Dueling Approaches to Dual Purpose Documents: The Reaches of the Work Product Doctrine After Textron

"[Work product protection] is less clear . . . as to documents which, although prepared because of expected litigation, are intended to inform a business decision influenced by the prospects of the litigation."1

I. INTRODUCTION

In a highly anticipated decision, the United States Court of Appeals for the First Circuit held that a company’s tax accrual work papers are not protected under the work product doctrine.2 In United States v. Textron Inc., the First Circuit applied the unprecedented test that materials must be prepared “for use in litigation” to be protected.3 The Textron decision provoked controversy because its interpretation of the work product doctrine significantly limits the types of documents afforded protection.4

In reaching its decision, the First Circuit stressed that Textron’s tax accrual work papers were dual purpose documents, i.e., prepared for both a business purpose and a possible business litigation purpose.5 Prior to Textron, courts commonly applied two different approaches to the work product doctrine: a broad test that protected dual purpose documents and a narrow test that did not protect dual purpose documents.6 The test established in Textron departed from the First Circuit’s previous broad interpretation of the work product doctrine,

1. United States v. Adlman, 134 F.3d 1194, 1197-98 (2d Cir. 1998).
3. See Textron, 577 F.3d at 27 (explaining work papers prepared “for use” in possible litigation protected). The dissent highlighted the unprecedented nature of the test. See id. at 33 (Torruella, J., dissenting) (stating “prepared for any litigation” test applied by majority follows no other court’s ruling).
4. See David E. Frank, Attorneys Predicting “Upheaval” in Wake of Work-Product Ruling by U.S. District Circuit Court of Appeals, MASS. LAW. Wkly., Aug. 24, 2009, at 1 (quoting lawyer stating “work-product doctrine has been significantly narrowed”); Novick, supra note 2 (referring to First Circuit’s decision as controversial).
5. Textron, 577 F.3d at 26 (framing issue as involving documents not prepared “for” litigation but relating to potentially litigated subject); cf. id. at 36 (Torruella, J., dissenting) (referring to such documents as “dual purpose documents”).
6. See William Jordan, Circuit Court Rules That Work Product Doctrine Does Not Shield Corporation’s Tax Accrual Work Papers from Discovery by IRS, 34 No. 9 PROF. LIABILITY REP. art. 6 (Sept. 2009) (laying out broad and narrow tests applied by other circuit courts).
under which the tax accrual work papers would likely have been protected.\footnote{7 See id. (highlighting dissent’s criticism of majority for altering First Circuit’s prior broad “because of” test).}

Following \textit{Textron}, the scope of protection for dual purpose documents under the work product doctrine is unclear.\footnote{8 See Frank, supra note 4, at 1 (recognizing attorneys “simply don’t know where the line is anymore,” regarding protection under work product doctrine after \textit{Textron}).} While \textit{Textron} put in-house tax professionals on edge, its effects will likely extend to areas beyond tax law because the First Circuit focused on the dual purpose nature of the tax accrual work papers in reaching its decision.\footnote{9 See Amir Efrati, \textit{Ruling in Tax-Auditing Case Puts Corporations on Edge}, \textsc{Wall St. J.}, Aug. 20, 2009, at A9, available at http://online.wsj.com/article/SB125072397055744533.html (stating ruling giving in-house lawyers “sleepless nights” and could transcend tax arena).} Many other areas of law rely on similar dual purpose documents, which could potentially be damaging if an opponent were able to gain access to these documents during the course of litigation.\footnote{10 See generally \textit{In re Grand Jury Subpoena}, 350 F.3d 1010 (9th Cir. 2003) (discussing issue of discoverability of dual purpose document in environmental law action); Simon v. G.D. Searle & Co., 816 F.2d 397 (8th Cir. 1987) (discussing issue of discoverability of dual purpose document in products liability action).}

This Note will begin by looking at the public policy rationale underlying the Supreme Court’s establishment, and Congress’s codification, of the work product doctrine.\footnote{11 See infra Part II.A.1 (discussing public policy rationale underlying establishment of work product protection and ultimate codification).} It will then look at the state of the work product doctrine before the First Circuit’s \textit{Textron} decision.\footnote{12 See infra Part II.A.2 (examining circuit split existing pre-\textit{Textron} over whether to apply narrow or broad approach to privilege).} The Note will then discuss the \textit{Textron} decision and how the First Circuit developed its new “for use in litigation” test.\footnote{13 See infra Part II.B (detailing First Circuit’s creation of “for use in litigation” approach to work product doctrine).} The Note will then examine the protection currently afforded to dual purpose documents in the areas of environmental law and insurance law.\footnote{14 See infra Part II.C (describing use and protection of dual purpose documents in environmental and insurance law).} The analysis will argue that the \textit{Textron} test will have broad ramifications beyond the context of tax accrual work papers, and it will discuss the negative consequences on environmental law and insurance law if dual purpose documents are no longer shielded from discovery by the work product doctrine.\footnote{15 See infra Part III.A (arguing significant ramifications expected from broadly sweeping \textit{Textron} decision); see also infra Part III.B (speculating about negative consequences in other areas of law resulting from \textit{Textron} decision).}
II. HISTORY

A. Work Product Doctrine Pre-Texton

1. Public Policy Justifications

The 1947 Supreme Court opinion in *Hickman v. Taylor* first established the work product doctrine. In *Hickman*, the Court rejected the plaintiff's attempts to discover notes taken by the defendant's attorney while interviewing prospective witnesses for trial. In protecting the notes of the defendant's attorney, the Court recognized the importance of providing a sphere of privacy that permits a lawyer to analyze a client's case and prepare for trial without the threat of intrusion by opposing counsel. The Court attempted to preserve the quality of legal representation through the sphere of privacy. Under the Court's rationale, documents revealing an attorney's mental processes, known as "opinion work product," merit special protection. Since the *Hickman*
decision over sixty years ago, the Supreme Court has repeatedly recognized the public policy grounds underlying the work product doctrine.22

Rule 26(b)(3) of the Federal Rules of Civil Procedure later codified the work product doctrine by protecting documents "prepared in anticipation of litigation or for trial" from discovery by the opposing party.23 However, Rule 26(b)(3) also provides for an exception if the opposing party shows a "substantial need for the materials... and cannot, without undue hardship, obtain their substantial equivalent by other means."24 Even upon this showing, Rule 26(b)(3) further provides that the court "must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney."25 In addition to the limitations Congress explicitly imposed on the scope of the work product doctrine through the language of Rule 26(b)(3), the advisory committee’s notes to Rule 26(b)(3) further limit its scope by stating that materials prepared in the ordinary course of business, pursuant to public requirement, or for nonlitigation purposes, are not given protection under this Rule.26 Therefore, the work product doctrine does not protect all materials prepared by a lawyer.27

22 Id. (stating Supreme Court continued to reaffirm public policy underlying work product protection since Hickman decision); see, e.g., Upjohn Co. v. United States, 449 U.S. 383, 397-98 (1981) (reaffirming “strong public policy” underlying work product doctrine); Herbert v. Lando, 441 U.S. 153, 183 (1979) (Brennan, J., dissenting) (recognizing sacrificing some sources of fact necessary to protect interests and relationships of social importance); United States v. Nobles, 422 U.S. 225, 238 (1975) (praising work product doctrine as “intensely practical” and grounded in realities of litigation). Although attorneys most frequently assert work product protection in civil litigation, the Nobles Court acknowledged the vital role of the work product doctrine in the criminal justice system to protect the interests of society and the accused in obtaining a fair and accurate trial. See 422 U.S. at 238.

23 Fed. R. Civ. P. 26(b)(3) (codifying work product doctrine); Adlman, 134 F.3d at 1197 (highlighting Rule 26(b)(3) as codification of Hickman’s work product doctrine); see also Fed. R. Civ. P. 26(b)(3) advisory committee’s notes (discussing influence of Hickman on 1970 Amendment).

24 Fed. R. Civ. P. 26(b)(3) (codifying exception to work product protection); Adlman, 134 F.3d at 1197 (stating documents prepared for litigation discoverable only if substantial need exists and undue hardship results).

25 Fed. R. Civ. P. 26(b)(3) (prohibiting disclosure of certain types of materials, such as mental impressions); Adlman, 134 F.3d at 1197 (cautioning work product sometimes not discoverable even upon showing of substantial need and undue hardship).

26 Fed. R. Civ. P. 26(b)(3) advisory committee’s notes (discussing further limitations on documents qualifying for immunity under Rule 26(b)(3)); see also Goosman v. A. Duie Pyle, Inc., 320 F.2d 45, 52 (4th Cir. 1963) (holding documents made pursuant to ICC regulations not work product because created in ordinary course of business).

27 See Hickman v. Taylor, 329 U.S. 495, 511 (1947) (clarifying all work product prepared by counsel with eye toward litigation not necessarily protected); see also United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982) (distinguishing work product doctrine from umbrella shading all materials prepared by lawyer from discovery).
2. Approaches of Various Circuits Pre-Textron

a. Narrow Interpretation

Before the Textron decision, most circuits took either a narrow or a broad
approach to the work product doctrine.28 In those circuits that follow the
narrow approach, the work product doctrine applies only to documents whose
creation is “primarily motivated to assist in future litigation.”29 According to
this interpretation, the work product doctrine would not protect dual purpose
documents prepared both in anticipation of future litigation and for use in a
business decision.30

The Fifth Circuit adopted the narrow approach in United States v. El Paso
Co.,31 in which the El Paso Company sought to withhold its tax accrual work
papers from the Internal Revenue Service (IRS) during a routine audit.32 When
the IRS requested El Paso’s tax accrual work papers, the company refused to
comply, claiming the work product doctrine protected the papers.33 Although
the Fifth Circuit recognized the important policy rationales underlying the work
product doctrine, the court stated that those rationales did not apply because the
primary motivation behind the preparation of the tax accrual work papers was
to conform to auditing principles compelled by the securities laws.34 Because
El Paso created the tax pool analysis with its business needs in mind rather than
its legal ones, work product protection would not have affected whether it
would create the documents.35 Having a primary purpose other than litigation
increases the chances that a company will commit its work to writing because
the documents need to be created whether or not protected by the work product
doctrine; therefore, the quality of legal representation is not a concern.36

(differentiating documents protected under two formulations); United States v. Adlman, 134 F.3d 1194, 1198
(2d Cir. 1998) (introducing two formulations of work product doctrine used by courts).
29. See El Paso Co., 682 F.2d at 542 (holding tax accrual work papers discoverable because not prepared
“in anticipation of litigation”).
30. Adlman, 134 F.3d at 1198 (pointing to exemplary cases from Fifth Circuit showing dual purpose
documents not protected by narrow approach).
31. 682 F.2d 530 (5th Cir. 1982).
32. Id. at 533 (explaining IRS annually audits El Paso Company).
33. Id. (noting El Paso refused IRS’s request for “all analyses prepared . . . regarding potential tax
liabilities and tax problems”); see also Textron, 577 F.3d at 30 (stating Fifth Circuit employs “primary
purpose” test).
34. El Paso Co., 682 F.2d at 542-43 (underscoring rationale behind work product doctrine and discussing
El Paso’s primary motivation in preparing materials); see also supra note 20 and accompanying text
(discussing public policy interest in protecting attorney privacy through work product doctrine).
35. See El Paso Co., 682 F.2d at 542-43 (denying applicability of work product rationale when documents
created with eye towards business needs); see also infra notes 67-69 and accompanying text (discussing
Textron Court’s rationale for refusing to apply work product protection under similar circumstances).
36. See supra notes 20 and 34 (discussing desire to prevent demoralization of legal profession through
work product protection).
In deciding whether El Paso’s tax accrual work papers were prepared “in anticipation of litigation,” the court followed a test it had previously used, which did not require litigation to be imminent, as long as possible future litigation was the primary motivation behind the creation of the documents. While the creation of tax accrual work papers involves an analysis of the potential impact of an IRS audit, litigation, and settlement on a company’s tax liability, a company’s primary purpose for preparing tax accrual work papers is for the financial reporting purpose of ensuring that the company has set aside sufficient funds for a contingent tax liability. Thus, the court felt the tax accrual work papers were more characteristic of unprotectable, ordinary business materials, rather than protectable materials regarding litigation strategy.

b. Broad Interpretation

The broad approach to the work product doctrine protects documents that are prepared “because of” anticipated litigation. Under this approach, the work product doctrine protects documents that would not have been prepared in substantially the same form but for the prospect of litigation. Following the broad interpretation, the work product doctrine may protect dual purpose documents.

Several circuit courts have adopted the broad interpretation of the work product doctrine. The Second Circuit adopted the “because of” test in United States v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998) (introducing broad “because of” litigation approach to work product doctrine). The “because of” existing or expected litigation approach protects more types of documents than the “primarily or exclusively to assist in litigation” approach. See id.

40. United States v. Adlman, 134 F.3d 1194, 1198 (2d Cir. 1998) (introducing broad “because of” litigation approach to work product doctrine). The “because of” existing or expected litigation approach protects more types of documents than the “primarily or exclusively to assist in litigation” approach. See id.

41. See id. at 1195 (applying “but for” element to “because of” approach to work product).

42. See id. at 1198 (differentiating protection under broad and narrow approach). The broad approach includes documents that contain an analysis of expected litigation, but are primarily created to make a business decision, even if their purpose is not to assist in litigation. See id.; see also United States v. Textron Inc., 577 F.3d 21, 33-34 (1st Cir. 2009) (Torruella, J., dissenting) (stating protection less clear for dual purpose documents but protected under “because of” test).

43. Adlman, 134 F.3d at 1202 (identifying several other circuits following broad approach). The Third, Fourth, Seventh, Eighth, and D.C. Circuits have all adopted the “because of” interpretation of the work product doctrine. Id.; see also, e.g., Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992) (protecting only documents prepared “because of” litigation); Senate of P.R. v. United States Dep’t of Justice, 823 F.2d 384, 386 (D.C. Cir. 1987) (stating work product protects documents prepared “in anticipation of litigation”); Binks Mfg. Co. v. Nat’l Presto Indus., Inc., 709 F.2d 1109, 1118-19 (7th Cir. 1983) (following “because of” approach, remote possibility of future litigation insufficient). The National Union court suggested
States v. Adlman. In Adlman, during the course of an audit of a recently restructured company, the IRS requested production of a memorandum prepared before the restructuring that included an evaluation of the tax implications of the proposed restructuring plan. While considering the proposed merger, the company’s attorney requested preparation of the memorandum to assist in making the decision. Among other information, the memorandum included a detailed legal analysis of challenges the IRS would likely make in response to the merger and the resulting tax refund claim, proposed legal theories or strategies the company could adopt in response to IRS challenges, and predictions regarding the outcome of litigation with the IRS. The company responded to the IRS’s request for production by withholding the memorandum, asserting that it fell under the work product doctrine.

The Second Circuit interpreted the phrase “prepared in anticipation of litigation” by looking to the plain language of Rule 26(b)(3) and the policies underlying the work product doctrine. In doing so, the court reasoned that a document’s purpose in making a business decision is irrelevant to the issue of whether it is afforded protection under the work product doctrine because the text and policies of the work product doctrine do not justify a company having to choose between making ill-informed business decisions and prejudicing its prospects in litigation. If the court required a company to turn over documents revealing litigation strategy to the opposing party because the company prepared the documents to assist in making a business decision it
expected to result in litigation, it would undermine the purpose of the work product doctrine—to protect documents that reveal an attorney’s opinions and legal theories about potential litigation. The Second Circuit held that the broader “because of” test comports with both the plain language of Rule 26(b)(3) and the underlying purpose of the work product doctrine.

**B. The Textron Test**

In *Textron*, the First Circuit addressed a question that the Supreme Court has not ruled on, but that two circuits previously addressed in the context of tax accrual work papers. The court considered whether the work product doctrine protects documents that are not prepared specifically “for” litigation, but instead relate to a subject that “might or might not” be litigated. By holding that the work product doctrine does not protect such dual purpose documents, the First Circuit adopted a new interpretation of the phrase “prepared in anticipation of litigation” found in Rule 26(b)(3). Under this new test, the question becomes whether the material was “prepared for use in possible litigation,” thereby limiting the scope of the work product doctrine.

In *Textron*, the First Circuit decided whether tax accrual work papers prepared to support a company’s calculation of tax reserves for its financial statements, are protected by the work product doctrine. Tax accrual work

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51. *Fed. R. Civ. P.* 26(b)(3) advisory committee’s notes (stressing courts safeguard against disclosing attorneys’ mental impressions and legal theories). The rule requiring a special need for discovery of protectable documents “reflects the view that each side’s informal evaluation of its case should be protected, that each side should be encouraged to prepare independently, and that one side should not automatically have the benefit of the detailed preparatory work of the other side.” *Id.; Adlman*, 134 F.3d at 1199 (observing Rule 26(b)(3) ratifies principle that documents revealing attorney’s opinions and legal theories deserve protection). In *Adlman*, it was almost certain that the IRS would challenge the company’s tax returns after the restructuring. See 134 F.3d at 1195. This demonstrates the possibility that a document’s creation can be primarily motivated by both a business purpose and a litigation purpose. See *id.* at 1198-99. These documents should not lose work product protection merely because they also assist in a business purpose. See *id.* at 1199. In such cases, the concern and desire to preserve the quality of legal representation still exists. See *id.*

52. *See United States v. Adlman*, 134 F.3d, 1194, 1202 (2d Cir. 1998) (adopting Wright & Miller’s “because of” formulation that protects documents created to assist business decisions).

53. United States v. Textron Inc., 577 F.3d 21, 26, 30 (1st Cir. 2009) (stating only First and Fifth Circuits squarely addressed issue).

54. *Id.* at 26 (identifying issue before First Circuit).


57. *Textron*, 577 F.3d at 22 (identifying issue before First Circuit).
papers are primarily created for a business purpose. They are used to calculate and support the amount of a company’s tax reserve on its financial statements. Because it is a publicly traded corporation, federal securities law requires that Textron have certified public financial statements. Further, the financial statements must include a tax reserve for contingent tax liabilities. Tax accrual work papers, which estimate the company’s potential liability if the IRS challenges the company’s tax return, are prepared to calculate tax reserves. Although apparently created primarily for a business purpose, Textron argued that the tax accrual work papers would not have been created “but for” potential litigation. Textron also asserted that the tax accrual work papers could prove useful in litigation if it arose.

The Textron Court held that tax accrual work papers are not protected by the work product doctrine because the “privilege is aimed at protecting work done for litigation, not in preparing financial statements.” The court offered several reasons for declining to extend the work product privilege to tax accrual work papers. First, the court failed to see how the rationale underlying the work product doctrine applied to tax accrual work papers. Presumably, if companies create documents for a business purpose, especially if created to comply with federal regulations, the threat of not receiving work product protection would not deter companies from creating the documents because the document’s production is required for a purpose other than litigation. This

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58. Id. at 27 (clarifying immediate motive for preparing tax accrual work papers).
59. United States v. Textron Inc., 577 F.3d 21, 27 (1st Cir. 2009) (stating tax accrual work papers prepared to determine tax reserve and obtain clean audit).
60. Id. at 22 (explaining federal securities law requirements for publicly traded corporations).
61. Id. (calculating company’s tax reserves necessary to prepare financial statements).
62. Id. at 22-23 (stating contingent tax liabilities necessary on financial statements because liabilities affect portrayal of company’s assets and earnings).
64. Textron, 577 F.3d at 30 (rejecting Textron’s argument because no evidence provided of work papers serving useful purpose in conducting litigation).
66. See id. (giving reasons behind decision not to apply work product doctrine to tax accrual work papers). In addition to the reasons discussed in this Note, the First Circuit gave one other reason that is not of significant relevance to the question of whether dual purpose documents outside the context of tax accrual work papers will similarly receive limited work product protection. See Jeremy H. Temkin, The Next Chapter in Textron over Protection for Work Papers, N.Y. L.J., Sept. 17, 2009, at 3. In response to Textron’s argument that it was not fair for the IRS to have access to the company’s tax accrual work papers, the majority concluded that the public’s interest in revenue collection trumped the resulting unfairness to Textron. See id.
67. See Textron, 577 F.3d at 31 (summarizing work product aimed at protecting work done for litigation, not in preparing financial statements); see also Temkin, supra note 66, at 3 (noting work product doctrine not aimed at helping lawyers prepare corporate documents).
68. See Textron, 577 F.3d at 31 (highlighting Hickman Court’s concerns of discouraging sound preparation for lawsuits not present in Textron). The First Circuit noted that the danger of discouraging sound preparation for lawsuits may exist in other cases, but where a company has a different purpose for preparing the documents or has a legal obligation to prepare the documents, that danger cannot be present. See id. But see
presumption undercuts the policy that the work product doctrine improves the quality of legal advice because tax accrual work papers will be created whether or not they are protected from discovery.69

Second, the court asserted that the work product doctrine was not triggered because the subject matter of a document relates to a subject that might conceivably be litigated.70 The work product doctrine protects documents that are prepared for litigation, so the function of the document rather than the subject matter determines whether or not it is protected.71 Finally, the court reasoned that because Textron had a legal obligation under federal securities law to prepare tax accrual work papers, there is no concern that a company would be discouraged from soundly preparing for lawsuits due to a lack of work product privilege for tax accrual work papers.72

C. Significant Dual Purpose Document Use Beyond Tax Law

1. Environmental Law

In addition to tax accrual work papers in tax law, other areas of law also rely on documents for making business decisions that might prove useful in preparing for litigation.73 One such area is environmental law.74 Companies

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69. See id. at 31-32 (majority opinion) (reasoning nonlitigation requirements assure tax accrual work papers prepared carefully even without protection).

70. See id. at 29 (reiterating Supreme Court’s explanation that language of Rule 26(b)(3) protects material prepared for litigation).

71. See United States v. Textron Inc., 577 F.3d 21, 29 & n.8 (1st Cir. 2009) (explaining protection afforded by literal language of Rule 26(b)(3)). Some circuits apply a test that focuses on the function of the document rather than its contents. See United States v. Roxworthy, 457 F.3d 590, 595 (6th Cir. 2006) (focusing on driving force behind document’s preparation in determining its function); see also Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 858 (D.C. Cir. 1980) (stating function documents serve in agency crucial factor in determining work product protection).

72. See Textron, 577 F.3d at 31 (declining to extend work product protection because policy underlying doctrine not applicable); Temkin, supra note 66, at 3 (noting sound preparation not compromised because preparation of tax accrual work papers required by law).


74. See Richard G. Leland & Elizabeth G. Tate, Environmental Consultants and the Attorney Work Product and Attorney-Client Privilege, BLOOMBERG L. REP.—ENVTL. L. (2009), available at http://www.friedfrank.com/siteFiles/Publications/E053D51AB770E327E09A11614093D381.pdf (stating environmental audits not protected if business report). An environmental audit report must clearly contain legal opinions or analysis to qualify for work product protection. See id. A report might be considered prepared for business purposes if it merely contains a recitation of information. See id. There are three specific situations where work product protection is typically sought. See id. The first is an investigatory situation, such as regulatory compliance checks or enforcement proceedings. See id. The second is a transactional
often perform self-audits involving a review of applicable environmental laws and an evaluation of the company’s compliance with those laws.\textsuperscript{75} These self-audits could be voluntary, or externally mandated by a governmental organization such as the Environmental Protection Agency (EPA).\textsuperscript{76} A self-audit could uncover potentially damaging information that would likely lead to litigation should the discovered violations be disclosed to a regulatory agency.\textsuperscript{77}

In \textit{Martin v. Bally's Park Place Hotel & Casino},\textsuperscript{78} the Third Circuit addressed work product doctrine protection of single purpose documents with respect to environmental law.\textsuperscript{79} In \textit{Martin}, an employee complained about skin, eye, and throat irritations they thought were caused by chemicals in the water used in the company’s kitchen.\textsuperscript{80} The employee contacted the Occupational Safety and Health Administration (OSHA), who then directed the company to investigate and correct the condition.\textsuperscript{81} After an initial investigation, the company hired a consultant and began preparing a defense against the claim.\textsuperscript{82} The court held that the work product doctrine protected the consultant’s report because of the clear showing that the company reasonably anticipated litigation and did not prepare the report in the ordinary course of business.\textsuperscript{83}

The Ninth Circuit, in \textit{In re Grand Jury Subpoena},\textsuperscript{84} addressed dual purpose situation, such as conducting due diligence for an anticipated merger or acquisition. See \textit{id}. The third is a self-audit situation where a company voluntarily evaluates its compliance with applicable environmental laws. See \textit{id}. Regarding work performed by environmental consultants, the work product doctrine normally protects materials prepared in the investigatory situation but does not protect documents prepared in the transactional or self-audit situations. See \textit{id}.

\textsuperscript{75} See \textit{id} (stating purpose of and issues addressed in self-audits).

\textsuperscript{76} See \textit{id} (noting different types of environmental audits).

\textsuperscript{77} See \textit{id} (recognizing audits could uncover information resulting in criminal prosecution of company executives or employees).

\textsuperscript{78} 983 F.2d 1252 (3d Cir. 1993).

\textsuperscript{79} See \textit{id} at 1253-54 (introducing issue on review as whether OSHA records access rule incorporates work product doctrine); see also Leland & Tate, supra note 74 (noting Bally’s prepared report under reasonable subjective belief that OSHA complaint might lead to litigation).

\textsuperscript{80} Martin, 983 F.2d at 1254 (reciting facts of case).

\textsuperscript{81} Id. (describing circumstances behind OSHA’s request for investigation). This is an example of a mandatory self-audit in that OSHA directed the company to perform the audit. See supra note 76 and accompanying text (noting difference between voluntary and mandated audits).

\textsuperscript{82} Martin, 983 F.2d at 1254 (noting that upon receipt of OSHA’s response after Bally’s initial investigation, its general counsel started preparing defense). Because OSHA was backlogged and would not be able to perform an inspection immediately, it suggested handling the matter informally by having the company perform a self-audit. Id. In such mandated self-audits, OSHA allows the company to hire a consultant of its choosing to perform the audit. Id.

\textsuperscript{83} Id. at 1261 (specifying Bally’s general counsel referred to “allegations” by OSHA and “defense of the . . . matter” when requesting report). In this context, limiting the scope of work product protection prevents companies from withholding audit records necessary for OSHA to perform its enforcement and regulatory functions. See \textit{id} at 1260-61. Because evidence showed the company reasonably anticipated litigation, the work product doctrine was being used for its proper purpose. See \textit{id}.

\textsuperscript{84} 350 F.3d 1010 (9th Cir. 2003).
documents in an environmental law context. In that case, a company was under investigation for violating federal waste management laws. The company refused the EPA’s requests to produce single and dual purpose documents, claiming the documents were protected by the work product doctrine. The single purpose documents were investigatory documents—created by an environmental consultant hired by the company—prepared exclusively to provide legal advice to the company in preparation for litigation. In addition to helping prepare for litigation, the dual purpose documents were created to comply with the EPA mandated cleanup. There was no question that the single purpose documents were protected by the work product doctrine; however, the issue was whether the dual purpose documents would also be protected. In determining whether the dual purpose documents would be protected under the work product doctrine, the court held that because their litigation and nonlitigation purposes were so intermingled, the test was whether the documents were prepared “because of the prospect of litigation.”

Therefore, in cases involving documentation of an audit, it is likely that the work product doctrine will protect documents arising out of an audit performed in the course of an investigation or as the result of an enforcement proceeding. Additionally, the audit report must contain legal opinion or analysis to be protected under the work product doctrine. But if a company conducts an audit for due diligence, or as a voluntary self-audit, the work is not likely to be protected.

85. See id. at 1015 (identifying work product protection of dual purpose documents as issue of first impression).
86. See id. at 1012 (setting forth background of case).
87. Id. at 1012-13, 1015 (stating environmental consultant refused to produce all documents). The environmental consultant hired by the company produced documents relating to his environmental consultant responsibilities, but refused to produce other documents on grounds that the work product doctrine protected them. Id. at 1012-13.
88. See Grand Jury Subpoena, 350 F.3d at 1015 (recognizing environmental consultant created most documents solely to defend impending legal proceedings).
89. Id. (differentiating single purpose documents from documents prepared for business purposes).
90. See In re Grand Jury Subpoena, 350 F.3d 1010, 1015 (9th Cir. 2003) (questioning whether work product doctrine protection also extends to dual purpose documents).
91. Id. at 1015, 1018 (joining other circuits in applying “because of” standard). When deciding whether work product protection applies, the totality of the circumstances must be considered because simply looking at the nature of the document does not answer the question. See id. at 1016-17. The analysis becomes complicated when a document is created for two interconnected purposes. See id. at 1017. The more one can separate the independent purpose for the creation of the documents from the anticipation of litigation, the less likely it is that work product protection will apply. See id. at 1016-17.
92. See supra note 71 and accompanying text (discussing protection of documents in different environmental audit situations).
93. See Leland & Tate, supra note 74 (stating privilege does not attach merely because document prepared by attorney).
94. See id. (addressing work product protection in context of environmental audits).

Little privilege protection exists for environmental audits. There is a tension among law makers...
2. Insurance Law

Another area of law that relies on dual purpose documents is insurance law. An insurance company’s counsel may prepare documents for the dual purposes of determining whether an insured’s policy covers a claim and preparing for litigation regarding that claim. Courts have addressed whether the work product doctrine protects dual purpose documents in this context.

In In re Professionals Direct Insurance Co., the Sixth Circuit addressed whether an insured party could compel production of documents from an insurance company’s coverage files during discovery. The insured, a law firm specializing in insurance defense, unsuccessfully defended a claim resulting in a large jury verdict for the plaintiff. The trial court then denied the law firm’s untimely motion for judgment notwithstanding the verdict or, alternatively, for a new trial. The law firm appealed that decision, and while the appeal was pending, the firm applied to renew its malpractice insurance policy. However, the firm did not disclose the trial court’s decision or the pending appeal that might lead to a malpractice suit against it in its application to renew its malpractice insurance coverage. The firm eventually notified its insurer of the potential malpractice claim, but only after the state supreme court had affirmed the trial court’s ruling that the motion was untimely filed.

After receiving notification, the insurance company retained counsel to explore possible avenues for denying the firm coverage in the event of a malpractice claim against it. After the firm’s client initiated malpractice

between the desire to encourage companies to conduct voluntary self environmental audits and subsequently to disclose discovered violations and the fear that a company will use such privilege to hide the contents of the audit if it should reveal violations that would carry legal penalties and/or be troublesome or expensive to remedy.

Id. 
95. See William Jordan, Work Product Doctrine Did Not Apply to Documents Prepared for Dual Purpose of Determining Insurance Coverage and Litigating Coverage, 34 No. 10 PROF. LIABILITY REP. art. 12 (Oct. 2009) (reporting on Sixth Circuit’s holding in In re Prof’ls Direct Ins. Co., 578 F.3d 432 (6th Cir. 2009)).
96. See id. (referencing role of dual purpose documents in Sixth Circuit’s decision).
97. See id. (discussing Sixth Circuit’s decision not to apply work product protection to dual purpose documents); see also In re Prof’ls Direct Ins. Co., 578 F.3d 432, 432 (6th Cir. 2009) (addressing dual purpose documents in insurance law context).
98. 578 F.3d 432 (6th Cir. 2009).
99. See id. at 435 (describing issues and positions of parties on review).
100. Id. (reciting facts of case).
101. Id. (detailing act reasonably expected to result in malpractice claim).
102. See Prof’ls Direct, 578 F.3d at 435 (recounting firm’s failure to include potential claim on application).
103. Id. (showing firm failed to disclose information requested on application). The law firm indicated “it was not aware of any circumstances, acts, or omissions during the prior twelve months that ‘could reasonably be expected to result in a claim to Professionals Direct’.” Id.
104. In re Prof’ls Direct Ins. Co., 578 F.3d 432, 435 (6th Cir. 2009) (suggesting insurance company acknowledged notice, but reserved right to deny claim).
105. Id. at 435-36 (reciting steps insurance company took to defend against potential claim).
settlement negotiations with the firm, which proved fruitless, the insurer filed an action in federal court for a declaratory judgment to exclude coverage.106 The firm counterclaimed, alleging breach of contract and bad faith in processing the claim, and during discovery it requested production of all related documents.107 The insurance company refused to produce certain documents on the grounds that they were protected by the work product doctrine.108

In deciding whether the work product doctrine covered the disputed documents, the Sixth Circuit needed to determine whether the insurance company prepared the disputed documents in anticipation of litigation.109 The court noted that a document prepared in anticipation of litigation is not deprived of work product protection just because it also served an ordinary business purpose.110 However, the party claiming protection must show that anticipated litigation was the “driving force behind the preparation of each requested document.”111 The court further stated that a document is prepared in anticipation of litigation if it is prepared “because of” the party’s objectively reasonable subjective anticipation of litigation.112

Following this rationale, the court held that the work product doctrine protected only some of the disputed documents.113 The court reasoned that the documents did not have a dual purpose until the insurance company seriously contemplated a declaratory judgment action, but the work product doctrine would only protect documents created after this point.114 Up until that point, the “driving force” behind the documents was to assist in the business decision of whether to provide coverage, not “because of” anticipated litigation.115 The court also stressed the importance of the context in which the insurance company created the documents when deciding whether the documents were, in

106. Id. at 436 (noting insurance company excluded coverage because firm did not give notice of potential claim before expiration of old policy or in renewal application).
107. Id. (introducing issues related to discovery).
108. See Prof’ls Direct, 578 F.3d at 436 (outlining insurance company’s reasons for refusal).
109. See id. at 438 (stating sole issue to be determined under work product doctrine).
111. See id. at 440 (agreeing with district court by asserting some documents protected by work product while others not). The documents “prepared ‘because of’ the coverage decision rather than anticipated litigation or . . . prepared prior to the time Professionals Direct could reasonably anticipate litigation” were discoverable. Id.
112. See id. at 439 (claiming serious evaluation of specific litigation met “in anticipation of litigation” requirement). Only documents created after the insurance company retained counsel and sent a second reservation of rights letter, which asked the law firm to explain its failure to disclose the potential malpractice claim on its renewal application, were considered dual purpose documents primarily prepared in anticipation of litigation. Id.
113. See id. at 439 (applying broad interpretation of work product doctrine).
114. See In re Prof’ls Direct Ins. Co., 578 F.3d 432, 439 (6th Cir. 2009) (setting forth requirements for determining whether document was prepared in anticipation of litigation).
III. ANALYSIS

A. Textron’s Application to Dual Purpose Documents in Other Areas

The dissent in Textron noted that the majority failed to address the future impact of its decision on work product doctrine disputes beyond the context of tax accrual work papers. Textron obscured the line separating discoverable dual purpose documents from privileged dual purpose documents, affecting multiple areas of law. Although some may argue that Textron’s impact is limited to tax accrual work papers, Textron is likely to be far reaching. Textron’s impact may extend far beyond the tax law context if litigants, in an attempt to gain access to a broad range of dual purpose documents, cite Textron as precedent that allows such discovery. Statements in Textron’s dissenting opinion, omissions from Textron’s majority opinion, and the policies underlying the work product doctrine all support the conclusion that the decision in Textron will not be limited to the tax accrual work paper context.

First, the Textron majority’s omissions are at least as important as its statements. The majority failed to specifically restrict its interpretation of the

116. See In re Prof’ls Direct Ins. Co., 578 F.3d 432, 439 (6th Cir. 2009) (recognizing context in which documents prepared important in determining work product protection). The work product doctrine does not protect documents prepared before litigation is anticipated because the public policy concerns that the doctrine addresses are not implicated. See id. Even if litigation is anticipated, the work product doctrine does not protect documents prepared for a business purpose other than for the anticipated litigation itself. See id.

117. See United States v. Textron Inc., 577 F.3d 21, 37 (1st Cir. 2009) (Torruella, J., dissenting) (predicting significant ramifications of majority opinion beyond tax accrual work papers); see also Frank, supra note 4, at 25 (agreeing Textron decision applicable to most work product cases in federal court).

118. See Frank, supra note 4, at 1 (observing work product doctrine significantly narrowed, but placement of line unknown).

119. See Frank, supra note 4, at 25 (predicting Textron gives rise to two opposing arguments). Some lawyers will cite Textron in non-tax accrual work paper cases to gain access to otherwise undiscoverable materials, while other attorneys will argue Textron only applies to the narrow context of tax accrual work papers. See id.; see also First Circuit Holds, supra note 55 (characterizing consequences of Textron as “far-reaching”).

120. See Work Product Doctrine, supra note 73 (predicting Textron’s application to private, non-tax business litigation, allowing broader range of business record discovery); see also Can You Shield Work Papers from the IRS? Understanding the Boundaries of the “Work Product Doctrine”, CPA Resource (Sept. 21, 2009), available at http://www.lorman.com/newsletters/article.php?article_id=1345&newsletter_id=288&category_id=6&topic=CPA (warning full impact of Textron decision likely not felt immediately).

121. See infra notes 122-128 and accompanying text (arguing Textron decision applicable to areas beyond tax law); see also Temkin, supra note 66, at 3 (listing factors in determining whether work product doctrine applies to documents).

122. See United States v. Textron Inc., 577 F.3d 21, 36-38 (1st Cir. 2009) (Torruella, J., dissenting) (recognizing issues majority opinion failed to address). For example, the majority did not address the public policy concern that attorneys will avoid putting certain information in writing when faced with the threat of limited work product protection. See id. Instead, the majority dismissed this concern because tax accrual work papers are required by federal law. See id. at 37. More importantly, the majority failed to address the possible
work product doctrine to the context of tax accrual work papers when it held that the work product doctrine did not protect tax accrual work papers because of their status as dual purpose documents. The First Circuit must have been aware of the potential ramifications of its decision, so the court would have taken the precaution of explicitly qualifying its decision if it intended to limit the scope of its decision to tax accrual work papers. Instead, the majority stated “the work product privilege is aimed at protecting work done for litigation,” indicating that dual purpose documents used in areas other than tax law will also receive limited protection under the work product doctrine.

Second, the public policy underlying the First Circuit’s refusal to protect tax accrual work papers applies equally well to others areas of law that rely on dual purpose documents. The Hickman Court explained this public policy rationale by cautioning that giving adversaries access to attorneys’ work product would demoralize the legal profession because attorneys would not commit their work to writing for fear that it would benefit the opposing party. In reaching its decision, the Textron majority held that the public policy rationale underlying the work product doctrine did not apply to documents prepared for a dual purpose because, even though the materials reflect an attorney’s legal thinking, they are prepared in the ordinary course of business or for other nonlitigation purposes. The public policy rationale does not apply to dual purpose documents because an attorney would have to

impact of its decision beyond the context of tax accrual work papers. See id.

123. See supra notes 65-72 and accompanying text (discussing reasoning behind First Circuit’s holding in Textron). If the majority did not intend for its Textron decision to be broadly interpreted, it could have included limiting language explicitly stating its decision applies only in the context of tax accrual work papers, and that the question of whether the work product doctrine protects dual purpose documents generally is still open for interpretation. See Textron, 577 F.3d at 29-30 (stating broadly many corporate materials not protected simply because they represent legal thinking).

124. See Novick, supra note 2 (referring to pending First Circuit decision as “highly anticipated”). Considering the importance and prevalence of the work product doctrine in litigation, and the media buzz surrounding the anticipation of the First Circuit’s decision, the court should have been aware of the potential impact of its decision.

125. See Textron, 577 F.3d at 31-32 (refusing to protect documents prepared for business purpose under work product doctrine).

126. See id. at 35 (Torruella, J., dissenting) (criticizing majority opinion’s refusal to apply Hickman’s rationale to dual purpose documents); see also Temkin, supra note 66, at 3 (recognizing policy judgments as another factor in determining work product protection).

127. See supra notes 19-20 and accompanying text (discussing public policy rationale underlying work product doctrine).

128. See United States v. Textron Inc., 577 F.3d 21, 30 (1st Cir. 2009) (reasoning dual purpose documents’ business characteristic trumps lawyer’s mental impression characteristic); supra notes 67, 72 and accompanying text (discussing First Circuit’s holding that work product rationale inapplicable to tax accrual work papers). But see Textron, 577 F.3d at 35 (Torruella, J., dissenting) (noting majority believes public policy rationale underlying work product doctrine inapplicable to dual purpose documents). In his dissent, Judge Torruella argued that the advisory committees’ “ordinary course of business” exception does not strip dual purpose documents of work product protection. See id. at 42. Instead, he asserted that the presence of a nonlitigation purpose does not override a litigation purpose, and concluded that documents created for both a business and litigation purpose should not lose work product protection. See id.
prepare such a document required in the ordinary course of business or for other nonlitigation purposes despite the risk that an adverse party could gain access to documents reflecting the attorney’s legal analysis. The business purpose ensures the work will be committed to writing, thus minimizing the public policy concern that denying work product protection will hinder the integrity of the legal profession. Again, this line of reasoning is not specific to tax accrual work papers, but is applicable generally to documents of a dual purpose nature.

B. Negative Impacts of the Textron Test in Other Areas

1. Environmental Law

If courts apply the test adopted in Textron to other areas of law, there will be negative consequences. In the environmental law context, the Textron test could have a range of impacts on the quality and performance of environmental audits, depending on whether an audit is voluntary or mandated. If the work product doctrine no longer protects dual purpose documents, companies will be less likely to voluntarily perform any audits because of the risk of uncovering and documenting liabilities that could be the subject of future litigation. Under the new Textron test, if a company performs an audit that exposes liabilities, the work product doctrine will not protect documents containing an evaluation of hazards discovered as a result of the audit. Companies aware of the legal risks of being forced to disclose audits revealing hazardous conditions will likely adopt a “what you don’t know can’t hurt you” attitude.

129. See supra notes 68-69 and accompanying text (discussing why public policy concerns regarding sound preparation not present for dual purpose documents).
130. See Textron, 577 F.3d at 31 (reasoning no danger of preventing sound preparation where company legally obligated to prepare documents).
131. See id. (applying reasoning to broader scope of cases than simply tax accrual work papers).
132. See id. at 35, 37 (Torruella, J., dissenting) (criticizing new rule and predicting ramifications beyond context of tax accrual work papers); supra note 120 and accompanying text (addressing multiple predictions that Textron decision likely to result in wide ramifications beyond tax law).
133. See supra notes 75-76 and accompanying text (discussing purpose and types of environmental audits).
134. See supra note 77 and accompanying text (noting audits potentially uncover information exposing companies to liability).
135. See supra notes 55-56, 58, 70 (discussing reasons for not protecting tax accrual work papers that apply to environmental audit documents). Environmental self-audits are dual purpose documents because they are prepared both for the business purpose of revealing hazards that must be addressed and for the purpose of anticipating litigation that could result from the hazards revealed. See supra notes 74-77 and accompanying text. Based on the First Circuit’s reasoning in Textron, the work product doctrine is not triggered simply because the subject matter of a document might be a subject of future litigation. See United States v. Textron Inc., 577 F.3d 21, 29 (1st Cir. 2009) (explaining proper focus on function of document, not subject matter). Further, following Textron’s reasoning, self-audits do not received work product protection because a company prepared them for a purpose other than litigation. See id. at 29-30.
136. See supra note 76 and accompanying text (emphasizing not all audits compelled by environmental agency, but often performed voluntarily).
Rather than running the risk of an opposing party discovering information that could cripple its chances of prevailing in future litigation, a company might choose to forego investigating a potentially hazardous situation.\textsuperscript{137}

Even when the EPA mandates that a company perform an audit, the negative effects of the \textit{Textron} test may still be felt.\textsuperscript{138} Although a company cannot exempt itself from a federally mandated audit, the company often maintains some control over how the audit is conducted.\textsuperscript{139} If a company is concerned that the audit document may be discoverable, the company has considerable motivation to ensure the audit results are favorable to the company.\textsuperscript{140}

\section*{2. Insurance Law}

Insurance law, like environmental law, depends heavily on dual purpose documents whose privilege status will be impacted by \textit{Textron}.\textsuperscript{141} Insurance companies often create dual purpose documents for the purpose of deciding whether an insurance policy covers a client’s claim.\textsuperscript{142} After \textit{Textron}, when an insurance company encounters a situation similar to that of \textit{In re Professionals Direct Insurance Co.}, the insurance company is more likely to immediately pay out the claim rather than fight it.\textsuperscript{143} Insurance companies may find that it is cheaper to pay immediately if the complaining client can obtain the documents prepared by the insurance company in assessing the claim through discovery, thereby damaging the insurance company’s case.\textsuperscript{144} Insurance companies’

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\item See supra note 77 and accompanying text (noting self-audit could uncover damaging information likely exposing company to liability). When deciding on its own whether to perform a self-audit, a company probably has a greater incentive to forgo the audit than to run the risk of exposing itself to potential liability. See supra note 77 and accompanying text (addressing inherent risk of performing voluntary self-audits).
\item See supra note 77 and accompanying text (noting environmental agencies sometimes require companies to perform self-audits).
\item See supra note 74 (recognizing some audits mandated by EPA, and companies sometimes perform and control own audit). Although a company may be required by EPA mandate to perform an audit, if the audit is a self-audit, the company oversees its execution. See supra notes 74-75 (discussing companies’ roles in self-audits). When a company decides who performs the self-audit, it has the ability to choose an auditor who may perform a cursory overview, or turn a blind eye to certain questionable practices, thereby leaving hazards undiscovered. See supra note 82 and accompanying text (discussing effect of permitting companies unrestricted discretion in choice of auditor).
\item See supra notes 82-83 and accompanying text (demonstrating company’s ability to potentially manipulate self-audit in its favor).
\item See United States v. Textron Inc., 577 F.3d 21, 35-37 (1st Cir. 2009) (Torruella, J., dissenting) (noting \textit{Textron}’s potential negative impact and wide ramifications beyond tax law).
\item See supra notes 104-105 and accompanying text (noting insurance company retained counsel to decide whether to deny or fight claim).
\item See supra notes 99-105 and accompanying text (discussing facts of \textit{In re Prof’ts Direct Ins. Co.}, 578 F.3d 432 (6th Cir. 2009)).
\item See supra notes 113-114 and accompanying text (discussing court’s determination that documents not dual purpose until company seriously considers legal action). Prior to \textit{Textron}, courts only protected documents under the work product doctrine after the point at which legal action becomes a serious consideration. See supra note 114 and accompanying text (discussing protection of dual purpose documents prior to \textit{Textron}). The point at which legal action is a serious consideration is when the documents become
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preference for immediately paying out claims will likely promote bad faith among their clients because they will be confident that insurance companies will not fight most claims and, as a result, insured parties will likely be able to achieve success with bad faith claims.\textsuperscript{145}

IV. CONCLUSION

In 1947, the Supreme Court established the work product doctrine in \textit{Hickman v. Taylor} to provide a sphere of protection in which attorneys could adequately prepare for litigation. Congress later codified the work product doctrine in Rule 26(b)(3) protecting documents “prepared in anticipation of litigation.” In subsequent years, federal circuit courts split over the precise scope of work product protection under Rule 26(b)(3), with some circuits applying a broad “because of” test, and others applying a more narrow “primary motivation” test.

Recently, in \textit{Textron}, the First Circuit announced an approach to the work product doctrine that applies a new, narrower test, resulting in a scope of protection that is more limited than that of any other circuit. Under the First Circuit’s new “for use in litigation” test, the work product doctrine does not protect dual purpose documents that are tax accrual work papers. Presently, it is unclear whether this decision applies in areas beyond the tax law context. However, based on the First Circuit’s rationale for refusing to extend work product protection to tax accrual work papers, and the lack of limiting language in its opinion, there is good reason to believe that this decision will compromise the protection of dual purpose documents in other areas of law.

The impact of the new test adopted by the First Circuit will likely extend beyond the context of tax law into other areas like environmental law and insurance law. Because both environmental law and insurance law rely heavily on dual purpose documents, the First Circuit’s new test could significantly affect litigation strategies in these fields, including decisions and behavior regarding the creation of nonmandatory dual purpose documents. If the First Circuit’s new test extends to the environmental law context, companies may be less likely to perform voluntary audits, or alternatively, be more likely to prepare biased mandatory audits, if documents resulting from audits are discoverable. In the area of insurance law, insurance companies might choose to pay out questionable claims rather than challenge them and risk the

\textsuperscript{145} See supra note 144 and accompanying text (discussing reasons insurance company would prefer paying out claim to disputing it).
discovery of dual purpose documents. Because the Textron majority’s opinion did not expressly limit the application of the “for use in litigation” test to tax law, and because the justifications for the test apply equally well to other areas of law, the First Circuit’s Textron test will likely be cited in disputes involving dual purpose documents in many different fields.

Before Textron, the issue of how the work product doctrine applied to dual purpose documents was unclear, with the federal circuits split between two approaches, partly due to the fact that there was little guidance from the Supreme Court. In Textron, the First Circuit further muddied the water by announcing a third approach. The potential confusion and uncertainty created by this new test will frustrate the purpose behind the work product doctrine, which is to allow lawyers to adequately prepare for litigation on behalf of clients, without fear of discovery. The Supreme Court should intervene to resolve this issue, thereby eliminating the confusion, while enabling lawyers to adequately prepare for litigation and allowing clients to make informed decisions about the creation of dual purpose documents.

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