purposes. See *infra* notes 310–311 and accompanying text.

158. See *Westinghouse I*, 132 F.R.D. 384, 389 (D.N.J. 1990). However, “[t]he privilege derived from the work product doctrine is not absolute.” *United States v. Nobles*, 422 U.S. 225, 239 (1975).

159. See *Cavallaro v. United States*, 284 F.3d 236, 246 (1st Cir. 2002); cf. *United States v. Textron Inc.*, 507 F. Supp. 2d 138, 152 (D.R.I. 2007), *overruled on other grounds*, 577 F.3d 21 (1st Cir. 2009). There are, however, two exceptions—for a detailed discussion and analysis of these exceptions, see Beardslee, *supra* note 44, at 744–51.

160. *Upjohn Co. v. United States*, 449 U.S. 383, 390–93 (1981); *Westinghouse I*, 132 F.R.D. at 388.

then the need for and expectation of confidentiality disappears.<sup>161</sup> The opposite is true of the work product doctrine. The work product doctrine is primarily intended to protect work product from disclosure to a party's adversaries—not third parties whose expertise may prove helpful to the attorney in analyzing the strength and weaknesses of his/her case and developing case strategies and theories. Thus, most courts hold that waiver occurs only when disclosure enables access to the confidential information by an adversary.<sup>162</sup> As courts have explained, “[a] disclosure made in the pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege.”<sup>163</sup> This is because

impressions and strategies are not always created in a vacuum, but, rather are generated in cogent discourse with others, including the clients and agents. Further, the exchange of such documents and ideas with those whose expertise and knowledge of certain facts can help the attorney in the assessment of any aspect of the litigation does not invoke a waiver of the doctrine.<sup>164</sup>

Thus, the doctrine “is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial.”<sup>165</sup> Indeed, work product can be shown to others “simply because there [is] some good reason to show it” without compromising its work product status.<sup>166</sup>

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161. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947) (explaining that waiver occurs because there is no expectation of confidentiality); see *Westinghouse II*, 951 F.2d 1414, 1424 (3d Cir. 1991).

162. See *Westinghouse II*, 951 F.2d at 1428 (citing *U.S. v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)); *Textron*, 507 F. Supp. 2d at 152 (“The [attorney-client] privilege . . . is designed to protect confidentiality, so that any disclosure outside the magic circle is inconsistent with the privilege; by contrast, work product protection is provided against ‘adversaries,’ so only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection.” (quoting *United States v. Mass. Inst. of Tech.*, 129 F.3d 681, 687 (1st Cir. 1997))); *Gutter v. E.I. Dupont de Nemours & Co.*, No. 95-CV-2152, 1998 WL 2017926, at \*3 (S.D. Fla. May 18, 1998) (“While disclosure to outside auditors may waive the attorney-client privilege, it does not waive the work product privilege.”); 8 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2024 (3d ed. 2010) (citing cases). But see *Russo v. Cabot Corp.*, No. 01-2613, 2001 U.S. Dist. LEXIS 23861, at \*6–9 (E.D. Pa. Oct. 26, 2001) (applying the common interest doctrine and the same waiver analysis); *id.* at \*7 n.6 (“While the cases deal with attorney-client privilege and not specifically with the work product doctrine, we see no reason to treat these principles differently for purposes of waiver.”).

163. *AT&T*, 642 F.2d at 1299.

164. *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 128 (N.D.N.Y. 2007).

165. *United States v. Nobles*, 422 U.S. 225, 238–39 (1975). For a discussion of whether or not the work product doctrine protects materials actually created by these third parties either under the direction of the attorney or independently, see *infra* Part II.B.2.c.

166. *Adlman II*, 134 F.3d 1194, 1200 n.4 (2d Cir. 1998). This is not true, however, for testifying experts. FED. R. CIV. P. 26(b)(4) (explaining that such testifying experts can be deposed). But see *NXIVM Corp.*, 241 F.R.D. at 138 (“In fact, in most respects, the discussion of a third party waiver is virtually the same for both the attorney-client privilege and the work product doctrine. A voluntary disclosure of work product, for some or any



One large difference between the two doctrines, aside from the temporal restrictions around application of the work product doctrine, is that the work product doctrine has an escape hatch that the attorney-client privilege does not.<sup>167</sup> As mentioned above, work product protection can be pierced with certain showings of need.<sup>168</sup> The attorney-client privilege is considered a rule of substance and therefore the state's attorney-client privilege rules apply in federal court when jurisdiction is based on diversity of the parties.<sup>169</sup> The work product doctrine, however, is a rule of the FRCP, and, therefore, it is universally applied in federal court regardless of whether federal jurisdiction is based on diversity of the parties or a federal question. Unfortunately, however, this universality has not produced a uniform standard or application of the work product rule.<sup>170</sup> It is to these differences that this Article turns next.

## 2. General Area of Debate: "In Anticipation of Litigation" or "Preparation for Trial"

As mentioned above, the Federal Rules of Civil Procedure state that work product protection applies to work "prepared in anticipation of litigation or for trial."<sup>171</sup> But what this exactly means is unclear. Put simply, to determine if work product applies, courts generally ask three questions.<sup>172</sup>

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inexplicable benefit, to a third party, especially if the party is an adversary, may waive the immunity.").

167. However, in some state courts, attorney-client privilege protection is not absolute and can be overcome with the requisite showing of need, relevance, and hardship. *See, e.g.,* Leonen v. Johns-Manville, 135 F.R.D. 94, 100 (D.N.J. 1990) (applying state law); Payton v. N.J. Tpk. Auth., 678 A.2d 279, 288 (N.J. Super. Ct. App. Div. 1996) ("The [attorney-client] privilege may be pierced upon a showing of need, relevance and materiality, and the fact that the information could not be secured from any less intrusive source.").

168. *See supra* note 142 and accompanying text.

169. *FED. R. EVID.* 501; Rhone-Poulenc Rorer Inc. v. Home Indem. Co., 32 F.3d 851, 861 (3d Cir. 1994) (noting that Pennsylvania law applies insofar as the "Federal Rules of Evidence 501 and 1101(c) provide that we should apply state law in determining the extent and scope of the attorney-client privilege"); *Russo v. Cabot Corp.*, No. 01-2613, 2001 U.S. Dist. LEXIS 23861, at \*10 (E.D. Pa. Oct. 26, 2001).

170. Evidently, there is little uniformity across state courts as well. Work product protection in some state courts is narrower. For example, in New York, work product is protected only when the item was "prepared exclusively for litigation." *Agovino v. Taco Bell*, 225 A.D.2d 569, 571 (N.Y. App. Div. 1996). Additionally, some state courts only provide absolute protection for tangible documents that reflect an attorney's mental impressions or legal theories. *Imwinkelried, supra* note 137, at 21-22 (explaining that work product does not protect communications between attorneys and non-testifying experts in a minority of states). Other states apply the work-product doctrine to unconditionally protect attorneys' "impressions, conclusions, [and] opinions" that are written down. *Williamson v. Superior Court of L.A. Cnty.*, 582 P.2d 126, 129 (Cal. 1978) ("Accordingly, [the California Code of Civil Procedure] affords a conditional or qualified protection for work product generally, and an absolute protection as to an attorney's impressions and conclusions.").

171. *FED. R. CIV. P.* 26(b)(3).

172. As will be apparent from the description below, these three questions are not necessarily each addressed by every court and, sometimes the questions morph into one another. But generally, these are the three questions that, either alone or in combination, are asked by courts to help make the work product determination. The larger question may be

First, there is the question of timing: at what point is litigation sufficiently probable that materials are prepared in anticipation of it? Second, courts look to what motivated the development of the work—whether it was conducted because of, or was primarily motivated by the pending litigation or upcoming trial.<sup>173</sup> Third, and often considered along with the second inquiry, courts ask if the work for which protection is sought would have been prepared in the ordinary course of business.<sup>174</sup>

#### a. Temporal Question

Courts recognize that the work product doctrine can protect material that parties prepare even before they file a lawsuit.<sup>175</sup> That said, when the possibility of litigation is remote, courts do not consider material to be prepared in anticipation of litigation.<sup>176</sup> Nor does “[t]he mere fact that litigation does eventually ensue . . . by itself, cloak materials prepared by an attorney with the protection of the work product privilege.”<sup>177</sup> Instead, courts require that the litigation be objectively “likely” or “foreseeable.”<sup>178</sup>

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what is the theory behind litigation—a question the Author intends to address at a later day in a forthcoming article.

173. As will be discussed further *infra*, these are actually two different standards: “because of” and “primarily motivated by.”

174. The original Advisory Committee notes to FRCP 26(b)(3) stated that “[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by [the rule].” FED. R. CIV. P. 26(b)(3) advisory committee notes (1970 amendments); *cf.* *Amway Corp. v. Proctor & Gamble Co.*, No. 1:98-CV-726, 2001 WL 1818698, at \*6 (W.D. Mich. Apr. 3, 2001) (“The concept of “anticipation of litigation” embodies both a temporal and motivational aspect.”).

175. *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657-L, 2007 U.S. Dist. LEXIS 23164, at \*9 (E.D. La. Mar. 5, 2007) (noting that “the existence of litigation is not a prerequisite”); *see also* *Upjohn Co. v. United States*, 449 U.S. 383, 401–02 (1981) (applying work product protection even though at the time the documents were prepared, there were no threatened proceedings against the company); *In re Sealed Case*, 146 F.3d 881, 886 (D.C. Cir. 1998) (applying the work product doctrine despite the fact that when the document was prepared no claim had been filed); *In re Grand Jury Investigation*, 599 F.2d 1224, 1229 (3d Cir. 1979) (explaining that work product protection “extends to material prepared or collected before litigation actually commences”). Indeed, there is no requirement that a specific claim be made or even contemplated. *In re Sealed Case*, 146 F.3d at 887 (holding that “where, as here, lawyers claim they advised clients regarding the risks of potential litigation, the absence of a specific claim represents just one factor that courts should consider in determining whether the work-product privilege applies”).

176. *See* *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (explaining that the “remote prospect of future litigation” is not “in anticipation of litigation” and is not work product); *Garfinkle v. Arcata Nat’l Corp.*, 64 F.R.D. 688, 690 (S.D.N.Y. 1974) (holding that the remote possibility of litigation does not meet this requirement).

177. *Binks Mfg. Co. v. Nat’l Presto Indus.*, 709 F.2d 1109, 1118 (7th Cir. 1983).

178. *In re Sealed Case*, 146 F.3d at 884 (“For a document to meet this standard, the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.”); *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980); *Amway*, 2001 WL 1818698, at \*6 (“[Work product protection] is not applicable, however, unless some specific litigation is fairly foreseeable at the time the work product is prepared.”); *In re Grand Jury Proceedings*, No. M-11-189, 2001 WL 1167497, at \*13 (S.D.N.Y. Oct. 3, 2001) (“A document is prepared in anticipation of litigation if there is the threat of some adversary proceeding, the document

Moreover, given the litigious society in which we live and the reality that businesses, like tobacco companies, insurance agencies, and banks, are almost always contemplating or facing litigation, courts often interpret these concepts very narrowly.<sup>179</sup>

A good example of how courts have applied the concept narrowly is the opinion in *Binks Manufacturing Co. v. National Presto Industries, Inc.* by the U.S. Court of Appeals for the Seventh Circuit's<sup>180</sup> In that case, Binks sought payment for equipment it had sold to Presto after Presto refused to pay because it claimed the equipment was faulty.<sup>181</sup> To determine if litigation was reasonably "anticipated," the court reviewed a series of correspondence between the two companies. At first the letters were non-threatening. The letters made clear that Binks wanted Presto to pay for the equipment or, it claimed, Binks would "make arrangements to dismantle and remove the equipment."<sup>182</sup> Presto wanted Binks to fix the equipment before it would pay. The correspondence culminated in a letter from Presto to Binks, which stated that unless Binks fixed the equipment, Presto would send a team to the plant to begin corrective work on the equipment, leading to major associated costs. Further, Presto warned:

If you persist in your choice not to make the necessary corrections, we shall have to proceed on our own and continue to hold you fully responsible for any damages and expenses incurred.<sup>183</sup>

Within two weeks of this letter, Presto sent an in-house attorney to the plant to investigate and conduct interviews about the problems.<sup>184</sup> The attorney summarized his findings, provided descriptions of some of the interviews, and recommended a negotiation strategy in memoranda to Presto's general counsel. Additionally, he sent a memorandum to Presto's Production Manager that, among other things, depicted the general counsel's opinion as to the "allocation of responsibility between Presto and Binks for each of the System's respective breakdowns."<sup>185</sup>

Based on the correspondence between the two companies, however, the court found that at the time these memoranda were written, there was merely the *remote* possibility of litigation.<sup>186</sup> Although it found that

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was prepared because of that threat and the document was created after that threat became real."); *Resident Advisory Bd. v. Rizzo*, 97 F.R.D. 749, 754 (E.D. Pa. 1983) ("The abstract possibility that an event might be the subject of future litigation will not support a claim of privilege . . .").

179. Patricia L. Andel, *Inapplicability of the Self-Critical Analysis Privilege to the Drug and Medical Device Industry*, 34 SAN DIEGO L. REV. 93, 102 (1997) ("[T]he requirement that the information be compiled 'in anticipation of litigation' has been interpreted narrowly.")

180. 709 F.2d 1109.

181. *Binks Mfg. Co.*, 709 F.2d at 1112-13. Binks believed that the equipment was "defectively manufactured," while Presto believed Binks had not installed the system properly. *Id.* at 1112.

182. *Id.* at 1119.

183. *Id.* at 1120.

184. *Id.* at 1113.

185. *Id.*

186. *Id.* at 1120. The first memo written to the general counsel had been protected as work product by the lower court and that decision was not appealed. *Id.* at 1120 n.8.

Presto's letters were "threatening," it concluded that they "[f]ell short of stating that Presto intended to institute litigation concerning the System. Rather, the letters clearly state[d] that Presto still intended to persuade Binks to correct the problems in the System and, falling short of that, to withhold full payment of the purchase price of the System."<sup>187</sup> Further, the court emphasized that the letters indicated that Presto would send "experts" [i.e., the in-house attorney] to fix the equipment and did not actually state that the visit by the experts was to prepare for litigation.<sup>188</sup> The court reached its decision even though the letters from the general counsel made clear that lawyers were involved and that litigation eventually did ensue.<sup>189</sup>

Thus, to meet this part of the work product doctrine, litigation needs to be actually pending or "impending"—"about to happen" or "imminent"<sup>190</sup>—much like a marriage is "impending" after an engagement. And this is true even if at the time the court is deciding whether work product protection should apply, the actual litigation is already underway.

*b. The "Primary Motivating Purpose" Test, the "Because of" Test, and the Ordinary Course of Business Exception*

Over time, two principle tests have emerged to define the non-temporal aspect to the "in anticipation of litigation" requirement: the "because of" test and the "primary motivating purpose" test. Currently, the thirteen federal appellate courts are split over what test to use. The majority of them apply the "because of" test.<sup>191</sup> They protect documents if they "were

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However, the court noted that it would have, had it been appealed, determined that this first memo was also "not prepared in anticipation of litigation." *Id.* Therefore, it disagreed with Presto's argument that it was a disconnect to decide that litigation was not "anticipated" at the time of the later two memos since they were written after the protected one. *Id.*

187. *Id.* at 1120 (explaining that because there was only "the remote prospect of litigation" and no "articulable claim, likely to lead to litigation," when the memoranda were prepared, the memoranda were like any other "investigative report developed in the ordinary course of business") (internal quotations omitted).

188. This naively assumes that companies always apprise the other side when it is beginning to prepare its case in order file a cause of action. *Id.*

189. *Id.*

190. DICTIONARY.COM, <http://dictionary.reference.com/browse/impending> (last visited Mar. 23, 2011) (defining "impending" as, first and foremost, "about to happen; imminent: *their impending marriage*" and secondarily as "imminently threatening or menacing: *an impending storm*"). Although there is some support for the view that the work product must be related to litigation that is pending or impending to be protected, many courts have decided otherwise. *See Rattner v. Netburn*, No. 88 Civ. 2080 (GLG), 1989 U.S. Dist. LEXIS 6876, at \*17 n.3 (S.D.N.Y. June 20, 1989); *United States v. Int'l Bus. Mach. Corp.*, 66 F.R.D. 154, 178 (S.D.N.Y. 1974); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D. Pa. 1970). Instead, courts "hold that the rule affords protection at least in lawsuits that are related to the litigation for which the document was prepared." *Rattner*, 1989 U.S. Dist. LEXIS 6876, at \*17 n.3 (citing multiple cases in support of the proposition); *id.* (explaining that "some cases have indicated that the work-product rule may be invoked in any litigation, whether or not related").

191. The U.S. Courts of Appeals for the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits apply the "because of" standard. *See, e.g., United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir. 2006) ("Today, we join our sister circuits and adopt the 'because of' test as the standard for determining whether documents were prepared 'in

prepared ‘because of’ existing or expected litigation.”<sup>192</sup> If, on the one hand, the document “would have been prepared irrespective of the expected litigation,” then protection will not be provided.<sup>193</sup> On the other hand, if the anticipated litigation was in any way part of the impetus for creating the work, then the work can be protected under the “because of” test.<sup>194</sup>

Other courts apply a higher standard and only protect material when the “primary motivating purpose” behind the creation of the work was to assist in pending or anticipated litigation.<sup>195</sup> Thus, as the Second Circuit has pointed out, the “primary motivating purpose” test “would potentially exclude documents containing analysis of expected litigation, if their primary, ultimate . . . purpose is to assist in making the business decision” whereas the “because of” test enables protection for “such documents, despite the fact that their purpose is *not* to ‘assist in’ litigation.”<sup>196</sup> The

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anticipation of litigation.”); *United States v. Torf* (*In re* Grand Jury Subpoena), 357 F.3d 900, 907 (9th Cir. 2004) (“[W]e join a growing number of our sister circuits in employing the formulation of the ‘because of’ standard.”); *Adlman II*, 134 F.3d 1194, 1195, 1198 (2d Cir. 1998); *Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) (“The document must be prepared *because* of the prospect of litigation when the preparer faces an actual claim or a potential claim following an actual event or series of events that reasonably could result in litigation.”); *Senate of P.R. v. U.S. Dept. of Justice*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987) (explaining that whether an investigation is underway is not dispositive but rather “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” (internal citations and quotations omitted)); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987); *Binks Mfg. Co.*, 709 F.2d at 1118–20; *In re* Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979) (“[T]he test should be 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.” (internal citations and quotations omitted)).

The U.S. Courts of Appeals for the Tenth and Eleventh Circuits have yet to explicitly adopt or reject either of the tests. *See* Pease-Wingenter, *supra* note 2, at 145 n.144 (“[A]s of this writing, neither the Tenth nor the Federal Circuit has adopted either the ‘primary purpose’ or the ‘because of’ test.”). However, it appears that the Eleventh Circuit, if forced to choose, would adopt the “because of” test. *Regions Fin. Corp. v. United States*, No. 2:06-CV-00895-RDP, 2008 WL 2139008, at \*5 (N.D. Ala. May 8, 2008) (stating that no binding decision clearly adopted the “primary motivating purpose” test and predicting that, if it had to decide on which standard the Eleventh Circuit would employ, it would likely be the “because of litigation” test).

192. *Adlman II*, 134 F.3d at 1195, 1198; *see also* *United States v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002) (explaining that Rule 26(b)(3) does not “state that a document must have been prepared *to aid* in the conduct of litigation in order to constitute work product, much less *primarily or exclusively* to aid in litigation. Preparing a document ‘in anticipation of litigation’ is sufficient.” (quoting *Adlman II*, 134 F.3d at 1198, 1202))).

193. *Adlman II*, 134 F.3d at 1195, 1204–05.

194. *Id.* at 1198.

195. *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985) (“If the primary motivating purpose behind the creation of the document is not to assist in pending or impending litigation, then a finding that the document enjoys work product immunity is not mandated.”); *see also* *Adlman II*, 134 F.3d at 1197–98 (explaining that some courts protect documents if they were “prepared because of expected litigation,” but that others do so only if they were prepared “‘primarily or exclusively to assist in litigation,’” which is a higher standard); *United States v. El Paso Co.*, 682 F.2d 530, 542–43 (Former 5th Cir. 1982).

196. *Adlman II*, 134 F.3d at 1198 (emphasis added).

“because of” test, therefore, is a very liberal test.<sup>197</sup> That said, as will be explicated below, some courts that claim to be applying the “because of” test deny protection when the work in question does not actually help or aid the anticipated litigation in some way.<sup>198</sup>

The ordinary course of business exception was derived from the advisory committee’s notes to FRCP 26.<sup>199</sup> Generally speaking, the work product doctrine protects documents that were created for both litigation and business purposes.<sup>200</sup> However, materials are not protected if they would have been produced in the ordinary course of business in a substantially similar form,<sup>201</sup> even if the party believes at the time the work is conducted that the work would be helpful if litigation ensues.<sup>202</sup> That said, when materials that would have been created in the ordinary course of business are made in a substantially different way, they are supposed to be protected.

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197. See Pease-Wingenter, *supra* note 2, at 148 (indicating that the correct interpretation of the “because of” test as outlined by Wright & Miller’s Federal Practice and Procedure, does not require that the work be useful in anticipated litigation).

198. See, e.g., *United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21, 30 (1st Cir. 2009) (claiming to apply the “because of” test, but instead applying a “prepared for use” in litigation test); *id.* at 32–33 (Torruella, J., dissenting) (contending that the majority claims to follow the “because of” test, but instead applies a different and more rigorous standard); *United States v. Textron Inc. & Subsidiaries*, 507 F. Supp. 2d 138, 150–51 (D.R.I. 2007); see also Pease-Wingenter, *supra* note 2, at 150; Douglas S. Stransky, *United States v. Textron, Inc.: The First Circuit En Banc Eviscerates the Work Product Doctrine and Creates a New “Prepared For” Test*, PRAC. U.S./DOMESTIC TAX STRATEGIES, July 2009, at 1, 3 (describing *Textron* as placing a “severe restriction” on work product protection); *infra* note 270; *infra* notes 341–351 and accompanying text (explaining the test applied by *Textron*).

199. FED. R. CIV. P. 26 advisory committee’s note, 48 F.R.D. 487, 499 (1970).

200. *Textron*, 577 F.3d at 41; *NXIVM Corp. et al. v. O’Hara*, 241 F.R.D. 109, 128 (N.D.N.Y. 2007) (“The crux being that a document which has been prepared because of the prospect of litigation will not lose its protection under the work product doctrine, even though it may assist in business decisions.”).

201. *Adlman II*, 134 F.3d at 1202 (“[T]he ‘because of’ formulation that we adopt here withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation.”); *Linde Thomson Langworthy Kohn & Van Dyke v. Resolution Trust Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993) (“A litigant must demonstrate that documents were created ‘with a specific claim supported by concrete facts which would likely lead to litigation in mind’ . . . not merely assembled in the ordinary course of business or for other nonlitigation purposes.” (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980))); *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657-L, 2007 U.S. Dist. LEXIS 23164, at \*9 (E.D. La. Mar. 5, 2007) (“[T]he work-product doctrine ‘does not protect materials assembled in the ordinary course of business, pursuant to regulatory requirements, or for other non-litigation purposes.’” (quoting *Carroll v. Praxair, Inc.*, No. 05-0307, 2006 U.S. Dist. LEXIS 43991, at \*2 (W.D. La. June 28, 2006))).

202. *Redvanly v. NYNEX Corp.*, 152 F.R.D. 460, 465 (S.D.N.Y. 1993); see also *U.S. v. Roxworthy*, 457 F.3d 590, 598–99 (6th Cir. 2006) (“[D]ocuments do not lose their work product privilege ‘merely because [they were] created in order to assist with a business decision,’ unless the documents ‘would have been created in essentially similar form irrespective of the litigation.’” (quoting *Adlman II*, 134 F.3d at 1202)); *Adlman II*, 134 F.3d at 1195 (“Where a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation, it falls within Rule 26(b)(3).”).

Arguably, this is because the differences expose counsel's thought processes to adversaries.<sup>203</sup>

It appears from the case law that courts handle this exception in two ways. Some courts interpret the exception to be an overarching rule to which one of the two motivating factor tests is applied. Essentially, when courts interpret the exception this way, they attempt to determine whether the work was routine by focusing on the motivation behind the work.<sup>204</sup> For example, in *Soeder v. General Dynamics Corp.*,<sup>205</sup> after a plane crash, the aircraft manufacturer conducted an investigation and developed an "In-House" Accident Report."<sup>206</sup> The court found that the report was developed in the ordinary course of business and not because of the potential litigation:

Certainly litigation is a contingency to be recognized by any aircraft accident. However, given the equally reasonable desire of Defendant to improve its aircraft products, to protect future pilots and passengers of its aircraft, to guard against adverse publicity in connection with such aircraft crashes, and to promote its own economic interests by improving its prospect for future contracts for the production of said aircraft, it can hardly be said that Defendant's "in-house" [accident] report is not prepared in the ordinary course of business.<sup>207</sup>

As one court explained, this exception is "a necessary corollary, when it is clear that documents 'would have been prepared independent of any anticipation of use in litigation (i.e., because some other purpose or obligation was sufficient to cause them to be prepared), no work product can attach.'"<sup>208</sup> Unsurprisingly, if one side asserts that documents were

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203. Based on this same reasoning, there is "a 'narrow exception' to the general rule that third-party documents in the possession of an attorney do not merit work product protection." *In re Grand Jury Subpoenas Dated March 19, 2002 & August 2, 2002*, 318 F.3d 379, 386 (2d Cir. 2003). When the party asserting work product protection can "show 'a real, rather than speculative, concern' that counsel's thought processes 'in relation to pending or anticipated litigation' will be exposed through disclosure of the" compilation of third party documents by counsel, then they can be protected. *Id.*

204. *MSF Holding Ltd. v. Fiduciary Trust Co. Int'l*, No. 03 CIV 1818PKLJCF, 2005 WL 3046287, at \*1 (S.D.N.Y. Nov. 10, 2005) (explaining that the "the ['because of'] rule is intended to distinguish material that is truly attorney work product from that which would be created in the normal course of business").

205. 90 F.R.D. 253 (D. Nev. 1980).

206. *Id.* at 254.

207. *Id.* at 255; *see also* *ADT Sec. Serv., Inc. v. Swenson*, No. 07-2983 (JRT/AJB), 2010 WL 2954545, at \*3 (D. Minn. July 26, 2010); *Testwuide v. United States*, No. 01-201L, 2006 WL 5625760, at \*7 (Fed. Cl. Aug. 7, 2006) ("Because some of the documents involved in this dispute were apparently produced both for the purpose of litigation and to comply with NEPA, the Court had to determine whether the documents 'would have been created in essentially similar form irrespective of the litigation' for '[i]t is well established that work product privilege does not apply to such documents.'" (quoting *Adlman II*, 134 F.3d at 1202)).

208. *Amway Corp. v. Proctor & Gamble Co.*, No. 1:98-CV-726, 2001 WL 1818698, at \*6 (W.D. Mich. Apr. 3, 2001) (quoting *First Pac. Networks, Inc. v. Atl. Mut. Ins. Co.*, 163 F.R.D. 574, 582 (N.D. Cal. 1995)); *see also* 8 WRIGHT ET AL., *supra* note 162, at § 2024 (explaining that the test should be the "because of" test, "[b]ut that the converse of this is that even though litigation is already in prospect, there is no work product immunity for

prepared “because of” or primarily for litigation, the other side counters that the documents were prepared in the ordinary course of business.<sup>209</sup> Additionally, the because of test is sometimes described in the context of the “ordinary course of business” exception.<sup>210</sup>

Alternatively, other courts consider the exception to be a test in its own right that essentially trumps the need to apply either of the motivating factor tests. For example, in *Hardy v. New York News, Inc.*,<sup>211</sup> to determine whether a group of documents were prepared in the ordinary course of business, the court considered whether the work was similar to the work of that person’s “general” and “continued” function at the company and emphasized that some work was required “annually” and was part of the company’s “long range management policy.”<sup>212</sup>

*c. Materials Prepared by the Attorney Versus Materials Prepared By Others*

It is fairly clear that the work product doctrine protects materials by non-lawyers. While the Restatement of the Law Governing Lawyers states that work product protection applies to materials prepared by a lawyer,<sup>213</sup> it acknowledges that “[f]ederal and state discovery rules accord work-product protection to others, including personnel who assist a lawyer, and to litigation preparation of a party and the party’s representatives.”<sup>214</sup> FRCP 26(b) supports this interpretation and indeed, does not specify that a lawyer has to be involved with the preparation of the materials at all.<sup>215</sup> In fact, the Rule does not even call the protection the “attorney work product doctrine” and makes reference to a variety of non-lawyers who might produce protected materials including the other party, consultants, and agents of the attorney.<sup>216</sup> Instead, the focus of the rule seems to be on whether the work was done in anticipation of litigation by the person preparing the work.<sup>217</sup>

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documents prepared in the regular course of business rather than for purposes of the litigation.”).

209. See, e.g., *United States v. Textron*, 507 F. Supp. 2d 138, 150 (D.R.I. 2007).

210. See, e.g., *Adlman II*, 134 F.3d at 1205 (“In short, the enforceability of the IRS summons for the Memorandum will turn on whether it (or substantially the same document) would have been prepared irrespective of the anticipated litigation and therefore was not prepared because of it.”).

211. 114 F.R.D. 633 (S.D.N.Y. 1987).

212. *Id.* at 645–46 (claiming that “the fact that documents prepared for a business purpose were also determined to be of potential use in pending litigation does not turn these documents into workproduct [sic]”); see also *SEC v. Thrasher*, No. 92 Civ. 6987 (JFK), 1995 U.S. Dist. LEXIS 1355, at \*8 (S.D.N.Y. Feb. 7, 1995).

213. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87 cmt. a (2000) (“This Section defines the work-product immunity as it applies to lawyers.”).

214. *Id.*

215. Federal Rule of Civil Procedure 26(b)(3) states that the work product doctrine protects “the mental impressions, conclusions, opinions, or legal theories of [the] attorney or other representative concerning the litigation.” FED. R. CIV. P. 26(b)(3)(B) (emphasis added).

216. FED. R. CIV. P. 26(b)(3)(A) (emphasis added) (defining “another party or its representative” as “including the other party’s attorney, consultant, . . . or agent”).

217. 1970 COMMENTS TO FEDERAL RULES OF CIVIL PROCEDURE 26, *supra* note 123.



As one scholar pointed out over twenty-five years ago, “The rule effectively abolishes the need to determine the preparer’s status and replaces it with a different form of analysis: whether or not the materials were prepared in anticipation of litigation.”<sup>218</sup>

However, the case law demonstrates that disagreement persists as to whether work product protection covers materials prepared by non-lawyers working independently without lawyer involvement.<sup>219</sup> The Supreme Court has stated that work product protection applies to materials created by agents and consultants working “for” the lawyer.<sup>220</sup> Therefore, some courts deny protection to work created by non-lawyers who acted independently.<sup>221</sup> For those courts, it is not sufficient that the non-lawyer was an agent working generally under the guidance and direction of the attorney.<sup>222</sup> Instead, the actual work must be conducted under the direction and control of a lawyer to be protected.<sup>223</sup> This line of cases may be related to those preceding the adoption of FRCP 26 in 1970 that confined protection to work that “represent[s] the product of the training, skill or knowledge of an attorney, which the work product privilege is aimed at protecting.”<sup>224</sup>

218. Anderson et al., *supra* note 99, at 869.

219. *Id.* at 866–70 (reporting similar disagreement in 1983 and citing cases in support).

220. United States v. Nobles, 422 U.S. 225, 238–39 (1975) (justifying this extension of the doctrine because “attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the [work product] doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.”); *see also In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 662 (3d Cir. 2003) (“[T]his protection extends beyond materials prepared by an attorney to include materials prepared by an attorney’s agents and consultants.”); United States v. Cabra, 622 F.2d 182, 185 (5th Cir. 1980) (providing work product protection to notes taken by a paralegal at trial).

221. One court claimed that,

[A]ny report or statement made by or to a party’s agent (other than to an attorney acting in the role of counselor), which has not been requested by nor prepared for an attorney nor which otherwise reflects the employment of an attorney’s legal expertise must be conclusively presumed to have been made in the ordinary course of business . . . .

Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367, 372 (N.D. Ill. 1972); *see also In re Public Defender Serv.*, 831 A.2d 890, 911 (D.C. 2003) (holding that where criminal defendant’s associates obtained written confession from witness at knife point, and defendant gave attorney the confession, it was not protected work product because it was not prepared by attorney or his agents).

222. *In re Grand Jury Proceedings*, No. M-11-189, 2001 WL 1167497, at \*19 (S.D.N.Y. Oct. 3, 2001) (holding that work conducted by an investigator was protected by the work product doctrine when conducted under the direction and control of a party’s counsel but not when the same investigator acted independently).

223. *Id.*; *see also Plew v. Ltd. Brands, Inc.*, No. 08 Civ. 3741 (LTS) (MHD), 2009 WL 1119414 (S.D.N.Y. Apr. 23, 2009) (holding that work product applied to emails exchanged in anticipation of litigation, between the defendant to a patent infringement suit and the defendant’s non-party supplier because defendant sent the emails requesting the information at the direction of the attorney).

224. Burke v. United States, 32 F.R.D. 213, 214 (E.D.N.Y. 1963). For a description of the three lines of cases preceding adoption of the rule, *see* Anderson et al., *supra* note 99, at 865–66.

Other courts, however, do not require a lawyer's supervision for the work product of a non-lawyer to be protected. In these jurisdictions, work product protection applies to work created completely independently by non-lawyers.<sup>225</sup> The rationale, similar to that expressed in the committee notes to FRCP 26, is that "whether a document is protected depends on the motivation behind its preparation, rather than on the person who prepares it."<sup>226</sup>

### III. THE WORK PRODUCT DOCTRINE AS APPLIED TO WORK RELATED TO PUBLIC RELATIONS

As discussed in Part I, the role of the corporate attorney has changed dramatically in the past twenty years. Globalization, changes in technology, the rise of in-house counsel, along with changing needs of clients have blurred the professional lines of expertise. Moreover, the changes have exacerbated the difficulty in determining whether and in what circumstances work product protection should be applied to areas that straddle the business/law divide.

The following section analyzes cases that assess whether the work product doctrine protects communications or materials prepared in conjunction with PR professionals. The PR context was chosen deliberately because it reflects the blurring of expertise and the effect that changes in technology, communication, and clients' needs has had on the role of the corporate attorney and the definition of litigation preparation. Attorneys today manage legal PR around corporate legal controversies, and there is disagreement about whether and how attorneys should be providing legal PR service for their corporate clients.<sup>227</sup> Moreover, in this context, the line between business and law is extremely fuzzy. It is excruciatingly difficult to discern when materials are being created for business purposes as opposed to in anticipation of litigation or for trial. While many will never be convinced that work related to PR should be protected by the work

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225. See, e.g., *Caremark, Inc. v. Affiliated Computer Servs., Inc.*, 195 F.R.D. 610, 615 (N.D. Ill. 2000) ("[M]aterials prepared in anticipation of litigation by any representative of the client are protected, regardless of whether the representative is acting for the lawyer."); *Moore v. Tri-City Hosp. Auth.*, 118 F.R.D. 646 (N.D. Ga. 1988) (holding that entries in plaintiff's diary discussing persons who could serve as witnesses in his lawsuit and attorneys who could help him were work-product even though they were made a month and a half before the plaintiff retained counsel).

Note, the case history of *Moore v. Tri-City Hospital Authority* is tumultuous. At the time *Moore* was decided, the Fifth Circuit required a substantial probability of litigation, which is a higher standard than currently applied in the Fifth Circuit. The case that impliedly overrules *Moore* is *Abdallah v. Coca-Cola Co.*, No. CIV A1:98CV3679RWS, 2000 WL 33249254 (N.D. Ga. Jan. 25, 2000), which adopts the looser "because of" standard, specifically espousing the view of *United States v. Davis*, 636 F.2d 1028 (5th Cir. 1981), from the Fifth Circuit. *Abdallah*, 2000 WL 33249254, at \*4, 8. In a related footnote, *Abdallah* claims that *Davis* remains binding on the Eleventh Circuit. *Id.* at \*4 n.1. Thus, as a substantive matter, *Moore* likely would have been decided in the same vein today.

226. *Caremark, Inc.*, 195 F.R.D. at 615; see also *United States v. Chatham City Corp.*, 72 F.R.D. 640, 642 (S.D. Ga. 1976) ("[I]f statements of witnesses are to be protected from discovery at all, the protection should not depend on who obtained the statement.").

227. See generally Beardslee, *supra* note 15; Beardslee, *supra* note 45.

product doctrine or that it has anything to do with the proper provision of “legal” services or litigation, this Article and specifically, this section, does not try to convince the non-believers. Instead, it seeks only to demonstrate that in the PR context, when applying any of the work product doctrine tests, judges: (1) attempt to make a distinction between business and law that is difficult, if not impossible, to make, and (2) infuse the work product doctrine’s tests with their own (oftentimes narrow) definition of litigation preparation and what the corporate lawyer’s role should be. There is evidence that similar maneuvers are made in other contexts,<sup>228</sup> and if this is true, then these findings have important implications for the future of corporate legal services.

#### A. The “Primary Motivating Factor” Test

Because the “primary motivating factor” test requires courts to determine whether materials were prepared primarily for use in litigation, courts are forced to make a distinction between business and legal work. Yet, as the cases addressing legal PR show, this distinction is often unworkable. For example, when faced with high profile litigation, an attorney might ask a PR consultant to provide a written analysis about how a certain trial strategy (like denial, or counterclaiming) might be perceived by the public. Although most courts would agree that this work is not done in the ordinary course of business, determining the *primary* motivation of that work may be impossible. By helping the attorney understand the chances for success, this work might help the attorney determine the best trial strategy—a strong legal motivation.<sup>229</sup> However, this work has business implications as

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228. Obviously, one fact pattern or context should not drive the law. Similar discernment issues arise, for example, in the context of failed mergers and the use of financial consultants. *See, e.g.,* Hexion Specialty Chems., Inc., v. Huntsman Corp., C.A. No. 3841-VCL, 2008 WL 3878339, at \*4 (Del. Ch. Aug. 22, 2008) (struggling to determine whether meetings with financial consultants were to help in the defense or structure of the pending litigation or merely to provide financial advising with respect to the failed merger). Such problems also arise in the context of internal investigations. As in a recent case surrounding Merck and Vioxx, on the one hand, the motivation behind an investigation into corporate wrongdoing and publication of a report of the findings that either absolve or criticize corporate managers’ behavior could be said to be “primarily intended to influence public opinion and to create positive publicity for Merck.” *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657-L, 2007 U.S. Dist. LEXIS 23164, at \*6–7 (E.D. La. Mar. 5, 2007). On the other hand, it could be argued, as Merck did, that the lawyer investigator “was retained to prepare a report in response to shareholder demands and the prospect of both litigation and governmental investigation.” *Id.* As some courts recognize, “[a]pplying a distinction between “anticipation of litigation” and “business purposes”” is blurry, “artificial,” and “unrealistic.” *In re Woolworth Corp. Sec. Class Action Litig.*, No. 94 CIV. 2217 (RO), 1996 WL 306576, at \*3 (S.D.N.Y. June 7, 1996). Moreover, courts addressing the application of the work product doctrine in other contexts make similar moves to those highlighted in this section. *See infra* notes 244, 279 and accompanying text.

229. *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999) (“The work-product privilege is intended to prevent a litigant from taking a free ride on the research and thinking of his opponent’s lawyer and to avoid the resulting deterrent to a lawyer’s committing his thoughts to paper.”); *United States v. Textron Inc.*, 507 F. Supp. 2d 138, 152 (D.R.I. 2007) (noting that “the purpose of the work product privilege is to prevent a potential adversary from gaining an unfair advantage over a party by obtaining documents prepared . . . in

well—it might help the corporation determine how a certain trial strategy or litigation tactic might impact its bottom line.

Consider a real case, *Rattner v. Netburn*.<sup>230</sup> There, litigation between the two parties had been ongoing for seven years.<sup>231</sup> Upon hearing that the plaintiff was going to publish a letter publicly damning the defendants, the defendants met with their attorneys and requested advice.<sup>232</sup> The attorneys drafted a proposed public announcement and delivered it to the client with the expectation of confidentiality.<sup>233</sup> The attorneys likely believed that an announcement crafted by the PR people could, if not worded appropriately, misrepresent the facts, the truth or the law and worse, prevent the future use of certain defenses.<sup>234</sup> But the Court found that neither the attorney-client privilege nor the work product doctrine protected the draft press release from disclosure.<sup>235</sup> In analyzing whether the work product doctrine applied, the court identified both a legal and business purpose to the attorney-drafted press release. It admitted that the press release might help the proponents to continue to litigate their case and that, without the properly crafted response, the defendants would be forced to settle.<sup>236</sup> Nevertheless, the court ultimately decided that the draft press release was designed primarily for a business purpose, “to shore up the [defendants’] political position with their constituents,” as opposed to a legal purpose.<sup>237</sup>

The “primary motivating factor” test is similar to the test used to determine whether the attorney-client privilege applies,<sup>238</sup> but there are important differences in purpose and function between the two doctrines and their tests. Specifically, to garner work product protection, the work performed in anticipation of litigation does not have to be primarily for

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anticipation of litigation which may reveal the party’s strategy or the party’s own assessment of the strengths and weaknesses of its case”).

230. No. 88 Civ. 2080 (GLG), 1989 U.S. Dist. LEXIS 6876 (S.D.N.Y. June 20, 1989). This case was decided before the Second Circuit had definitively adopted the “because of” test. *See supra* note 191 (listing cases applying the “because of” standard and explaining the test).

231. *Rattner v. Netburn*, No. 88 Civ. 2080 (GLG), 1989 U.S. Dist. LEXIS 6876, at \*6 (S.D.N.Y. June 20, 1989).

232. *Id.* at \*7.

233. *Id.* at \*11.

234. For example, if the press release was viewed as an apology, it might forestall the use of a denial in the future. An apology or expression of sympathy has been used, in other contexts, as proof of liability. *See, e.g.,* Sarah Kellogg, *The Art and Power of the Apology*, WASH. L., June 2007, at 21, 25 (noting that twenty-nine states have passed laws excluding expression of sympathy as proof of liability in medical malpractice suits and five states have passed laws that require hospitals to notify patients of adverse medical outcomes).

235. *Rattner*, 1989 U.S. Dist. LEXIS 6876, at \*14–17 (deciding that the attorney-client privilege did not apply); *id.* at \*18 (finding that defendants did not meet their burden of showing that the primary motivating purpose was to assist in the “pending or impending litigation” (quoting *United States v. Gulf Oil Corp.*, 760 F.2d 292, 296 (Temp. Emer. Ct. App. 1985))).

236. *Id.* at \*18 (“[A]lthough this is surely an understandable goal, and indeed one that might make it easier for the Village to continue to spend large sums on its lawsuits, it cannot be said that the document was for use in litigation.”).

237. *Id.*

238. *Id.* at \*15 (explaining that if the communication “is [not] designed to meet problems which can fairly be characterized as predominately legal, the privilege does not apply”).

legal advice. Instead, work motivated primarily by the desire to help the lawyer in anticipation of litigation will be protected. Arguably, the press release in *Rattner* could have been specially crafted by lawyers to ensure that what was communicated to the press was synergistic with the litigation strategy (and what would be communicated at trial). Alternatively, it could have been crafted to combat negative publicity that already existed and might have affected potential juries or judges.<sup>239</sup> Both moves are allowed under the Model Rules of Professional Conduct. Thus, it is incongruent that the court did not even entertain that the work product doctrine would apply.

Further, to distinguish between business and law, the court appeared to infuse into the analysis its own definition of corporate practice, the role of a corporate attorney, and litigation. Despite identifying a possible legal purpose to the press release, in the same breath the court claimed that the press release was simply not useful *at all* in litigation.<sup>240</sup> The court explained that drafting a press release was something that a publicist—as opposed to an attorney—would do.<sup>241</sup> This is consistent with the court’s reasoning for denying attorney-client privilege protection. The court reasoned that it is not “ordinarily a part of the attorney’s legal advice function to prepare public announcements for the client, although he may well be called upon to review proposed announcements for legal implications.”<sup>242</sup> While the “primary motivating” test, if applied as intended, might very well have logically prevented work product protection, based on these facts (presuming the primary motivating factor could be identified), it seems the court did not even determine which motivation was the primary one. Instead, it summarily decided that legal PR was not useful—*ever*—in litigation, and therefore, it was unnecessary to determine whether business or legal purposes were the primary motivation behind the work. Thus, even if the court has been applying the “because of” test, it may still have denied protection. And as will be shown in the next section, when courts apply the “because of” test along with a narrow view of what corporate practice and litigation encompasses, they can (and do) deny protection.

### B. The “Because of” Test

The “because of” test, on its face, seems to solve the problems inherent in the “primary motivating factor” test. It appears to avoid the task of

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239. Beardslee, *supra* note 15, at 1274–75 (explaining that neither judges nor juries are immune).

240. *See supra* note 236.

241. *Rattner*, 1989 U.S. Dist. LEXIS 6876, at \*18–19 (“The fact that the draft was authored by an attorney does not change this result. The work product rule ‘does not extend to every written document generated by an attorney; it does not shield from disclosure everything that a lawyer does.’ If counsel chose in this case to perform a publicist’s function, the documents prepared in that connection cannot be shielded by the work product rule.” (citation omitted) (quoting *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980))).

242. *Id.* at \*15.

separating business from legal work because work is protected if the proponent can merely show that it was prepared “because of” anticipated litigation.<sup>243</sup> Despite this, even when courts claim to be applying the “because of test,” courts can and do delve into the opaque task of making a distinction between business and law—and when they do, it affects the outcome.<sup>244</sup> For example, in *ADT Security Services, Inc. v. Swenson*,<sup>245</sup> in the course of analyzing whether the attorney-client privilege and work product doctrine applied to communications concerning press around the case, some of which was authored by the client’s attorneys, the magistrate judge began by defining business and legal functions. The court stated that “[a]dvertising, responding to media inquiries, and engaging in other public relations efforts are traditional business functions.”<sup>246</sup> Perhaps due to this belief, in analyzing whether certain documents could be protected, the court lumped together thirteen different documents that involved PR in some way and labeled them all “communications concerning media coverage of [the client].”<sup>247</sup> However, some of the documents were emails between the client, and inside and outside counsel discussing the possible media response to the litigation and providing legal advice about what could and could not be said.<sup>248</sup> Other documents were draft press releases written by the general counsel that varied in scope and content from the press release that was actually published.<sup>249</sup> Further, the court did not conduct separate analyses of the attorney-client privilege and the work-product doctrine<sup>250</sup> despite the fact that their contours are very different.<sup>251</sup> Importantly, the attorney-client privilege, unlike the work product doctrine, requires that a court attempt to demarcate legal from business advice since it only applies to communications made primarily for the provision of legal advice.<sup>252</sup>

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243. See *supra* notes 192–93 and accompanying text.

244. This is true in other contexts as well. For example, in a case involving a failed merger, a court applying the “because of test” denied work product protection because the presentations and materials of the financial consultants “consist[ed] of business, not legal, advice.” *Hexion Specialty Chems., Inc., v. Huntsman Corp.*, C.A. No.3841-VCL, 2008 WL 3878339, at \*4 (Del. Ch. Aug. 22, 2008). The court acknowledged that “some of those presentations address[ed] questions raised by the outbreak of litigation” but because some of “the advice relate[d] to business issues rather than to the conduct or defense of litigation,” work product protection was unavailable. *Id.* Thus, it viewed the financial consultants as acting as “financial advisor[s]” as opposed to litigation consultants. Essentially, it appears to have applied a primary purpose test despite announcing that it was applying the “because of” test. *Id.* Moreover, it clearly attempted to draw a line between business and law.

245. No. 07-2983 (JRT/AJB), 2010 WL 276234 (D. Minn. Jan. 15, 2010), *rev’d by* ADT Sec. Serv., Inc. v. Swenson, No. 07-2983 (JRT/AJB), 2010 WL 2954545, at \*4–5 (D. Minn. July 26, 2010). Note, the Eighth Circuit applies the “because of” test.

246. *Id.* at \*3 (making this point in its analysis of the talking points but referring to it later in its analysis of the communications around the media).

247. *Id.* at \*4.

248. *Id.* at \*3.

249. *Id.* at \*4–5.

250. Beardslee, *supra* note 44, at 755 n.146 (pointing out that courts sometimes mix the two analyses and use one test to determine the other). See also *infra* note 267 and accompanying text.

251. See *supra* Part II.B.1.b.

252. See *supra* Part II.B.1.b.

Perhaps, in part, because the analyses of the two doctrines was merged together, the *ADT* court found that neither the attorney-client privilege nor the work product doctrine applied because “the entire tenor of the documents [was] to craft a response for a news report concerning [the client].”<sup>253</sup> Finally, the court explained that “[w]here the legal team is the author of the documents [related to PR], they are acting in a public relations capacity.”<sup>254</sup> Evidently, the judge believed that a line could easily be drawn between law and business and had a narrow view of the role of a corporate attorney and that which PR can and should play in litigation strategy. To this judge, communications involving PR could only be “prepared in anticipation of a potential media battle, instead of a courtroom battle.”<sup>255</sup>

On appeal, Judge John R. Tunheim of the U.S. District Court for the District of Minnesota did not adopt as narrow a view as the magistrate judge of the lawyer’s role in managing PR around legal controversies or the role that PR can play in legal controversies and litigation. Judge Tunheim overturned most of the magistrate judge’s holdings with respect to the attorney-client privilege and the work product doctrine and handled the analysis much differently. He began by separating the documents identified by the magistrate judge as communications concerning media coverage into four distinct categories.<sup>256</sup> He then analyzed each category to determine if either the attorney-client doctrine or the work product doctrine should apply. He denied protection to press releases and newspaper clippings already in the public domain but provided work product protection to previous drafts of press release because they included the mental impressions of the attorneys.<sup>257</sup> Although this analysis appears correct, to justify this treatment, he stated that “[t]he Court has examined the substantive differences between the drafts and concludes that counsel was acting primarily in a legal capacity, rather than simply in a public relations or business capacity, in making revisions to the document.”<sup>258</sup> Arguably, this statement implies that the court mistakenly believed that the lawyer had to be acting in a “legal” capacity to garner work product protection, while in reality the work product doctrine historically extended to work created by non-lawyers who presumably can never act in a “legal capacity.”<sup>259</sup> Taken together, these two opinions suggest that if a court has a narrow view of a corporate lawyer’s job and of how litigation can/should be managed outside and inside the courtroom, the very broad and seemingly easy-to-pass

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253. *ADT*, 2010 WL 276234, at \*4.

254. *Id.*

255. *Id.* at \*3 (citing Teena-Ann V. Sankoorikal & Kathleen H. McDermott, *Attorney-Client Privilege and Work-Product Doctrine: Potential Pitfalls of Disclosure to Public Relations Firms*, 786 PRACTICING L. INST. 271, 286 (2008)).

256. *ADT Sec. Serv., Inc. v. Swenson*, No. 07-2983 (JRT/AJB), 2010 WL 2954545, at \*4-5 (D. Minn. July 26, 2010).

257. *ADT*, 2010 WL 2954545, at \*4.

258. *Id.* at \*5.

259. *See supra* Part II.B.2.c.

“because of” standard is as insurmountable as the more exacting “primary purpose” test.

Further support of this conclusion is that some courts, purportedly applying the “because of” test, infuse the test with a primary motivation analysis. In *NXIVM Corp. v. O’Hara*,<sup>260</sup> the U.S. District Court for the Northern District of New York declared that sharing a report about an internal investigation with an external PR agency waived work product protection.<sup>261</sup> The court recognized that work product protection applied to a party’s representative and that “the exchange of such documents and ideas with those whose expertise and knowledge of certain facts can help the attorney in the assessment of any aspect of the litigation does not invoke a waiver of the doctrine.”<sup>262</sup> Indeed, it considered it “[o]bvious[.]” that “impressions and strategies” are created by talking with others.<sup>263</sup> The court found that the PR firm “reviewed legal documents, pleadings, judicial decisions and the like, and participated in strategy discussions about [the opposing party] and the litigation”<sup>264</sup> and admitted that:

Even the most proficient and prolific attorneys have to resort to consultation with others in order to render full and complete legal services to their clients. That is how the legal world now turns. As a harbinger of things to come, such as media firms assisting attorneys in mega-litigation cases with economic, political, and social ramifications for their clients . . . .<sup>265</sup>

Yet based in part on its attorney-client privilege analysis, the court found work product protection waived because the PR agency was hired “*primarily* to combat negative press and create a long term and short term public relations strategy and hopefully generate positive press.”<sup>266</sup>

In addition to imparting a primary purpose examination to the “because of” test, the court also openly infused its work product analysis with its findings on whether the attorney-client privilege was applicable.<sup>267</sup> This is

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260. 241 F.R.D. 109 (N.D.N.Y. 2007).

261. *See id.* at 142.

262. *Id.* at 128.

263. *Id.*

264. *Id.* at 140.

265. *Id.* at 140–41.

266. *Id.* at 140 (emphasis added) (“[B]ut the *predominate* services [the PR firm] furnished were monitoring relevant news coverage, collecting information on [the opposing party] and others, vetting and pitching news stories to reporters, researching and locating friendly reporters, capitalizing on positive developments, creating a press kit, and otherwise formulating a public relation strategy.” (emphasis added)). Other courts have found the opposite, that is, that work product protection applies to notes detailing meetings wherein attorneys communicate legal strategy to “the representative of the public relations firm so that the public relations firm could properly represent [the client] with regard to th[e] action.” *Fitzgerald v. Cantor*, No. 16297-NC, 1999 WL 135237, at \*1 (Del. Ch. Feb. 15, 1999).

267. This court admitted that it was using its reasoning behind its decision to deny attorney-client privilege protection to determine whether work product protection should apply. *NXIVM Corp.*, 241 F.R.D. at 141 (admitting that “[f]or several critical reasons, which we alluded to [in the analysis] above [involving the attorney client privilege], we are also not prepared to apply to our case the *Calvin Klein Trademark* determination that work product



problematic because it leads a court to look at the primary motivation and attempt to distinguish law from business—which, as discussed above, are complicated, if not impossible, tasks. Further, in so doing, courts forget the two doctrines' very different stances towards work created by or with non-lawyer third parties. This is exactly what happened here.

Here, in denying attorney-client privilege protection, the *NXIVM* court defensibly believed that the communication was not primarily to attain legal advice.<sup>268</sup> In support of its decision, the *NXIVM* court emphasized that the PR agency did not receive the report from the attorneys, nor was there evidence that the attorneys met and discussed the report with the PR agency.<sup>269</sup> However, as the court stated, work created by a party or a representative can be protected as work product if it was prepared “because of” the litigation. Despite this, the court applied a more stringent test than the “because of” litigation test—something akin to the “primary purpose” analysis.<sup>270</sup> As mentioned above, the court admitted that the PR firm helped with the litigation strategy, yet ultimately concluded that “[the PR agency] was hired to clean up *NXIVM*'s damaged image . . . . The *underlying* and *transparent* intent was to use the contents of the Interfor Report to promulgate certain images of both Ross and *NXIVM* or deflect further media intrusion by Ross and others.”<sup>271</sup>

Other court decisions, such as *Haugh v. Schroder Investment Management North America, Inc.*,<sup>272</sup> have found similar uses of PR firms during litigation to meet the “because of” test. Despite recognizing this fact, the *NXIVM* court determined that work product protection was waived because disclosing the report was “a deliberate, affirmative and selective strategic decision to disclose this information for another benefit other than

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protection is not waived when ‘the attorney provides the work product to the public relations consultant whom he has hired and who maintains the attorney’s work product in confidence . . . [especially] if . . . the public relations firm needs to know the attorney’s strategy in order to advise as to the public relations[.]’” (alteration in original) (quoting *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000)); *see supra* note 250.

268. *NXIVM Corp.*, 241 F.R.D. at 140 (“O’Hara’s involvement was nothing more than a tool to achieve secrecy, not to give legal advice.”). Also, the court applied a narrow test to determine whether attorney-client privilege was waived by sharing the report with the third party. *See id.* at 141 (“Notwithstanding the cogent reasoning that incorporates modern realities and intentions in addressing how profile cases are handled in the courtroom and the court of public opinion, we are not prepared to make that same deviation from the narrowly tailored test of *Kovel* and *Ackert*.”). Granted, there were credibility issues on both sides. Indeed, the court prefaced the opinion by bemoaning the convoluted, complicated nature of the case in addition to the issues of credibility. *Id.* at 114 & n.5; *see also id.* at 142 (contending that the PR firm’s “relationship with O’Hara was nothing short of smoke and mirrors”).

269. *See id.* at 142.

270. Courts within districts that apply the “because of” test also sometimes overlay a “primary purpose” or “exclusively for litigation” lens to the ordinary course of business exception. *See, e.g.*, *de Espana v. Am. Bureau of Shipping*, No. 03 Civ. 3573 LTRSLE, 2005 WL 3455782, at \*3 (S.D.N.Y. Dec. 14, 2005).

271. *NXIVM Corp.*, 241 F.R.D. at 142 (emphasis added).

272. No. 02 CIV. 7955 (DLC), 2003 U.S. Dist. LEXIS 14586 (S.D.N.Y. Aug. 25, 2003); *see infra* notes 324–29 and accompanying text.

aiding the lawyer pitched in the battle of litigation. The benefit was for control of the airwaves and print media, which *NXIVM* hoped to profit.”<sup>273</sup> On the one hand, this may be true—and some might contend the work product doctrine should not, therefore, protect this communication under any test. On the other hand, as other courts have argued, positively influencing the court of public opinion might be a strategic decision to help in the current litigation (and possible future litigation) by creating good will among regulators,<sup>274</sup> court personnel, and potential jurors or by pressuring the other side to settle.<sup>275</sup>

Whether or not the consultation with the PR agency was actually intended to aid the attorney in assessing the strength and weaknesses of the case or develop case strategies or theories in litigation (and therefore could justifiably be protected as work product), it is clear that this judge was not applying the “because of” test. Rather, the court applied some stricter standard that included the judge’s view of what the role of the lawyer should be, the breadth of litigation, and what constitutes legal—as opposed to business—advice. Here, the court did not claim that the work product doctrine did not apply, but instead that it was waived. Work product protection, however, is supposedly only waived when it enables an adversary to access confidential information.<sup>276</sup> This is because the work product was designed to enable attorneys to seek the help and expertise of others in order to analyze the strength and weaknesses of their clients’ case and develop case strategies and theories.<sup>277</sup> As a result, the holding regarding the waiver suggests that the court departed from a traditional “because of” test.

### *C. The Ordinary Course of Business Exception*

As mentioned above, the ordinary course of business exception is sometimes utilized as a direct corollary to the “because of” test. The *NXIVM* court reasoned that if the work would have been produced in the ordinary course of business, then it could not have been produced “because of” the anticipated litigation.<sup>278</sup> In the PR context, however, courts sometimes make two moves that are inconsistent with the contours of the doctrine. First, some courts infuse the “ordinary course of business” analysis with a “primary purpose” component, even if the court sits in a jurisdiction that has adopted the “because of” test. Second, courts occasionally deny protection because the work would have been done in the ordinary course of business without considering whether the work would

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273. *NXIVM Corp.*, 241 F.R.D. at 142.

274. Here, there were alleged illegalities on the part of *NXVIM* and its strategic partner, Intefor, which O’Hara had disclosed to the public. This may have motivated regulators to bring charges against *NXVIM*. See, e.g., Beardslee, *supra* note 15, at 1270 (contending that regulators often get leads from the press and pursue a certain target to appease the public).

275. For a detailed discussion of how the court of public opinion can impact the process and outcome of litigation, see generally Beardslee, *supra* note 15.

276. See *supra* notes 162–164 and accompanying text.

277. See *supra* notes 162–164 and accompanying text.

278. See *supra* Part II.B.2.b.

have been done in the same or substantially similar way if the anticipation of litigation did not exist.<sup>279</sup> Such action contravenes the formal requirements of the exception. Although the ordinary business exception only excludes material when it would have been produced in the same or similar form, courts instead apply the exception like an “ordinary business ingredient” test.<sup>280</sup> Additionally, in attempting to determine whether something was created in the ordinary course of business, courts inevitably seek to distinguish between business and law. Of course, the same issues arise as those described above, and if a judge has a narrow view of contemporary corporate law practice, they are likely to deny protection.

A good example of these maneuvers can be found in *de Espana v. American Bureau of Shipping*,<sup>281</sup> decided by the U.S. District Court for the Southern District of New York, a jurisdiction that has adopted the “because of” text. In *de Espana*, the nation of Spain brought suit against a shipping company over a ship that sunk off the country’s shores. The defendant shipping company accidentally produced notes that summarized discussions between it, its counsel, and an external public relations firm “regarding its strategy for addressing media inquiries related to the [ship sinking].”<sup>282</sup> In an attempt to get the documents back, the shipping company asserted the attorney-client privilege and work product doctrine claiming “that the notes discuss legal matters combined with [internal management’s] purview of public relations, and that most of the notes summarize discussions with [its] counsel concerning legal strategy for addressing media inquiries regarding the [sinking].”<sup>283</sup> The court, however, denied work product protection finding that the corporation would have created notes concerning press and public relations strategies in the normal course of business without the threat of litigation and explaining that “[t]he information detailed is not the sort that would be sought *only* because litigation was anticipated.”<sup>284</sup> Thus, when deciding whether the work would have been produced in the ordinary course of business, the court attempted to discern what other motives might have existed for creating the work. Because it determined that the work around legal PR was motivated by more than simply the anticipated litigation, it denied protection.

However, the “because of” test does not require that the motivation for the work be primarily or solely because litigation was anticipated. To the contrary, material under this test is supposed to be protected even if there

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279. See *supra* notes 201–03 and accompanying text.

280. This is also true for courts that apply the “primary purpose” test. If the material does not actually reference the litigation, the court might presume it was prepared for ordinary business reasons. In *Hardy*, for example, the court began by stating the ordinary course of business exception. *Hardy v. N.Y. News Inc.*, 114 F.R.D. 633, 644 (S.D.N.Y. 1987). It analyzed whether the “primary purpose” of the work was to prepare for litigation by taking into account that “there [was] no reference in any of the[] documents to the [opposing party] or to litigation generally, and . . . no reference to litigation in the affidavit of [the consultant] regarding the purpose of [the] assignment.” *Id.* at 645.

281. No. 03 Civ. 3573 LTRSLE, 2005 WL 3455782 (S.D.N.Y. Dec. 14, 2005).

282. *Id.* at \*1.

283. *Id.* at \*3.

284. *Id.* (emphasis added) (internal quotations omitted).

are multiple motivations for the work as long as one of the motivations was anticipated litigation.<sup>285</sup> Granted, the court was not wrong in determining that regardless of whether litigation would ensue, if a ship sinks, the shipping company will likely meet with PR consultants in the ordinary course of business to manage the publicity surrounding the event. But it failed to consider the possibility that the manner and form of the work—that is, the way the consultation was handled, what communications were shared, what notes might have been written—may have been different because litigation was erupting.<sup>286</sup> Moreover, it appears that the court believed that PR (even if it is what might be called legal PR) is always the business of business and not the business of law. In keeping with that, the court denied attorney-client privilege protection because the notes “contain[ed] discussions of non-legal issues, including business, press and public relations strategies.”<sup>287</sup>

Another case that exemplifies the problems identified above is *Procter & Gamble Co. v. Amway Corp.*<sup>288</sup> Originally, Procter & Gamble (P&G) sued Amway for defamation, fraud, and unfair trade practices, among other things.<sup>289</sup> It claimed that Amway spread a rumor connecting P&G with the Church of Satan.<sup>290</sup> Amway then brought a suit claiming that P&G tortiously interfered with Amway’s business relations by “support[ing] . . . an internet web site that contain[ed] vulgar, false and defamatory statements about Amway, and through its dissemination of press releases contain[ed] false and misleading statements about Amway.”<sup>291</sup> Amway sought discovery of documents related to P&G’s public relations plans to clarify the rumors and the publicity around the litigation.<sup>292</sup>

In denying work product protection to documents that discussed which defamation litigation targets to pursue and the purpose of the litigation,<sup>293</sup> the court emphasized the ordinary business exception.<sup>294</sup> It explained that the work product doctrine does not apply if there is “some other purpose or

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285. See *supra* notes 192–94 and accompanying text.

286. See *de Espana*, 2005 WL 3455782, at \*3 (finding without explanation that “ABS has not shown that the notes would not otherwise have been prepared in a substantially similar form”). Interestingly, this judge inaccurately stated that the rule for the court was that “a party generally must show that the documents were prepared principally or exclusively to assist in anticipated or ongoing litigation” and cited to a case that accurately stated that the test to be applied in the Second Circuit was the “because of” test. *Id.* (citing *MSF Holding Ltd. v. Fiduciary Trust Co. Int’l*, No. 03 CIV 1818PKLJCF, 2005 WL 3046287, at \*1 (S.D.N.Y. Nov. 10, 2005)).

287. *Id.*

288. No. 1:98-CV-726, 2001 WL 1818698 (W.D. Mich. Apr. 3, 2001).

289. *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 523 (5th Cir. 2002).

290. *Id.* at 522–24; *Amway Corp. v. Procter & Gamble Co.*, No. 1:98-CV-726, 1999 WL 33494857, at \*1–2 (W.D. Mich. June 29, 1999). P&G had also sued other parties for defamation related to this same rumor. *Procter & Gamble*, 280 F.3d at 523.

291. *Amway*, 1999 WL 33494857, at \*1.

292. *Procter & Gamble*, 2001 WL 1818698, at \*1.

293. *Id.* at \*7–8.

294. *Id.* at \*8.

obligation” that “was sufficient to cause [the work] to be prepared.”<sup>295</sup> According to the court, the work in question was designed to garner positive publicity for the company in order to counteract the rumors, “[a]lthough pending and prospective lawsuits are mentioned in these documents, or the redacted portions thereof, the purpose of the discussion was to assess the public relations aspects of the lawsuits, not their legal import or merit. . . . [The] documents were produced for public relations and other business purposes.”<sup>296</sup>

The problem with this reasoning is twofold. First, the underlying suits were for public defamation and, therefore, any litigation that the company pursued was necessarily designed not only to stop the defamation, but also to counteract the defamatory press. Second, P&G sought help from PR experts to understand which litigation targets would be more viable for the company. If the selected targets would be seen as too sympathetic, the corporation would be unable to win the lawsuit—not to mention the harm this defeat would cause to the company’s reputation. Indeed, some of the memorandums made both of these points.<sup>297</sup> Further, the court acknowledged that these documents exposed P&G’s litigation strategy (albeit an unscrupulous one) and “analyze[d] the public relations aspects of

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295. *Id.* at \*6 (citing *First Pac. Networks, Inc. v. Atl. Mut. Ins. Co.*, 163 F.R.D. 574, 582 (N.D. Cal. 1995)).

296. *Id.* at \*5. According to the court, the documents communicated that (1) Amway was having trouble finding the right defendants to sue because “[f]requently, persons disseminating the rumor would immediately apologize and retract their statements when confronted by Procter & Gamble. Procter & Gamble wanted to avoid the public relations problems in pursuing ‘obviously sympathetic defendants,’” and (2) Amway “was eager to blame a competitor for fostering the rumor, principally (but perhaps not solely) to enhance Procter & Gamble’s competitive and public relations position in the marketplace.” *Id.* The court provided quotes from some of the documents in question. *See, e.g., id.* (“At that time, we will have another week’s experience on the number of phone calls and will want to assess the need for *more publicity, which is the primary objective of these lawsuits.*” (citing Document 12)); *id.* (“Our objective is to have a minimum of at least [sic] three additional, geographically dispersed, cases in making our next press release.” (emphasis in original) (citing Document 798)); *id.* at \*7 (“The memo documents public relations strategy, which included the possibility of filing lawsuits. It relates the company’s desire to ‘avoid obviously sympathetic defendants.’ ‘However, we will definitely pursue other areas particularly those showing business connections which may profit from continuation of the rumor. We should continue to direct our energies towards those instances where information has developed indicating a connection with a competitive company. Keep in mind that these investigations are not being done for strictly Public Relations aspects, but that we intend to exercise our full legal rights where appropriate.’” (citing Document 127)).

297. *See, e.g., id.* at \*7 (“The redacted portions of document no. 383 fall in the same category. The redacted discussion of ‘lawsuits/investigations’ reflects that the legal department ‘has not been able to find a case which satisfied both Legal and Public Relations needs.’” (citations omitted)); *id.* (“The memorandum reflects the ‘public relations risks’ associated with bringing suit against members of the clergy and defendants who ‘seem to be poor, uneducated and apparently acting independently.’ It reiterates Procter & Gamble’s desire, for public relations purposes, to tar a competitor with the charge of spreading the rumor: ‘Obviously, we would prefer to have cases against people who would not engender such sympathies (e.g., competitors, fanatics, someone with his own special interests, etc.), but none are available at this time.’” (quoting Document 375)); *id.* (“[M]emo of public affairs officer reflecting a desire to continue with lawsuits to demonstrate the company’s seriousness and ‘to continue the publicity momentum.’” (quoting Document 375)).

bringing a lawsuit” in order for the lawyers to determine which target they should pursue.<sup>298</sup> As the documents explained, P&G needed a case that would “satisf[y] both Legal and Public Relations needs.”<sup>299</sup> Though an attorney must conduct a cost/benefit analysis about litigation that includes PR concerns—especially when the client is suing or being sued for defamation—the court still found that the documents failed the “because of” test and that the ordinary course of business exception applied.<sup>300</sup> It attempted to make a distinction between business and law and concluded that the documents were “business and not legal documents . . . . Disclosure of these documents exposes Procter & Gamble’s public relations strategies, not its litigation strategy.”<sup>301</sup>

In support of its decision to deny work product protection, the *Amway* court repeatedly pointed out that the authors of the documents were not lawyers and that the documents were shared with non-lawyers.<sup>302</sup> However, there is much support that the work product doctrine, as outlined in FRCP (26)(b)(3), protects documents prepared “by or for another party or its representative”—not just work crafted by lawyers.<sup>303</sup> Moreover, as other courts have explained, the Rule also protects work designed to assist in developing “all that is necessary to prosecute or defend a lawsuit” and “the exchange of such documents and ideas with those whose expertise and knowledge of certain facts can help the attorney in the assessment of *any* aspect of the litigation.”<sup>304</sup> Though there was a business purpose to these documents, the case law clearly states that “a document which has been prepared *because of* the prospect of litigation will not lose its protection under the work product doctrine, even though it may assist in business decisions.”<sup>305</sup> Further, even if the *Amway* court accurately assessed that the work would have been performed in the ordinary course of business to

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298. *Id.*

299. *Id.* The court was obviously not happy with P&G. It reprimanded and sanctioned P&G for its failure to follow discovery orders and provide the requisite details in its privilege log. *See id.* at \*8–11. The court voiced disgust with P&G’s motives and litigation tactics. *Id.* at \*8 (stating that the “statements do not reflect legal advice or core work product, but merely the public relations problems that arise from bringing lawsuits against priests, nuns, and other members of the clergy who innocently repeated the Satanism rumor”).

300. Unsurprisingly, the court’s definition and application of the “because of” test and/or the ordinary course of business exceptions were not consistent with the doctrine. *Id.* at \*6 (explaining that under the “because of” test, “[t]he document must have also been prepared for purposes of the litigation and *not* for some other purpose” (emphasis added)).

301. *Id.* at \*8. This contradicted the court’s earlier admittance that the documents exposed the corporation’s litigation strategy. *See supra* note 298 and accompanying text.

302. *See Amway*, 2001 WL 1818698, at \*6–8.

303. FED. R. CIV. P. 26(b)(3); *see supra* notes 219–226 and accompanying text (explaining that there is disagreement around how much control or direction the lawyer need have over the work of the nonlawyer in order for work product protection to apply).

304. *NXIVM Corp. v. O’Hara*, 241 F.R.D. 109, 128 (N.D.N.Y. 2007) (emphasis added); *see also* *United States v. Nobles*, 422 U.S. 225, 239 (1975); *United States v. Adlman (Adlman I)*, 68 F.3d 1495, 1502 (2d Cir. 1995).

305. *NXIVM Corp.*, 241 F.R.D. at 128 (emphasis added). Although it was applying the “because of” test, the court stated that “[t]he document must have also been prepared for purposes of the litigation and *not* for some other purpose.” *Amway*, 2001 WL 1818698, at \*6 (emphasis added).

protect the corporation's image, the court failed to consider that the anticipation of litigation may have tinged the form and manner of the work. Under this court's view of corporate legal practice—as opposed to corporate business—all documents related to managing public opinion are considered ordinary business. While such a stance may be defensible, for example, in the context of tobacco companies for whom the anticipation of litigation is arguably part of the ordinary course of business and inextricable from all business tasks, household products companies do not perpetually face defamation litigation. As will be discussed in more detail, even though PR work is an ordinary business task for all large consumer-oriented corporations, it is unimaginable that threatened or actual concurrent lawsuits would not impact the way in which PR is analyzed and executed.

#### IV. ANALYSIS AND PRELIMINARY THOUGHTS FOR FUTURE DEVELOPMENT

What do the cases described above tell us about the former and current state of the work product doctrine and how we, as a profession, view the role of the corporate attorney and define litigation? And do the answers to those questions help us determine when an attorney's work should be protected in the corporate context by the work product doctrine and how to revise the doctrine to provide such protection? It is to these questions that this next section turns.

##### A. Analysis

This sampling of federal court opinions in the context of public relations uncovers three primary problems with the current work product doctrine. First, the work product doctrine allows judges to attempt to distinguish business from law to determine whether the work product doctrine should apply. Not only is such delineation arbitrary and artificial, it is arguably inconsistent with the historical underpinnings of the work product doctrine. Second, as applied, the work product doctrine hinges protection on the judge's view of the proper role of the corporate attorney and what litigation preparation encompasses. Finally, in addition to enabling inconsistent application, the work product doctrine fails to present a cohesive view of the role of the corporate attorney or embrace the demands of contemporary corporate attorneys representing clients in anticipation of litigation.

From its inception, the attorney-client privilege has always been about communications between client and attorney for the purpose of obtaining legal assistance.<sup>306</sup> Expectedly, in the literature and case law about the corporate attorney-client privilege, there is debate about whether a communication was generated for the purpose of obtaining legal, as

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306. Cf. *In re Cnty. of Erie*, 473 F.3d 413, 419 (2d Cir. 2007) (applying attorney-client privilege protection to lawyer emails proposing changes to existing policy to comply with the law and guidance around other beneficial, though not legally required, policy changes); *id.* at 422 (“When a lawyer has been asked to assess compliance with a legal obligation, the lawyer’s recommendation of a policy that complies (or better complies) with the legal obligation—or that advocates and promotes compliance, or oversees implementation of compliance measures—is legal advice.”).

opposed to business, advice and whether a communication with a third party consultant should ever be protected.<sup>307</sup> But these debates are misplaced in the work product context. The work product doctrine has always been designed to include conversations with, and work created by, non-lawyers,<sup>308</sup> business people, and *any* advice (business or otherwise) that might help with *any* aspect of case preparation or potential litigation.

Yet courts, when analyzing whether work product protection applies, debate whether the purpose of the work was for business, as opposed to legal, advice. This leads courts to consider whether the lawyer consulted a third party and whether that third party's line of work is concerned with legal as opposed to business issues.<sup>309</sup> As demonstrated above, these digressions are, in part, a byproduct of the "primary purpose" test which requires the court to decipher whether the primary motivating reason for the work was for litigation or business purposes. The problem is that trying to decipher what is done primarily for litigation as opposed to business purposes is, to borrow the words of Judge Richard Owen, "artificial, unrealistic, and the line between is . . . essentially blurred to oblivion."<sup>310</sup> Thus, the analysis often devolves into whether the work "carries much more the aura of daily business than it does of courtroom combat."<sup>311</sup>

Framing the question in this way naturally affects the answer. Unless the work coincides with the historically narrow vision of the lawyer as an adversary in combat, it is not protected.<sup>312</sup> However, case management and litigation preparation today are very different than they used to be and simply cannot be summed up as work done in preparation for "courtroom combat." Undeniably, the words "litigation" and "case" today encompass more than just the "trial."<sup>313</sup> Real courtroom combat only occurs in less

307. *See id.* at 419.

308. This may also be true when non-lawyers create work without supervision by, or direction of, an attorney. *See supra* Part I.B.2.

309. As discussed above, courts also erroneously collapse their analysis of the attorney-client privilege with that of the work product doctrine.

310. *In re Woolworth Corp. Sec. Class Action Litig.*, No. 94 CIV. 2217 (RO), 1996 WL 306576, at \*3 (S.D.N.Y. June 7, 1996) (holding that notes and memoranda created during an investigation led by lawyers and accountants were protected by work product doctrine).

311. *United States v. El Paso Co.*, 682 F.2d 530, 544 (Former 5th Cir. 1982); *see also United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21, 43 (1st Cir. 2009).

312. Literature on the psychology of choice suggests that how a choice is framed materially affects what decision is made by the decisionmaker. *See, e.g.*, Daniel Kahneman & Amos Tversky, *Choice, Values, and Frames*, 39 AM. PSYCHOLOGIST 341, 343 (1984) (explaining the "failure of invariance," that is, that rational actors do not make the same choices irrespective of the way the decision is framed); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453, 453 (1981); *supra* note 78. In support of this is the court's analysis in *NXVIM Corp.* justifying denial of work product protection in part because it was "for another benefit other than aiding the lawyer pitched in the battle of litigation." *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 142 (N.D.N.Y. 2007) (emphasis added); *see supra* notes 270–275 and accompanying text.

313. Indeed the FRCP make this clear. *See supra* notes 129 and 132. *See also* Pease-Wingenter, *supra* note 2, at 154 (explaining that "the term 'litigation' has a much broader meaning than 'trial'"). More specifically,

'Litigation' includes civil and criminal trial proceedings, as well as adversarial proceedings before an administrative agency, an arbitration panel or a claims



than five percent of cases and oral hearings are rare.<sup>314</sup> Thus, an attorney's preparation for anticipated litigation does not only involve the preparation for the ultimate, actual trial, but also pre-trial motions (such as motions to dismiss and motions for summary judgment), maneuvers to limit the number and types of charges that might be brought by regulators and/or stockholders, and tactics and strategies to bulwark negotiation power. Much of the preparation and steps in the litigation process—although completed with an eye towards a potential trial—are meant to prevent the filing of a suit, initial or future charges, or convince the other side to settle or make the case go away (by winning a motion to dismiss or summary judgment). And arguably, all of this “work” is part of litigation and is fortified by the right perceptions of influential players. How regulators view the corporation's actions, how the opponent perceives the strength of the case, and how the public consumer views the controversy as a normative or practical matter necessarily impacts the risks versus benefits calculus of proceeding with actual litigation.<sup>315</sup> These tasks align with the historical purpose of the work product doctrine—to enable attorneys to consult with others to determine the weaknesses of their clients' cases,

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commission, and alternative-dispute-resolution proceedings such as mediation or mini-trial. It also includes a proceeding such as a grand jury or a coroner's inquiry or an investigative legislative hearing. In general, a proceeding is adversarial when evidence or legal argument is presented by parties contending against each other with respect to legally significant factual issues. Thus, an adversarial rulemaking proceeding is litigation for purposes of the immunity.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 87 cmt. h (2000); *see also In re Grand Jury Proceedings*, No. M-11-189, 2001 WL 1167497, at \*13 (S.D.N.Y. Oct. 3, 2001). Federal Rules of Criminal Procedure 16 codifies work-product protection for documents prepared “during the case's investigation or defense” in criminal proceedings. FED. R. CRIM. P. 16(b)(2)(A). Because Rule 16 refers to proceedings in which there is a named defendant, it does not specifically apply to investigatory procedures of a grand jury. *See In re Grand Jury Subpoena*, 599 F.2d 504, 509 (2d Cir. 1979). Nevertheless, the work product protection rule “has been applied to grand jury proceedings.” *Id.*; *see also In re Grand Jury Subpoena*, 484 F.Supp. 1099, 1102 (S.D.N.Y. 1980).

314. According to Marc Galanter, “[t]rial activity is diminishing not only in comparison to the rest of the legal world, but compared to the society and the economy.” Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 31 (“[T]here are fewer trials per capita and fewer trials per unit of GDP.”); *see also id.* at 14 (showing that from 1992 to 2001, the number of tort, contract, and real property cases declined 47% in state courts, the number of tort trials in federal court declined 37.6%, and contract trials in federal court declined 47.7%); Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1255 (2005) (explaining that there is a long term and gradual decline in the percentage of cases that terminate in trial and a more extreme decline in the actual number of trials during the past twenty years); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 461 (2004) (reporting that the percentage of civil cases reaching trial in federal court dropped from 11.5% in 1962 to 1.8% in 2002); *id.* at 492–93 (showing that federal criminal cases in federal courts decreased by approximately 30% from 1962 to 2002 despite an increase in the number of criminal defendants); *cf.* Neal Ellis, *Saving the Jury Trial*, BRIEF, Summer 2005, at 15, 15 n.3 (reporting that the U.S. Department of Justice issued a study in 2005 that showed an 80% decrease in federal tort trials from 1985 to 2003 (citing Thomas B. Cohen, *Federal Tort Trials and Verdicts: 2002–2003*, BUREAU JUST. STAT. BULL. 2, 2 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ftv03.pdf>)).

315. *See supra* notes 274–75, 314 and accompanying text.

fortify the strengths of their clients' positions, develop effective litigation strategies—including those that may (for their clients' benefit) end the litigation almost as soon as it starts.<sup>316</sup> This Article contends, therefore, that managing legal PR is inextricably part of case preparation in anticipation of litigation. Yet a court that has a more narrow view of corporate practice—a court that views anything that sniffs of PR as having the “aura of daily business”<sup>317</sup>—might deny work product protection, despite the fact that such a demarcation is not in keeping with corporate practice today or the theory of litigation, and is artificial at best.

Although the primary purpose test lends itself to this type of artificial line drawing, ironically, the same issues abound in application of the “because of” test. At first blush it might appear that the two tests—the narrower “primary purpose” test and the broader “because of” test—represent the two ends of the spectrum, epitomizing the extremes of the burgeoning debate about what it means to be a corporate attorney. Conceivably, the narrower “primary purpose” test—which essentially asks judges to disaggregate decisions mostly based on a business/law distinction—represents a more narrow view of the role of the corporate attorney and breadth of litigation. Ideally, the “because of” test—which is a much broader test providing protection for any work developed because of pending litigation—embraces a broader role for the corporate attorney. However, characterizing the two tests as operating on a continuum that moves from a narrow to broad conception of the corporate attorney and litigation, or that moves from requiring a distinction between business and law to one that embraces the melding of the two, is untoward. In application, the “because of” test also enables work product decisions to hinge on how narrowly a court views the role of the corporate lawyer and an “artificial, unrealistic” line to be drawn between business and law.

First, as is the case when a court applies the primary motivating factor test, if a court narrowly interprets case management or litigation preparation, even under the “because of” test, work can easily be denied protection. Although it is fairly clear that the work product doctrine protects materials prepared by non-lawyers, courts use the fact that the work was created by non-lawyers to buttress decisions to deny work product protection. Further, they infuse the “because of” test with a primary motivating factor analysis. Second, as described in the PR related cases above, some courts applying the ordinary course of business test (the direct corollary to the “because of” test), also incongruently apply a “primary purpose” test. This move is a non sequitur. The ordinary course of business exception does not require that the court decipher the motivating purpose behind the work let alone the primary motivating purpose.<sup>318</sup> Instead, the exception merely asks the court to consider whether an

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316. See *supra* notes 158–66 and accompanying text.

317. *United States v. El Paso Co.*, 682 F.2d 530, 544 (Former 5th Cir. 1982).

318. *But see* *Wilson*, *supra* note 180, at 601 (interpreting FRCP 26 to mean that it does not deny protection for material made in the ordinary course of business entirely, but instead material made in the ordinary course of business for non-litigation purposes).

“ordinary” task, generally performed by a type of person or department, was done in substantially the same way despite the anticipated litigation. Unfortunately, courts consistently fail to consider that work may have been conducted in an “unordinary” manner because the parties were acting with “an eye towards litigation.” In other words, courts fail to recognize that the task may be the same but the output may be different, or that the output may look the same but the work leading up to it was different.

Arguably, the ordinary course of business exception itself is completely unworkable and too blunt of an instrument. On the one hand, it should be obvious that work will be done differently when litigation is looming than when it is not. For example, while a quarterly disclosure statement—which is issued regularly regardless of any anticipated litigation—would be considered done in the “ordinary course of business” and not protected as work product,<sup>319</sup> when the company is facing high profile litigation, the quarterly disclosure statement is informed and crafted in a manner that is arguably anything but “ordinary.”

On the other hand, a large, public company exists in a world of anticipated litigation and therefore, anticipating litigation is arguably the ordinary course of business.<sup>320</sup> For example, after some analysis of the risks and probabilities, a large manufacturer of camping goods might view anticipating and handling litigation stemming from consumers using lamps inside their tents as part of the ordinary course of business. That said, if the impending suit was for securities’ fraud, then such litigation might not be considered part of the normal course. In addition to the seriousness, the timing and status of the impending litigation may move something from the ordinary to the extraordinary. If the consumer of the camping lamp wins at a lower court level, suddenly what was an ordinary course of business lawsuit becomes more important and stops being ordinary. Yet, the

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319. *Id.* at 600 (explaining that in this scenario, the statements should receive work product protection because “[o]ne categorization is not exclusive of the other; one purpose does not necessarily exclude the other purpose. Whether or not a company’s attorney prepares the materials regularly and systematically, to the extent that they reflect his opinions or mental impressions concerning certain circumstances involved in litigation, they are opinion work product.”).

320. Some cases have suggested or held that, while claims documents generated in the ordinary course of business by a casualty insurer may not be work product unless and until something happens that indicates a lawsuit is likely, the claims documents generated by a liability insurer may always fall under work product, even though prepared in the ordinary course of business, because when considering a claim under a liability insurance policy, the insurer is conducting ordinary business that by its very nature is always in anticipation of litigation. *Ashmead v. Harris*, 336 N.W.2d 197 (Iowa 1983) (holding that even a routine investigation by an insurer into a claim by a third-party on a liability policy is in anticipation of litigation and thus within the work product protection); *see also* *Brown v. Superior Court*, 670 P.2d 725 (Ariz. 1983) (noting the issue). Although the absolute protection of insurer files in *Ashmead v. Harris*, 336 N.W.2d 197 (Iowa 1983), is the minority position, *see Langdon v. Champion*, 752 P.2d 999, 1006 (Alaska 1988), other courts have also found such documents to be subject to work product protection on a case-by-case basis. *See Askew v. Hardman*, 918 P.2d 469 (Utah 1996). I thank Professor Sisk for introducing this point and these cases in support.

ordinary course of business exception is not written or interpreted to encompass those nuances.

As demonstrated in Part III.B, even the “because of” test enables judges to deny or grant work product protection based on their definition of what contemporary corporate practice entails. Those judges with a narrow view of the role of the corporate attorney and legitimate litigation tactics can deny protection of work that involves other disciplines like public relations. However, the opposite is also true, those with a broad view of what corporate legal services comprises can find a way to apply protection. Although the history of the work product doctrine supports a very broad net, the “because of” test enables judges embracing an expansive role of the corporate attorney to protect some work that perhaps should not receive work product protection. As it currently stands, the “because of” test enables protection of work that is completely unrelated to lawyers’ management of the legal controversy. For example, one might meet with PR executives to devise a PR campaign to help the corporation’s brand image because impending litigation is producing substantial negative press. This PR campaign would never have been conceived if not for the impending litigation and thus was not prepared in the ordinary course of business but instead “because of” litigation. However, the primary motivation for the PR campaign was to protect market share—not to win a lawsuit or help the lawyer prepare for the case or make decisions about the case.<sup>321</sup> Still, under the “because of” standard, all meetings and preparation work around this marketing campaign could be protected as work product by a judge that has a broad view of what it means to represent a client in anticipation of litigation. Arguably, this goes too far in the other direction.

Lastly, in a recent decision on the work product doctrine, the U.S. Court of Appeals for the First Circuit uncovered one of the issues this Article identifies: “how far work product protection extends turns on a balancing of policy concerns rather than application of abstract logic.”<sup>322</sup> Although this is likely true of most doctrine, the problem is that this balancing of policy concerns is unguided.<sup>323</sup> Each jurisdiction does not have a stable set

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321. A good example of this tactic is the PR campaign by Merck in 2005. For the six months preceding a Vioxx trial in Texas, Merck “saturated” the specific city in which the trial was to be held with image advertising. Evidently, it spent almost double the amount it spent on its national ad campaign the preceding year in those six months targeting that specific city. Larry Smith, *Merck’s Powerful Tactical Advantage in the Court of Public Opinion*, OF COUNS., Nov. 2006, at 12, 13 (explaining that “a white noise of positive messaging about the defendant . . . can be as ultimately decisive as any evidentiary material”); *id.* (reporting that “from January through June 2005—just a few weeks before one Vioxx trial began in Texas—Merck spent \$8.9 million on ‘image’ ads alone, up from \$4.6 million during all of 2004”); *id.* (reporting that the year that Merck found out “there was legal trouble ahead” it “outspent Budweiser and Pepsi[,] . . . spending more than \$160 million, the most ever for a prescription drug” and that the “advertising paid off for Merck as retail sales quadrupled”).

322. *United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21, 26 (1st Cir. 2009).

323. *Cf. generally* Richard K. Greenstein, *The Nature of Legal Argument: The Personal Jurisdiction Paradigm*, 38 HASTINGS L.J. 855 (1987) (making a similar argument with respect to personal jurisdiction doctrine).

of policy concerns that are given varying weight. Instead, each court uses its own idiosyncratic policy concerns and arguably these concerns are based, in part, on the courts' view of what is the proper role of the corporate attorney.

As described above, the "because of" test embraces both a very broad and a very narrow interpretation of the responsibilities of the contemporary corporate attorney in litigation preparation. Yet it also enables a more moderate approach. For example, in *Haugh*, an age discrimination case, the plaintiff's former attorney retained a public relations consultant (who was also a licensed lawyer) to develop a media strategy to assess potential public reactions to certain litigation strategies and how PR spin might affect the litigation strategy. The documents in question included a draft press release that contained the PR consultant's written comments, the PR consultant's handwritten notes, and a meeting agenda.<sup>324</sup> According to the court, the PR consultant handled media relations and worked with the lawyer to draft press releases about the litigation and develop both litigation and PR strategies taking into account the impact that certain tactics might have on the viability of the litigation strategy.<sup>325</sup> The court denied attorney-client privilege protection because the PR consultant only performed "standard" or "ordinary" public relations services akin to a public relations campaign and had not shown that the communications with the PR consultant were "necessary" to the lawyer to provide *legal* advice to his client.<sup>326</sup>

In its analysis of the work product doctrine, however, the court applied the "because of" test and protected the work. It explained that the work product doctrine "protects a lawyer's ability to prepare his client's case, protects against the disclosure of the attorney's mental impressions, conclusions, strategies, or theories, and also avoids the unfairness that would occur if one party were allowed to appropriate the work of another."<sup>327</sup> Therefore, it concluded, "All of the documents submitted in conjunction with this motion are covered by the work product privilege, as they were all prepared by a party, her agent, attorney or consultant in anticipation of litigation."<sup>328</sup> Thus, although the court viewed the attorney client privilege as only protecting an attorney's role in providing legal advice, it drew no similar line when analyzing protection under the work product doctrine. Therefore, generally speaking,<sup>329</sup> the *Haugh* court correctly approached the analysis.

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324. *Haugh v. Schroder Inv. Mgmt. N. Am., Inc.*, No. 02 CIV 7955 (DLC), 2003 U.S. Dist. LEXIS 14586, at \*5 (S.D.N.Y. Aug. 25, 2003).

325. *Id.* at \*3-4 (citation omitted).

326. *Id.* at \*8; *id.* at \*9-10 ("Some attorneys may feel it is desirable at times to conduct a media campaign, but that decision does not transform their coordination of a campaign into legal advice." (citing *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000))).

327. *Id.* at \*12-13.

328. *Id.* at \*15.

329. The problem, however, is that the "because of" test can be applied broadly, perfunctorily, and overinclusively. It can be construed so broadly that even when it is clear

In sum, the work product doctrine as it stands today enables courts to take an expansive, moderate, or limited approach to contemporary corporate practice and litigation and litigation preparation. As a result, the case law fails to reflect a unified picture of the corporate attorney's role or consensus on the breadth of litigation and the profession's protective doctrines. Considering the sample of work product cases from the PR context, courts' definitions of the corporate attorney's role runs the gamut—from delivering traditional legal services to developing PR plans.<sup>330</sup> Thus, as currently constructed, the doctrine fails to provide predictable protection for the responsibilities and obligations of the contemporary corporate attorney managing or preparing for litigation.

### B. Possible Solutions and Preliminary Recommendations

This Article is primarily concerned with identifying problems with the work product doctrine and demonstrating that the doctrine provides a lens through which we can view the debate about the proper role of the contemporary corporate attorney. To that end, instead of constructing a new test for determining whether work product protection should apply based on the three problems identified above, this section identifies the goals toward which any new solution should strive, makes general recommendations on how to fix the doctrine, and offers one possible solution that might, after further development and analysis, meet those goals and embrace these recommendations.

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that the communications are solely to attempt to garner positive publicity to help the business stay afloat and not conducted to help the client in its anticipated litigation in some way, they can be protected under the “because of” standard because arguably they would not have been prepared but for the litigation. Some courts, however, do a better job at making a distinction. For example, in *Burke v. Lakin Law Firm, PC*, No. 07-CV-0076-MJR, 2008 WL 117838 (S.D. Ill. Jan. 7, 2008), the court determined that “[t]he emails include[d] attachments that provide strategies for communicating with employees, clients, and the media, and proposed letters to be sent to employees and clients reassuring them of the firm’s stability” should not be protected by the work product doctrine. *Id.* at \*2. Instead, it stated that

the documents involved here do not involve preparation or legal strategies for conducting litigation itself, nor do they discuss how Defendants plan to defend this or any other action. Instead, the documents discuss preparation and strategy for minimizing the public relations fallout that could result from pending litigation. And though the work product doctrine may protect documents that were prepared for one’s defense in a court of law, it does not protect documents that were merely prepared for one’s defense in the court of public opinion.

*Id.* at \*3. It is a nuance that is hard to make—especially under the “because of” standard. For instance, in *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53 (S.D.N.Y. 2000), the district court did not apply work product protection to communications that “strategiz[e] about the effects of the litigation on the client’s customers, the media, or on the public generally.” *Id.* at 55. Instead, it made clear that protection would only accord to circumstances wherein “the public relations firm needs to know the attorney’s strategy in order to advise as to public relations, and the public relations impact bears, in turn, on the attorney’s own strategizing as to whether or not to take a contemplated step in the litigation itself.” *Id.*

330. See *supra* note 321 and accompanying text.

Based on the analysis above, any work product standard should meet three goals. First, it should hew more closely to the historical purpose behind work product and take into account the differences between it and the attorney-client privilege. Therefore, as an overarching matter, courts should take the “business” prong of the analysis out of the work product doctrine entirely. Although in the attorney-client privilege context, courts have to attempt to differentiate that which is arguably indistinguishable (business and law), in the work product context judges should not attempt to make such a distinction—especially given that the work product doctrine was historically designed to enable lawyers to utilize non-legal expertise when making decisions about how to handle a legal controversy.

Second, the work product doctrine should be easily applicable and predictable (avoiding judicial ad hoc decisions), while reflecting the demands of the contemporary corporate attorney. It should neither enable judges to deny work product protection based on the judge’s personal view of what is the proper role of the corporate attorney—especially when that view is very narrow—nor be designed so broadly that that work product protection applies to all work that an attorney recommends, oversees, or comes across once the temporal anticipation of litigation has been met. Third, it may be defensible to match the contours of work product protection to the normative and practical commitments lawyers are charged with realizing in contemporary corporate practice and litigation preparation.

So what type of test will accomplish these goals? First, the ordinary course of business exception should be completely abolished.<sup>331</sup> If courts were to apply it as intended—that is, if courts were to truly take into account whether the document was not “substantially” the same or in the same form—any attorney worth his snuff could make a winning argument that all business documents are substantially different when litigation is impending or pending. Second, courts should not be placed in the impossible position of having to determine a party’s motivation in creating a document.<sup>332</sup> The analysis above makes clear that both tests devolve into courts determining ex post the motivation behind the work—whether it was

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331. Another scholar has recommended renouncing the ordinary course of business exception but for different reasons. Wilson, *supra* note 180, at 559–600 (making this recommendation because courts “plac[e] a heavier burden on the party resisting discovery” and “the increased uncertainty of the standard encourages attorneys to either disguise all of their materials as litigation documents or, in the extreme, discourages them from prudent investigation and evaluation”).

332. Scholars writing in other areas of law have made similar arguments against using “motivation” or “intent” as part of a legal standard. See, e.g., Adam Candeb, Comment, *Motive Crimes and Other Minds*, 142 U. PA. L. REV. 2071, 2077 (1994) (“[L]aws which require determining intent and motivation to a high specificity present courts with decisions which cannot be made on a sound basis . . . [and] threaten both the credibility and impartiality of the court room as well as freedom of thought.”); cf. Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1367, 1476 (1987) (arguing for a reversal of the “current preference for intent-based constitutional regulation of prosecutorial behavior,” largely because courts, by tending to factor prosecutor intent into determining whether a prosecutorial action is unconstitutional is “not only unsystematic, but largely unreflective,” as well as inflicting significant system costs inherent in employing such a system).

motivated “primarily” or simply “because of” anticipated litigation. Once courts enter into that type of determination, they inevitably assume the near-impossible task of distinguishing law from business. Moreover, it enables courts with a very narrow view of the role of corporate law practice to deny protection and those with a very broad view to apply protection.

Therefore, as Sisk and Abbate have recommended in the context of the attorney-client privilege, this Article argues that the scope of the work product doctrine should “correspond to the dynamic changes in the practice of law.”<sup>333</sup> As corporate case management and litigation services expand, “the contours of the [work product doctrine] should be adjusted proportionally.”<sup>334</sup> Further, “courts should be mindful of the necessarily expanded role of corporate counsel in the modern legal and regulatory environment.”<sup>335</sup> Granted, the work product doctrine should not be so expansive that attorneys can use it to protect work unrelated to the anticipated litigation. But, as Sisk and Abbate also argue, “the potential for abuse” is not best addressed by “narrowly defining the nature of the lawyer’s role or artificially constraining the topics that may be considered . . . in addressing a legal matter.”<sup>336</sup> Attorneys should be free to talk to any third party that may be helpful to litigation and case preparation—as defined broadly. And work product protection should extend to work created by non-lawyers as it has historically. Given the increase in regulations, types of available lawsuits, technology, and globalization, the realm of activities that go into case management today is much broader than it used to be. In addition to traditional considerations, lawyers also take into account public relations, government relations, and international regulations when building a case in anticipation of litigation. That said, one way to reel in the potential for abuse is to require that work created by non-lawyers be done at the direction or supervision of an attorney in order to garner work product protection. This will help ensure a tighter nexus between the non-lawyers’ work and the lawyer’s case preparation.

#### 1. Analysis of Solutions Offered by Others

Before moving into this Article’s preliminary recommendation, it is helpful to review two new work product tests that have emerged recently. Although at first glance both appear to meet the goals identified above, they ultimately fall prey to some of the current doctrine’s pitfalls.

In *Textron*, the First Circuit’s most recent decision analyzing the work product doctrine, the court concocted a new test that appears to sidestep the

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333. Sisk & Abbate, *supra* note 9, at 204.

334. *Id.* One might argue that if Sisk and Abbate’s recommendation were adopted, the need for such a change in the work product context might decrease. However, that might not be the case unless the doctrine that provides protection to communications with third-party consultants is also similarly expanded because work product is often developed in conjunction with non-lawyers.

335. *Id.* at 231.

336. *Id.* at 230.



need to make the squirrely law/business distinction. Despite having adopted the “because of test” in the past,<sup>337</sup> in *Textron* the First Circuit applied a “for use in litigation” test. It denied protection to the work at hand because only “case preparation materials” that “would be useful in the litigation” could garner work product protection.<sup>338</sup> However, the First Circuit appears to view the words “trial” and “litigation” as synonymous.<sup>339</sup> For example, the court recognized that materials could be developed “in advance of [litigation’s] institution,”<sup>340</sup> but reiterated that “[i]t is only work done in anticipation of or *for trial* that is protected.”<sup>341</sup> As mentioned above, construing the work product doctrine as only applying to “trial” and not litigation<sup>342</sup> is problematic given the rarity of trial.<sup>343</sup>

That issue aside, with this narrow construction, the test appears on its face to prevent a court from determining whether work product will apply by making a distinction between business and law. That is, if the party can show that the materials were useful at trial—regardless of whether they were also useful for business reasons—the work will be protected. However, after closer analysis it does not seem likely that the First Circuit meant for the analysis to be so simple. On the one hand, the court appears to limit the analysis to whether the work could be considered useful at trial. On the other hand, it also seems concerned with the motivation for why the work was produced. To that end, the First Circuit’s description of the test in some areas of the opinion seems to imply a motivation test. For example, it states that work product protection is limited to “case preparation materials” that are “designed for use at trial” or “prepared for potential use in litigation.”<sup>344</sup> Thus, under this test, if a motivating reason was for a business purpose but the work was also useful at trial, the First Circuit might deny work product protection. Indeed, this is exactly what happened in *Textron*. As the dissent points out, the lower court found that the work had both litigation and business purposes.<sup>345</sup> However, the court seemed to believe that if the work had even one business or regulatory purpose, that protection for the work altogether should be denied.<sup>346</sup> Thus, although the test appears to skirt the need to make a distinction between business and law, it does not do so in application.

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337. *Maine v. U.S. Dep’t of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002) (adopting and applying the “because of” test); *see also* *United States v. Textron Inc. & Subsidiaries*, 577 F.3d 21, 32 (1st Cir. 2009) (Torruella, J., dissenting) (explaining that the First Circuit adopted the “because of” test and is abandoning it with this decision).

338. *Textron*, 577 F.3d at 28–29 (explaining that “[f]rom the outset, the focus of work product protection has been on materials prepared for use in litigation”).

339. Pease-Wingenter, *supra* note 2, at 153–55 (“The Fifth Circuit’s ‘primary purpose’ test gives effect only to the latter, narrow term [trial] and not the former, much broader one [litigation].”).

340. *Textron*, 577 F.3d at 29 (emphasis omitted).

341. *Id.* at 30.

342. Defined distinctly as “[t]he process of carrying on a lawsuit.” BLACK’S LAW DICTIONARY 1017 (9th ed. 2009).

343. *See supra* note 314 and accompanying text.

344. *Textron*, 577 F.3d at 26–30; *id.* at 32 (Torruella, J., dissenting).

345. *Id.* at 39.

346. *Id.* at 42.

More importantly, the test does not circumvent the other problem identified in this Article, namely that judges that adopt a very narrow view of the role of the corporate attorney may deny protection to work that was designed to help lawyers at trial if the judge does not believe it *should* be used or helpful at trial. The First Circuit had a very solid idea of what material is protectable when it claimed that the focus of the work product doctrine is on “materials that lawyers *typically* prepare for the purpose of litigating cases.”<sup>347</sup> Further, it believed that the determination was easy: “Every lawyer who tries cases knows the touch and feel of materials prepared for a current or possible . . . law suit.”<sup>348</sup> But as the dissent pointed out, this cannot be right given “a host of cases which grapple with tough work product questions that go beyond the stuff that ‘[e]very lawyer who tries cases’ would know is work product.”<sup>349</sup> Lastly, this test is exceedingly narrow—narrower than the “primary motivating” test<sup>350</sup>—which, as discussed above—and as critiqued by many other scholars—severely limits protection to a point that is inconsistent with the historical underpinnings of the doctrine itself.<sup>351</sup>

Another possible solution could be an “intertwined test,” one that confers protection when the business and legal motivations are inextricably intertwined. For example, in a recent case, the Ninth Circuit reasoned that work product protection applied because “taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that they cannot be discretely separated from the factual nexus as a whole.”<sup>352</sup> Similarly, in the attorney-client privilege context, Sisk and Abbate suggest that the attorney-client privilege should apply when law-related services and non-legal components of legal advice are “merged seamlessly together with a law practice,”<sup>353</sup> when legal and business advice and services are offered as an “integrated package of legal services,”<sup>354</sup> or when “non-legal components of a communication are intertwined with genuine and material requests for legal advice from corporate counsel.”<sup>355</sup> Terrence Perris recommends a slightly different rendition of an “intertwined” test in the context of tax contingency reserves. He argues that work product protection should attach when “the prospect of future litigation and the business need for the documents are so intertwined

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347. *Id.* at 26 (majority opinion) (emphasis added).

348. *Id.* at 30.

349. *Id.* at 34 (Torruella, J., dissenting).

350. *Id.* at 32 (describing the majority’s test as narrower than the “primary purpose test” and arguing that the work product rule does not say work must have been prepared to actually aid litigation to qualify as work product). The majority itself provides many clues that it views the doctrine very narrowly. For example, in the second page of the opinion, the First Circuit framed the work product doctrine as “the *qualified* privilege available for *litigation* materials.” *Id.* at 24 (majority opinion) (emphasis added).

351. *See supra* Part II.A.

352. *In re Grand Jury Subpoena*, 350 F.3d 1010, 1018 (9th Cir. 2003).

353. Sisk & Abbate, *supra* note 9, at 226.

354. *Id.* at 226–27 (explaining that the privilege should extend to “law-related services that rotate around a legal nucleus”).

355. *Id.* at 231.

that the prospect of future litigation itself creates the business need for the document.”<sup>356</sup>

The various renditions of an “intertwined test” appear to move in the right direction and address the problematic issues of the current doctrine. They seem to evade delineating what is business from what is law and prevent judges from denying work product protection simply because they have a very narrow view of corporate practice. However, arguably these tests are as broad (if not broader) than the current “because of” test. For example, impending litigation can impact a corporation’s bottom line and create a business need to more heavily market the brand. As explained above, a marketing plan designed to improve brand image and awareness could be deemed work product under the “because of” test.<sup>357</sup> Similarly, it could be deemed work product under an “intertwined” test because it could be viewed as work that was intertwined with the “genuine and material requests for legal advice from corporate counsel” about how to manage the impending litigation given the potential negative PR ramifications.<sup>358</sup> Thus, while the First Circuit’s test was too narrow and enabled a distinction between law and business, an intertwined test is too broad. The challenge, therefore, is to develop a test that not only avoids those extremes, but also addresses the other issues identified in this Article.

## 2. Tentative Preliminary Recommendation

Although not fully developed, a possible solution might be to confine work product protection to work by attorneys or work supervised by attorneys that is designed to, can, or actually does facilitate any litigation-related activity or decision—without respect to whether the work was also designed to, can, or actually does facilitate making a business decision.<sup>359</sup> Thus, work that assists in preparing materials for trial, or in making decisions about whether to file for summary judgment, implement a certain litigation tactic, proceed to trial, settle, file a claim, or raise a defense or counterclaim, would be protected. Work that aids a lawyer in assessing the strengths and weaknesses of a client’s case or in its positioning among regulators and opponents would also be protected. As in the FRCP, the word litigation is not confined to a trial.<sup>360</sup> Instead, this test protects work

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356. Terrence G. Perris, *Court Applies Work Product Privilege to Tax Accrual Workpapers*, PRAC. TAX STRATEGIES, Jan. 2008, at 4, 7 (“Under both the *Adlman* decision and the more recent *Roxworthy* decision by the Sixth Circuit, it will be difficult for the IRS to successfully argue that the work product privilege fails to attach when the anticipated future litigation is itself the source of the business need for the document.”).

357. See *supra* note 321 and accompanying text.

358. Sisk & Abbate, *supra* note 9, at 231.

359. This recommendation is narrower than the contours of the Federal Rules of Civil Procedure, which does not require that work be done under the direction or guidance of the corporate attorney. This makes sense in the corporate context, given that lawyers drive the direction of the case, and this will help ensure that the doctrine is not too expansive. Whether this makes sense outside the corporate context is outside the contours of this paper.

360. See *supra* note 313. That said, it appears that courts do not agree on the scope of litigation or litigation preparation and this may create issues for the application of this proposal.

that facilitates any tactical or strategic decision or action related to managing a legal controversy when litigation around that legal controversy is pending or impending (as defined by the current case law). Thus, if attorneys can show that the work helped them make a strategic or tactical decision about how to defend their case, proceed with developing the facts, or interview witnesses, the work would be protected. Further, although the doctrine appears to protect work that was created by non-lawyers even if not at the direction or under the supervision of lawyers, this test requires that the work was produced by non-lawyers at the direction of a lawyer or under his/her supervision. This ensures that the doctrine does not become too broad—as threatened by the current “because of” test.

Essentially, this test incorporates everything that would pass the First Circuit’s narrow “for use” test. Yet it sidesteps the need to decipher whether the motivating purpose was for business or law or whether the task had a business purpose to it. Thus, it does not easily merge with an attorney-client privilege analysis, and it slightly scales back the “because of” test. Importantly, the outcome under this test would not change if a judge has a very narrow view of the role of the corporate attorney.

To illustrate, consider a large drug manufacturing company that has just learned that users are experiencing serious side effects. Litigation will definitely occur, but before charges are filed, the company has to make decisions that will impact what charges might be filed, what defenses it can raise later on,<sup>361</sup> and its future negotiation leverage.<sup>362</sup> Thus, to determine which strategies and tactics are most likely to produce an advantageous outcome for its client, a lawyer and the CEO of the corporation might want to ask a PR expert to calculate the negative press associated with settling a case or pursuing a certain defense strategy.<sup>363</sup> The CEO, however, might also want the PR expert to devise a media campaign to improve brand image to offset the negative press from the legal controversy.

The documents prepared by the PR expert related to the decisions that the lawyer is trying to make would be protected under this test. This makes sense. Here, as was the case in *United States v. Adlman*,<sup>364</sup> a company is

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361. Beardslee, *supra* note 44, at 739 (“[T]he PR consultants need guidance from attorneys on how to position legal controversies and other types of disclosures to the public in a way that comports with the law, does not instigate potential lawsuits, and is synergistic with the legal strategy. . . . To be sure, a message in the court of public opinion that is different than the message in the court of law can create inconsistencies that are fatal.”) (internal quotations and citations omitted).

362. *Id.* at 737.

363. *Id.* at 738; *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (explaining that PR consultants need to understand legal strategies to provide PR advice and PR advice influences attorneys’ strategic and tactical legal decisions). As Kimberly Kirkland points out in another context, “[L]awyers make judgments about whether to employ a targeted or ‘kitchen sink’ approach to litigation. A ‘kitchen sink’ approach is one in which they would pursue every advantage, including making every non-frivolous argument or objection available to them.” Kirkland, *supra* note 67, at 705. Understanding the PR ramifications to taking such an approach might impact the lawyers’ opinions and help them “make decisions about how aggressive to be with opposing counsel.” *Id.*

364. *United States v. Adlman (Adlman II)*, 134 F.3d 1194 (2d Cir. 1998).

faced with an “untenable choice.” If, out of fear of losing privileges, it declines to fully analyze the legal PR ramifications from litigating or selecting one case management or litigation strategy over another, “it subjects itself . . . to ill-informed decisionmaking. On the other hand . . . [such legal PR analysis] cannot be turned over to litigation adversaries without serious prejudice to the company’s prospects in the litigation.”<sup>365</sup> However, the brand marketing plan would not be protectable—as it might be under the “because of” test or the “intertwined” test analyzed above.

Thus, at first blush, it appears that this approach would not only hew more closely to the history and purpose behind the work product doctrine, but would also serve several pragmatic ends. The approach, if adopted, would ensure that the work product doctrine is appropriately constrained in the corporate practice setting, providing meaningful protection only when it is most needed. Moreover, it would reduce the amount of time courts spend trying to distinguish between business and legal decisions—a largely meaningless and inefficient endeavor. Lastly, as compared to the “primary purpose” test, this approach enables work product to encompass a broader view of corporate practice (one that accounts for the increasing reliance on attorneys to play a quasi-public role) without protecting documents that arguably are completely unrelated to pending litigation.<sup>366</sup>

#### CONCLUSION

The overarching thrust of this Article is not to present answers, but instead to uncover and turn focus to the serious questions hovering within the work product doctrine in the corporate law arena: How, if at all, should the line be drawn between the business of business and the business of law and what is the proper role of the corporate attorney? This Article provides only a snapshot of how the work product doctrine applies in a single corporate context. However, if this snapshot is at all translatable to other contexts (e.g., investment banking, accounting, marketing, morals) then it may be true that the definition and application of the work product doctrine have real consequences for the professions’ ability to identify the role corporate attorneys can and should play in litigation and in society.

There are many business people, lawyers, judges, and scholars who argue for increased responsibilities of lawyers. As mentioned above, many call for lawyers to act as gatekeepers and moral counselors and believe that lawyers are not providing competent “legal” service if it is not holistic and multidisciplinary. Further, there has been an undeniable increase in the types of responsibilities that corporate lawyers are asked to take on with respect to corporate practice and litigation and the number and types of regulations that require lawyers to play a quasi-public role. The question of this Article is: As we change the rules to increase the practical and

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365. *Adlman II*, 134 F.3d 1194, 1200 (2d Cir. 1998).

366. Such enlargement is, in part, set off by the reality that the temporal aspects of the in anticipation requirement and the attorney-client privilege doctrine are both interpreted very narrowly. See *supra* note 179 and accompanying text; *supra* Part II.B.1.b.

normative responsibilities and expectations of corporate attorneys, should not those rules that afford protections to attorneys also grow? When corporate attorneys provide an expanded array of legal services that are “right” for clients (and litigation preparation) and at the same time “not wrong” for the public good, should not our protective doctrines follow suit?

Undeniably, we have moved to a world where the approach to legal practice includes functions that were not traditionally considered legal in nature. Concomitant with that move is a departure from the view of the lawyer as the amoral legal technician.<sup>367</sup> Therefore, if the profession and world at large have a more expansive view of litigation and what it means to be a corporate attorney, and if the regulations, responsibilities, and expectations of corporate attorneys continue to grow and include what might have been dubbed years ago as “extra legal” duties, then it makes sense for the doctrines that shield attorneys and attorneys’ work and communications with clients to follow suit. To this end, the Article concludes with a call to action to the legal profession, or perhaps better put, an attempt to begin a focused, holistic discussion about the proper role of the corporate attorney today.

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367. See Regan, Jr., *supra* note 32, at 202–03 (making a similar point).