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CORPORATE AND INSTITUTIONAL ACCIDENT INVESTIGATIONS AS WORK PRODUCT PURSUANT TO THE RULES OF THE SUPREME COURT OF VIRGINIA

*William Todd Benson**

I. INTRODUCCION

If the magnitude of the mishap so warrants, many businesses immediately call their insurance adjuster or other accident investigator. In some of the larger businesses, accident investigation and insurance have become in-house operations. This quick reflex toward early fact investigation is prompted, in part, by a healthy respect for the potentiality of claims arising out of the day to day conduct of business affairs. When a suit against such company ultimately is filed and discovery sought, an issue often arises concerning whether early institutional investigations are "work product" for purposes of the federal or Virginia rules of civil procedure. This leads to the natural follow-up questions: What is the work product rule? How should it be implemented? This article addresses these two questions as they pertain to Virginia procedure.

The federal work product doctrine is currently found in Federal Rule of Civil Procedure 26(b)(3).¹ Virginia's work product doctrine is found in Rule 4:1(b)(3) of the Rules of the Supreme Court of Virginia.² Virginia's pretrial discovery rules are Federal Rules 26 through 37 "verbatim so far as is consistent with Virginia practice."³ Indeed, the language of the two work product doctrines is identical. Considerable more case law and commentary have been devoted to the federal doctrine;⁴ thus, it provides the basis for much of the discussion of the Virginia rule.

II. THE WORK PRODUCT RULE

What we know as Federal Rule 26(b)(3) developed through the

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

2. VA. SUP. CT. R. 4:1(b)(3).

3. W. H. BRYSON, NOTES ON VIRGINIA CIVIL PROCEDURE 111 (1979).

4. As yet, there are no Supreme Court of Virginia decisions on Rule 4:1(b)(3). *But see* *Rakes v. Fulcher*, 210 Va. 542, 172 S.E.2d 751 (1970) (discussing "good cause").

merger of two separate but related concepts:⁵ the rule in *Hickman v. Taylor*⁶ and the "good cause" provision under the old Federal Rule of Civil Procedure 34.⁷

A. *Hickman v. Taylor*

The facts of this well-known case are stated briefly as follows: On February 7, 1943, the tug "J.M. Taylor" sunk while towing a barge across the Delaware River. Five of the nine crew members were killed. Three days later, the tug owners and their underwriters employed a law firm to defend them against potential suits. A public hearing on the accident was held before the United States Steamboat Inspectors on March 4, 1943. Shortly thereafter, the tug owners' retained lawyer privately interviewed the survivors and took their statements. The survivors signed their statements on March 29, 1943.

At the time the statements were taken, representatives of two of the deceased crew members had been in contact with the tug owners' lawyer. Ultimately, all claims were settled out of court except the claim of the representatives of Hickman ("Hickman"). Whether Hickman was one of the claimants who had previous contact with the defendants' lawyer is not disclosed in the reported case. Hickman filed suit on November 26, 1943. In the course of discovery, Hickman filed an interrogatory requesting any statements made by any crew member of the "J.M. Taylor" in connection with its sinking. In upholding the attorney's refusal to honor the request of this interrogatory the United States Supreme Court based its decision on two primary considerations.

First, the Court sought to protect the mental impressions and

5. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 499 (1970).

6. 329 U.S. 495 (1947) (articulating a qualified protection against discovery for the work product of attorneys).

7. FED. R. CIV. P. 34 (amended 1970). "Upon motion of any party showing good cause therefore and upon notice to all other parties, . . . the court . . . may [order discovery]." *Id.* The current version is absent the good-cause language:

The [production] request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

FED. R. CIV. P. 34(b). See also *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487 (1970).

mental process of the attorney.⁸ The Court found that it is essential that an attorney be able to prepare his legal theories and plan his strategies without undue and needless interference. The Court also noted that an attorney's thoughts are reflected in "interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways."⁹ Collectively, the Court referred to these items as "work product".¹⁰ The court went on to note that

[w]ere such materials open to an opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be in his own. . . . The effect on the legal profession would be demoralizing. And the interests of the client and the cause of justice would be poorly served.¹¹

Although this aspect of the decision often comes to mind in consideration of the *Hickman* case, it has been suggested that the "mental process" import of the case has been diminished in light of subsequent cases on the subject.¹²

The second, and arguably dominant, policy behind *Hickman* has been described as the anti-indolence provision.¹³ The Court noted that the plaintiff sought discovery of oral and written statements of witnesses whose identities were well known to him and whose availability appeared unimpaired and that this discovery was sought as a matter of right. The Court held that such a demand could not be made without a showing of necessity for the production of this material or a demonstration that denial of production

8. Closely associated with this aspect of the holding was the fear that probing an attorney's thoughts would harm the judicial process: "Inefficiency, 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." 329 U.S. at 511.

9. *Id.* It is important to point out that the Court implied that even "mere facts" are indications of an attorney's thought process because "[p]roper preparation of a client's case demands that he assemble information [and] sift what he considers to be the relevant from the irrelevant facts. . . ." *Id.*

10. *Id.*

11. *Id.*

12. Note, *Development In The Law—Discovery*, 74 HARV. L. REV. 940, 1028 (1961).

13. *State v. Circuit Court*, 34 Wis. 2d 559, —, 150 N.W.2d 387, 404 (1967). The policy of the anti-indolence provision was to encourage individual research and investigation of a matter and to discourage attorneys from using the work of their opponents to bypass their own efforts.

would cause undue hardship or injustice.¹⁴ The mere fact that the materials were not privileged was not a sufficient reason to compel production.

In a concurring opinion, Justice Jackson addressed Hickman's argument that the Federal Rules of Civil Procedure were designed "to do away with the old situation where a lawsuit developed into 'a battle of wits between counsel.'" ¹⁵ Justice Jackson rejected this argument, noting that an inherent aspect of our common law system is that trials proceed on an adversarial basis. Indeed, the Justice noted that free and open discovery of work product materials

14. No attempt was made to establish any reason why Fortenbaugh [the tug owner's attorney] should be forced to produce the written statements. There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved. That was insufficient to justify discovery under these circumstances and the court should have sustained the refusal of the tug owners and Fortenbaugh to produce.

329 U.S. at 512.

We are thus dealing with an attempt to secure the production of written statements and mental impressions contained in the files and mind of the attorney Fortenbaugh without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice. . . .

. . . .

[N]either Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. . . . Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery. . . . Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.

329 U.S. at 509-10. Cf. *Rakes v. Fulcher*, 210 Va. 542, 546, 172 S.E.2d 751, 755 (1970):

The mere assertion by affidavit that discovery is necessary for a movant to investigate fully and prepare his case is clearly insufficient in a statement of good cause. *Holt v. The James Sheridan*, 12 F.R.D. 72 (S.D.N.Y. 1951); *Aetna Life Ins. Co. v. Little Rock Basket Co.*, 14 F.R.D. 383 (E.D. Ark. 1953). Neither is good cause established when the moving party has not shown a bona fide effort to obtain the information by independent investigation. *Goldner v. Chicago & N.W. Ry. Sys.*, 13 F.R.D. 326 (N.D. Ill. 1952).

Accord, *A.H. Robins Co. v. Aetna Cas. & Sur. Co.*, Chan. No. G. 3321-2 (Rich. Cir. Ct. February 19, 1981), reported in 6 Virginia Assoc. of Defense Attorneys Newsletter 1 (1981).

15. 329 U.S. at 516 (Jackson, J., concurring). Subsequent courts have picked up on and followed Jackson's sentiment. See, e.g., *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 373 (N.D. Ill. 1972) ("[T]he obligation of discovery imposed on parties generally . . . [is] designed to insure that the fact finding process does not become reduced to gamesmanship that rewards parties for hiring or obscuring potentially significant facts."). However, Justice Jackson's retort is as applicable now as it was then: "But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." 329 U.S. at 516.

without any showing of substantial need "put trials on a level even lower than 'a battle of wits.'"¹⁶ This aspect of *Hickman* clearly admonishes an attorney to do his own trial preparation. Opposing counsel should not be required to turn over information unless and until the party seeking discovery has made a good-faith effort to acquire such information through other means. Furthermore, the party seeking discovery is admonished to demonstrate that the requested information is substantially necessary in the preparation of his case.

B. "Good Cause" Under Old Federal Rule of Civil Procedure 34

The old Federal Rule of Civil Procedure 34¹⁷ required a showing of "good cause" for the production of all documents and things whether or not trial preparation was involved.¹⁸ By 1970, however, it became obvious that many courts were applying two different "good cause" tests.¹⁹ "With respect to documents not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect[ed] a strong and increasing tendency to relate 'good cause' to a showing that the documents [were merely] relevant to the subject matter of the action."²⁰ "As to trial-preparation materials, however, the courts [were] increasingly interpreting 'good cause' as requiring more than relevance."²¹ In fact, "an overwhelming pro-

16. 329 U.S. at 516 (Jackson, J., concurring).

17. FED. R. CIV. P. 34 (amended 1970). See *supra* note 7.

18. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. at 500.

19. *Id.*

20. *Id.* (citing *Bell v. Commercial Ins. Co.*, 280 F.2d 514 (3d Cir. 1960); *Connecticut Mutual Life Ins. Co. v. Shields*, 17 F.R.D. 273 (S.D.N.Y. 1959); *Houdry Process Corp. v. Commonwealth Oil Refining Co.*, 24 F.R.D. 58 (S.D.N.Y. 1955)).

21. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. at 500. Some courts, including the Fourth Circuit Court of Appeals, applied the "more than mere relevancy" test whether or not the requested information was prepared in anticipation of litigation.

[C]ompelling the production of documents under Rule 34 can be extremely harrassing. Use of the weapon which this rule forges should not be permitted without more than the easily satisfied test of relevancy. This is particularly true since the identity of the witnesses can be readily discovered by Rule 33 interrogatories. Opposing counsel then has the opportunity to interview these witnesses himself or take their depositions. If it should subsequently appear that there exists a special need to compel disclosure of the statements themselves, this would undoubtedly satisfy the required showing of good cause.

We are not unmindful that one important purpose of discovery is to disclose all relevant and material evidence before trial in order that the trial may be an effective method for arriving at the truth and not "a battle of wits between counsel." *Hickman v. Taylor*, 329 U.S. 495, 516, 67 S. Ct. 385, 396, 91 L.Ed. 451 (1947) (Jackson, J.,

portion of the cases in which a special showing [was] required [were] cases involving trial preparation materials."²²

As noted by the Advisory Committee to the Supreme Court on the Reformation of the Federal Rules of Civil Procedure, courts were also split as to whether the "good cause" trial preparation standard applied to preparatory work of non-lawyers. However, the Committee found that with respect to information compiled by non-lawyers, the growing trend in 1970 was "to read 'good cause' as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information."²³

C. *Federal Rule of Civil Procedure 26(b)(3)*

In 1970, the current Federal Rule 26(b)(3) was created, and the "good cause" language was deleted from Federal Rule 34. Apart from trial preparation materials, discovery requests no longer required a showing beyond that of relevance and absence of privilege.²⁴

concurring); see Frost, *The Ascertainment of Truth by Discovery*, 28 F.R.D. 89 (1961). Doubtless, written statements of witnesses, if placed in the hands of opposing counsel, could aid him in preparing his case because this would give him a specific indication of the forthcoming testimony and a basis for impeachment if a witness departed from his prior statements. There is also the possibility that counsel would gain information opening up new areas for investigation before trial. However, these considerations must have been before the Advisory Committee that drew up the Rules and the Supreme Court when it adopted them. It is noteworthy that, while the Advisory Committee in 1955 urged deletion of the good cause requirement, the Supreme Court did not act on the recommendation. See *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 965-67 (1961).

The Federal Rules of Civil Procedure should be liberally construed, but they may not be expanded by disregarding plainly expressed limitations. We are not prepared to depart from the explicit language of Rule 34 when viewed in the context of the entire discovery section. In holding that a demonstration that the desired materials are relevant to the subject matter of the litigation does not by itself satisfy the good cause requirement of Rule 34, we are joining every other Court of Appeals that has considered this question. *Hauger v. Chicago, Rock Island & Pac. R.R.*, 216 F.2d 501 (7th Cir. 1954); *Martin v. Capital Transit Co.*, 83 U.S. App. D.C. 239, 170 F.2d 811 (1948); see *Mitchell v. Bass*, 252 F.2d 513 (8th Cir. 1958); *Williams v. Continental Oil Co.*, 215 F.2d 4 (10th Cir. 1954); *Allmont v. United States*, 177 F.2d 971 (3d Cir. 1950).

Guilford Nat'l Bank of Greensboro v. Southern Ry., 297 F.2d 921, 924-25 (4th Cir. 1962). *Accord*, *Rakes v. Fulcher*, 210 Va. 542, 172 S.E.2d 751 (1970).

22. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. at 500.

23. *Id.*

24. *Id.*

Prior to the 1970 amendments, the Federal Rules of Civil Procedure made no provisions concerning "the production of documents prepared in anticipation of litigation or for trial."²⁵ Federal Rule 26(b)(3) was created in order to address "the controversial and vexing problems"²⁶ arising out of the doctrines discussed above. The new rule included three central points: 1) It codified the work-product doctrine enunciated in *Hickman v. Taylor*;²⁷ 2) it expanded the work-product doctrine so as to include information or materials prepared by non-lawyers in anticipation of litigation;²⁸ and 3) "good cause" was inserted as a requirement for the discovery of an opponent's work product.²⁹

III. VIRGINIA'S RULE 4:1(B)(3)

With the above understanding of the history of the federal work product rule, Virginia's comparable work product rule, its intent and effect, is examined.

A. *Clear and Unambiguous Statutory Language Is to Be Given Effect*

The language of Rule 4:1(b)(3) is clear and unambiguous. It states that documents and tangible evidence prepared in anticipa-

25. *Id.* at 499.

26. *Id.*

27. *Id.* at 500-02.

28. *Id.* at 502 ("Subdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative acting on his behalf."). See also *A.H. Robins Co. v. Aetna Cas. & Sur. Co.*, Chan. No. G 3321-2 (Rich. Cir. Ct. February 19, 1981), reported in 6 Virginia Assoc. of Defense Attorneys Newsletter (1981):

It should be noted at this point that the protection for ordinary work products extend under the Rule to documents prepared by or for the party's representative, not just his attorney. . . . Therefore, the fact that the documents were prepared by or for Aetna's computer experts or paraprofessionals is not in itself relevant as long as the materials were prepared for trial or in anticipation of litigation.

Id. at 5.

29. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. at 501.

On the other hand, the requirement of a special showing for discovery of trial preparation materials 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. As this language so clearly demonstrates, "work product" is not limited to mental impressions or thought processes.

tion of litigation by or for a party or by or for a party's representative "including his attorney, consultant, surety, indemnitor, insurer, or agent" is not discoverable without a showing of substantial need or undue hardship.³⁰ When statutory language is clear and unambiguous, it is to be given effect. This rule of law is firmly entrenched in Virginia.³¹ If language is clear and unambiguous, the courts will not resort to rules of construction.³² As forcefully stated by the Supreme Court of Virginia on one occasion:

It is contended that the construction insisted upon by the plaintiff in error is violative of the spirit or reason of the law. The argument would seem to concede that the contention is within the letter of the law. We hear a great deal about the spirit of the law, but the duty of this court is not to make law, but to construe it; not to wrest its letter from its plain meaning in order to conform to what is conceived to be its *spirit*, in order to subserve and promote some principle of justice and equality which it is claimed the letter of the law has violated. It is our duty to take the words which the legislature has seen fit to employ and give to them their usual and ordinary signification, and having thus ascertained the legislative intent, to give effect to it, unless it transcends the legislative power as limited by the Constitution.³³

It is clear, therefore, that, in Virginia, plain language is given effect. The fact that what is under consideration is a rule of the Supreme Court of Virginia rather than a statute enacted by the General Assembly is immaterial. It is clear that the rules of court authorized by statute³⁴ have the force and effect of law.³⁵ Once adopted, "[t]hey become binding upon the litigants as well as upon the court in the conduct of its proceeding."³⁶

B. "In Anticipation of Litigation"

Statutes are to be construed according to the reasonable meaning of the language employed.³⁷ The clear language of Rule

30. VA. SUP. CT. R. 4:1(b)(3).

31. See generally 17 *Michie's Jur. Statutes* § 34 (1979 and Cum. Supp. 1981).

32. *Sanitation Comm'n v. Chesapeake*, 218 Va. 696, 240 S.E.2d 819 (1978).

33. *Saville v. Virginia Ry. & Power Co.*, 114 Va. 444, 452-53, 76 S.E. 954, 957 (1913). See *supra* note 21.

34. VA. CODE ANN. § 8.01-3 (Cum. Supp. 1982).

35. *Weil v. Neary*, 278 U.S. 160, 165-69 (1929).

36. *Star Piano Co. v. Burgner*, 89 W. Va. 475, —, 109 S.E. 491, 492 (1921).

37. *Cason v. Commonwealth*, 181 Va. 297, 24 S.E.2d 435 (1943).

4:1(b)(3), when viewed in light of the above-stated legal principles, indicates that materials will receive the qualified protection against discovery provided by Rule 4:1(b)(3) if prepared "in anticipation of litigation." The next step of this inquiry, therefore, requires that the meaning of "in anticipation of litigation" or, more specifically, "anticipation" be analyzed.

In absence of any statutory definition a word is to be given its common, ordinary, and accepted meaning.³⁸ As noted by the Supreme Court of West Virginia, there are four traditional tools to be used to determine the meaning of a statutory word: contemporary dictionaries, judicial pronouncements, reliable extra-judicial pronouncements, and the legislative history of the subject statute.³⁹

Turning to the first of these traditional tools, "anticipation" is an "intuitive preconception: a priori knowledge: . . . formation of an opinion before all facts are known."⁴⁰ Similarly, "anticipation" means "to consider in advance: give advance thought, discussion, or treatment."⁴¹

Because the Rules of the Supreme Court of Virginia are promulgated by the Virginia Supreme Court, it is particularly helpful to examine the court's use of the word "anticipate" in recent decisions.⁴² In *Harris v. Bankers Life and Casualty Co.*,⁴³ at issue was

38. *Commonwealth v. Orange-Madison Cooperative Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533 (1980).

39. *Pauley v. Kelly*, ___ W. Va. ___, 255 S.E.2d 859 (1979).

40. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 94 (1971).

41. *Id.* For Virginia cases which use derivations of the word "anticipate" in harmony with notes 40-41 *supra* and accompanying text, see *Coppola v. Warden of the Virginia State Penitentiary*, 222 Va. 329, 282 S.E.2d 10 (1981); *Norfolk and Portsmouth Belt Line R.R. v. Barker*, 221 Va. 924, 275 S.E.2d 613 (1981); *Kay Management Co. v. Creason*, 220 Va. 820, 263 S.E.2d 394 (1980); *Nicholaou v. Harrington*, 217 Va. 618, 231 S.E.2d 318 (1977); *Breeden v. Commonwealth*, 217 Va. 297, 227 S.E.2d 734 (1976); *Westcott v. Commonwealth*, 216 Va. 123, 216 S.E.2d 60 (1975); *India Acres of Thornburg, Inc. v. Denion*, 215 Va. 847, 213 S.E.2d 797 (1975); *Appalachian Power Co. v. Laforce*, 214 Va. 438, 201 S.E.2d 768 (1974); *Sager v. Ortt*, 214 Va. 318, 200 S.E.2d 539 (1973); *Broaddus v. Standard Drug Co.*, 211 Va. 645, 179 S.E.2d 497 (1971).

Cf. Upjohn Co. v. United States, 449 U.S. 383 (1981) which found that an in-house study can be a legitimate work product prior to any overt action by a prospective plaintiff signaling that the prospective plaintiff contemplates an action against the preparers of the report. Based upon various factors, the defendants in *Upjohn* had reason to believe that they should anticipate prosecution or other action against them by the United States. Such anticipation prompted the in-house study, and thus it was viewed by the Supreme Court as work product.

42. Even though the language of the Virginia Rule is identical to Fed. R. Civ. P. 26(b)(3), the Rule is the same only as far as consistent with Virginia practice. W.H. BRYSON, NOTES ON VIRGINIA CIVIL PROCEDURE 111 (1979). Therefore, it is proper to construe derivations of

whether recovery was permissible under a life insurance policy covering accidental death. Quoting *Smith v. Combined Insurance Co. of America*,⁴⁴ the Virginia court said:

[I]t is generally held that if the insured voluntarily provokes or is the aggressor in an encounter, and knows, or under the circumstances should reasonably anticipate, that he will be in danger of death or great bodily harm as the natural or probable consequence of his act or course of action, his death or injury is not caused by an accident within the meaning of such a policy.⁴⁵

The court went on to hold that the decisive issue was "whether . . . Harris should have reasonably foreseen that his actions would put him in danger of death or great bodily harm."⁴⁶ Therefore, this case indicates that the Supreme Court of Virginia views "anticipation" as synonymous with to "reasonably foresee." Such construction is readily seen in other Virginia cases as well.⁴⁷

In determining whether a resultant act reasonably should have been anticipated, the Supreme Court of Virginia has applied a retrospective test;⁴⁸ "looking at the consequences, were they so improbable or unlikely to occur that it would not be fair and just to charge a reasonably prudent man with them. If not, he is liable."⁴⁹ In other words, the Virginia Supreme Court uses the "reasonable man" test to determine whether subsequent matter was or should have been foreseeable or reasonably anticipated. This is not an unworkable test. Indeed, it already has been adopted by some

"anticipate" in a manner consistent with Virginia case law.

43. 222 Va. 45, 278 S.E.2d 809 (1981).

44. 202 Va. 758, 761, 102 S.E.2d 267, 269 (1961).

45. 222 Va. at 47, 278 S.E.2d at 810.

46. *Id.*

47. In *Baltimore & Ohio R.R. v. Patterson*, the Court, in discussing foreseeability, quoted *Hair v. City of Lynchburg*, 165 Va. 78, 84, 181 S.E. 285, 287 (1935):

"One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy a responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as is sometimes said, is only remotely and slightly probable. . . ."

204 Va. 81, 85, 129 S.E.2d 1, 4 (1963).

In *Judy v. Doyle*, 130 Va. 392, 403, 108 S.E. 6, 9 (1921) (quoting *Norfolk & W. Ry. v. Whitehurst*, 125 Va. 260, 263, 99 S.E. 568, 569 (1919)) the court stated: "The 'foreseeableness' or reasonable anticipation of the consequences of a wrongful or negligent act . . . may be determinative of the question of his negligence."

48. *Houston v. Strickland*, 184 Va. 994, 37 S.E.2d 64 (1946); *Norfolk & W. Ry. v. Whitehurst*, 125 Va. 260, 99 S.E. 568 (1919).

49. 125 Va. at 264, 99 S.E. at 569.

courts.⁵⁰

IV. APPLICABLE TEST TO BE USED TO IMPLEMENT RULE 4:1(b)(3)

It light of the foregoing, the applicable test as to what constitutes materials prepared "in anticipation of litigation" should be a reasonable man test. If a reasonable man, in the shoes of the party *resisting* discovery when the requested material was produced, would have anticipated or reasonably foreseen litigation, the subject matter should receive the qualified protection of Rule 4:1(b)(3). This test should be applied even handedly to any and all parties resisting discovery.

It can be argued, by detractors of this proposed test, that the 1970 amendments to the Federal Rules of Civil Procedure, mirrored in the Virginia Rules as applicable, were enacted so as to

50. *Almaguer v. Chicago, Rock Island & Pac. R.R.*, 55 F.R.D. 147 (D. Neb. 1972) concerned an accident to a railroad employee. There was only one witness other than the plaintiff. Two months before plaintiff hired counsel, the defendant's non-lawyer claim agent took the written statement of the eyewitness as part of the routine investigation and in anticipation of a possible claim. After a lengthy quotation from and consideration of the Proposed Amendments to the Federal Rule of Civil Procedure Relating to Discovery, 48 F.R.D. 497, 500 (1970), the court concluded:

I think it is fair to conclude from the Advisory Committee's Note and the cases cited in it that statements taken by a claim agent immediately after an accident are taken in anticipation of litigation. . . . The anticipation of the filing of a claim against a railroad, when a railroad employee has been injured or claims to have been injured on the job, is undeniable, and the expectation of litigation in such circumstances is a reasonable assumption.

55 F.R.D. at 149. Similarly, the Supreme Court of Alabama has held that "[f]rom the nature of the case, a death claim, State Farm's [insurance] agent could have reasonably concluded that its insured would be sued. This was not the type of fender-bender case where a settlement with the insured would likely occur without a lawsuit." *Ex Parte State Farm Mutual Auto Ins. Co.*, ___ Ala. ___, 386 So. 2d 1133, 1136 (1980).

The Supreme Court of Rhode Island concurs:

In our litigious society, when an insured reports to his insurer that he has been involved in an incident involving another person, the insurer can reasonably anticipate that some action will be taken by the other party. The seeds of prospective litigation have been sown, and the prudent party, anticipating this fact, will begin to prepare his case. . . . The recognition of this possibility provides, in any given case, the impetus for the insurer to garner information regarding the circumstances of a claim.

Fireman's Fund Ins. Co. v. McAlpine, ___ R.I. ___, ___, 391 A.2d 84, 89-90 (1978). This case purports to reject a case by case determination. *Id.* at ___, 391 A.2d at 89. But, in fact, that is what it has done; and, in so doing, has laid the first stare decisis cobblestone which will eventually present a defined, structured road over which work product litigation may travel. *See infra* note 79.

Whether or not to compel discovery requires the courts to undertake a two step analysis: 1) Is it work product? 2) if so, has the party seeking discovery shown good cause? The reader should note that this article primarily considers the first question. Many times the answer to both questions will be yes and, therefore, work product will be discoverable.

make discovery easier. Therefore, a position, as asserted in this article, should not be adopted because it limits, rather than expands, the new discovery rules. As applied to this particular problem, the preceding argument is only a half-truth. It is true that the 1970 amendments were enacted so as to make discovery easier in general. In order to do so, "good cause" was deleted from old Federal Rule 34 which pertained to discovery of all documents and things. The only "good cause" restrictions remaining were incorporated in what is now Federal Rule 26(b)(3). However, the scope of the work-product doctrine was expanded at that time. No longer did it apply just to an attorney's work product, but it was extended so as to apply to the work product of the parties and their agents.⁵¹ Therefore, while the 1970 amendments did make discovery, in general, easier, they also expanded the scope of work product protection. The position asserted in this article merely is consistent with the more expanded scope of the current work product protection.

The proposed test, for Virginia, is also consistent with the two prongs of *Hickman*. One of the central purposes of *Hickman v. Taylor* was that an attorney's thoughts⁵² be protected. If an attorney's work product is "open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten."⁵³ This is not a phenomenon singularly restricted to the practice of law. It has long been known and, therefore, held by the courts in Virginia that fear of litigation will affect the way in which a business will conduct its operations. If a corporation does not make a full or honest investigation, or if it makes merely a self-serving investigation, not only will the causes of the accident not readily be identified or remedied, but also it is doubtful that truth will be discovered in subsequent trials. The implementation of Rule 4:1(b)(3), as written and as advocated in this article, recognizes this fact.

The advocated implementation of Rule 4:1(b)(3) is also consistent with the anti-indolence policy of *Hickman*. The object of any trial is the discovery of truth. When the trial is conducted fairly and properly, this objective is attained and the ends of justice have been met.⁵⁴ "[T]he ultimate objective of the adversary trial system

51. See *supra* notes 28-30.

52. See *supra* notes 9-16 and accompanying text.

53. *Hickman v. Taylor*, 329 U.S. at 511.

54. *Leech v. Beasley*, 203 Va. 955, 128 S.E.2d 293 (1962).

and of pretrial discovery is identical.”⁵⁵ The reason for this is that justice can more likely be done if there is a preliminary determination of the truth of fact. As noted by the Supreme Court of Wisconsin, the fundamental reason why the adversary system works as well as it does is that it contains built-in incentives to ensure that the conduct of the participants favors greater investigation, thereby enhancing the attainment of truth. Foremost among these incentives is the motivation for winning the case, which fosters diligence and industry on the part of the attorney.⁵⁶

If this is true, in most, if not all, cases it should not matter who supplied the work product in anticipation of litigation to the party seeking to suppress discovery. Whether it is an attorney’s work product, a principal party’s work product, or an agent’s work product, the result is the same. *Hickman* admonishes a party to pursue diligently his own answers from “witnesses whose identity is well known and whose availability . . . appears unimpaired.”⁵⁷ This indeed is the position that has been taken by some courts. In discussing *Hickman*, the Third Circuit Court of Appeals noted that *Hickman* is broader in sweep than merely protecting the work product of attorneys.

For since, as the Court held, statements of prospective witnesses obtained by a lawyer are not protected by the historic privilege inherent in the lawyer-client relationship and are only protected against disclosure if the adverse party cannot show good cause for their production, we can see no logical basis for making any distinction between statements of witnesses secured by a party’s trial counsel personally in preparation for trial and those obtained by others for the use of the party’s trial counsel. In each case the statements are obtained in preparation for litigation and ultimately find their way

55. *State v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, —, 150 N.W.2d 387, 397 (1967).

56. In formulating rules concerning the discovery or nondiscovery of work product, a primary concern must be to preserve the lawyer’s incentive to industry, the bedrock principle of the practical working of our adversary system of jurisprudence. Any rule which tends to diminish this incentive will necessarily diminish the aggregate investigation of facts by lawyers. This, in turn, will lessen the efficiency of the rational decision-making machinery of our adversary system. Effective trial preparation must be encouraged in order to enhance the prospects of an informed resolution of the controversy. Accordingly, we shun any rule which would tend to encourage indolence or laying back in pretrial investigation or which would tempt an attorney to unfairly conceal the results of investigations they have made.

Id. at —, 150 N.W.2d at 397.

57. 329 U.S. at 508.

into trial counsel's files for his use in representing his client at trial. The adverse party could certainly have no greater or different need for copies of the statements in the one case than in the other. In each case he has had the same opportunity through interrogatories to learn all the pertinent facts which his opponent has gleaned from the witnesses as well as the names and addresses of those witnesses so that he himself may interview them or secure their depositions if he wishes.⁵⁸

Similarly, the Ohio Supreme Court held that "we see no reason to limit or modify the rule because the defendant is a corporation and obtained its information and made its memoranda for the purpose stated, through the usual agencies of a corporation."⁵⁹

58. *Allmont v. United States*, 177 F.2d 971, 976 (3d Cir. 1949). See also *Note, Discovery of an Attorney's Work Product in Subsequent Litigation*, 1974 DUKE L.J. 799.

An interesting and related issue is whether parties responsible for the preparation of protected work product documents also are protected by Rule 4:1(b)(3) from disclosing, through interrogations or other discovery means, the substantive details of such preparation. Rule 4:1(b)(3) is silent on this matter. It only talks in terms of a qualified protection for "documents and other tangible things."

"[A] statute often speaks as plainly by inference, and by means of the purpose that underlies it, as in any other manner. A policy that is clearly implied is as effective as that which is expressed. . . . The statute should have a rational construction consistent with its manifest purpose, and not one which will substantially defeat its object."

Leitner v. Citizens Cas. Co., 135 N.J.L. 608, ___, 52 A.2d, 687, 690 (1947), *quoted in Norfolk S. Ry. v. Lassiter*, 193 Va. 360, 364, 68 S.E.2d 641, 643 (1952).

Accord Southern Ry. v. Commonwealth, 205 Va. 114, 119, 135 S.E.2d 160, 166 (1964) ("We are required to give to the statute a reasonable construction - one which will, if possible give effect to its obvious purpose."); *Bott v. Hampton Roads Sanitation Commission*, 190 Va. 775, 783, 58 S.E.2d 306, 309-10 (1950), *quoted in NAACP v. Committee*, 201 Va. 890, 900, 114 S.E.2d 921, 929 (1960) ("[W]e must consider the object of the legislation, the purpose to be accomplished, and so construe it as to promote the end for which it was enacted.")

The object of Rule 4:1(b)(3) is to qualifiedly restrict discovery of certain work products prepared in anticipation of litigation. The purpose behind this objective, as discussed previously in this article, is to prevent parties from being deterred from the full and adequate preparation for trial, to prevent counsel from coat-tailing on their adversaries, thereby reducing the likelihood that all facts and law will be fully and adequately presented to the court.

In light of this, Rule 4:1(b)(3) must be read as including within its ambit, interrogatories to parties and other discovery tools which go toward their substantive input into protected documents. This does not mean that one cannot ask "What happened on the night of the 24th?" but it does mean that one should not ask "What did opposing counsel ask you about what happened on the 24th?" To hold otherwise would render negatory the objective of the rule and frustrate its policies. Counsel should not be permitted to do indirectly that which counsel cannot do directly. See, e.g., *Dritt v. Morris*, 235 Ark. 40, ___, 357 S.W.2d 13, 17 (1962). ("[Such interrogatories have] the same effect as asking for statements made by witnesses, and cannot be granted without a showing of necessity.")

59. *Ex parte Shoepf*, 74 Ohio St. 1, ___, 77 N.E. 276, 279 (1906).

It is possible that there are persons who would complain that if the courts adopted the position advocated in this article the "little" litigants would be hampered, and the balance of justice would be further weighted toward those with money. The basis for such an assertion would be that once an accident occurred, any reasonable major company would "anticipate litigation" and seal its internal files and investigations, thereby barring discovery. The fallacy of this argument lies at its end. It has not been articulated how *reasonable* discovery would be barred in the future. The work-product doctrine does not seal files forever. Quite the contrary. It encourages reasonable discovery. In fact, it bars all else.⁶⁰

The Supreme Court in *Hickman* noted that its rule did not lay down an absolute work product privilege. Rather, the Court noted that discovery could be held where production of information in opposing counsel's files was "essential to the preparation of one's case."⁶¹ But the Court also noted that one must first show that the information sought is unavailable through other means.⁶² This general principle has been followed and fleshed out by subsequent courts.

For example, in *Allmont v. United States*,⁶³ the Third Circuit stated:

In other words he must show that there are special circumstances in his particular case which make it essential to the preparation of his case and in the interest of justice that the statements be produced for his inspection or copying. His counsel's natural desire to learn the details of his adversary's preparation for trial, to take advantage

60. As noted by the *Hickman* court:

There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved. That was insufficient to justify discovery under these circumstances and the court should have sustained the refusal of the tug owners and Fortenbaugh [the attorney] to produce.

329 U.S. at 512.

61. *Id.* at 511. See also *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480 (4th Cir. 1973). In *Duplan*, the Fourth Circuit held that work product developed in one suit maintains its classification as such in subsequent suits even though a new opposing party is involved. In so holding the Fourth Circuit noted that "our decision will not in any way frustrate the ends of justice. If the party seeking discovery can demonstrate the substantial need and undue hardship specified in the Rule and recognized in *Hickman*, the district court will order production." *Id.* at 485 (footnote omitted).

62. *Id.* at 495. If a "little" litigant truly needs the information and cannot afford its substantive equivalent, this latter fact should be considered by the courts in determining whether the work product is indeed unavailable through other means.

63. 177 F.2d 971 (3d Cir. 1949).

of his adversary's industry in seeking out and interviewing prospective witnesses, to help prepare himself to examine witnesses or to make sure that he has overlooked nothing are certainly not such special circumstances since they are present in every case.⁶⁴

Similarly, the Fourth Circuit Court of Appeals stated that

[c]ompelling the production of documents under Rule 34 can be extremely harassing. Use of the weapon which this rule forges should not be permitted without more than the easily satisfied test of relevancy. This is particularly true since the identity of the witnesses can be readily discovered by Rule 33 interrogatories. Opposing counsel then has the opportunity to interview these witnesses himself or to take their depositions. If it should subsequently appear that there exists a special need to compel disclosure of the statements themselves, this would undoubtedly satisfy the required showing of good cause.

.....
The Federal Rules of Civil Procedure should be liberally construed, but they may not be expanded by disregarding plainly expressed limitations. We are not prepared to depart from the explicit language of Rule 34 when viewed in the context of the entire discovery section. In holding that a demonstration that the desired materials are relevant to the subject matter of the litigation does not by itself satisfy the good cause requirement of Rule 34, we are joining every other Court of Appeals that has considered this question.⁶⁵

The Supreme Court of the United States cited *Guilford National Bank of Greensboro v. Southern Railway* with favor in a subsequent discussion of the good cause requirement in the federal rules.⁶⁶ In addition, this case was also cited by the Advisory Committee as representing the modern trend of cases interpreting "good cause."⁶⁷ Furthermore, *Guilford National Bank of Greensboro* states the position subsequently adopted by the Supreme Court of Virginia.⁶⁸ In construing a similar provision in Rule 4:9 of

64. *Id.* at 978; accord *Gill v. Stolor*, 16 F.R.D. 9 (S.D.N.Y. 1954).

65. *Guilford Nat'l Bank of Greensboro v. Southern Ry.*, 297 F.2d 921, 924-25 (4th Cir. 1962) (discussing the old Rule 34 wherein "good cause" was a necessary element when compelling production).

66. *Schlagenhauf v. Holder*, 379 U.S. 104, 117-18 (1964).

67. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. at 500.

68. "One purpose of discovery procedures is to obtain evidence in the sole possession of one party and unobtainable by opposing counsel through independent means. But more than mere relevancy to the issue of the documents sought is necessary; the movant must

the Rules of the Supreme Court of Virginia, the court stated that before any party is entitled to the production of documents, or other tangible things, good cause must be shown. Consequently, "there must be a showing of some special circumstances in addition to relevancy."⁶⁹ It was this trend, not the one found in *Thomas Organ Co. v. Jadranska Slobodna Plovidba*,⁷⁰ that the Advisory Committee adopted.⁷¹

Keeping in mind the anti-indolence policies behind the work product doctrine, it logically follows that it is insufficient merely to allege that essential information will not be produced through other discovery means; rather, an attorney should first exhaust all other practical modes of discovery before requesting discovery of opposing counsel's work product.⁷² The Supreme Court of Virginia adopted a similar position, arguably in furtherance of the anti-indolence policies: "Where both parties have an equal opportunity to investigate, and where all the witnesses to the accident are known and available to both sides, discovery should not be granted."⁷³ Consequently, the implementation of Rule 4:1(b)(3) proposed in this article is consistent with the second prong of *Hickman*.

V. AN ANALYSIS OF A RECENT FOURTH CIRCUIT APPROACH

Virginia's pre-trial discovery rules are identical to Federal Rules 26 through 37 so far as is consistent with Virginia practice.⁷⁴ Because state precedent is lacking, it is not unreasonable to assume that a state court will look to its federal circuit for guidance. For reasons set forth below, this author does not believe that Virginia courts should follow the recent Fourth Circuit case, *McDougall v. Dunn*.⁷⁵

show good cause." *Rakes v. Fulcher*, 210 Va. 542, 545-46, 172 S.E.2d, 751, 755 (1970) (citing *Guildord Nat'l Bank v. Southern Ry.*, 297 F.2d 921, 923-24 (4th Cir. 1962)).

69. 210 Va. at 547, 172 S.E. at 756.

70. 54 F.R.D. 367 (N.D. Ill. 1972). See *infra* for detailed discussion of case.

71. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. at 500-02.

72. See, e.g., *Tandy & Allen Construction Co. v. Peerless Cas. Co.*, 20 F.R.D. 223, 223 (S.D.N.Y. 1957) ("[P]laintiff's task will not be simple, but [that] do[es] not make the work product of defendant's attorney available. Of course, if plaintiff, after diligent efforts, has been unsuccessful, he is not precluded hereby from seeking production at a later date.")

73. 210 Va. at 547, 172 S.E.2d at 756 (citing *Herrick v. Barber S.S. Lines, Inc.*, 41 F.R.D. 51, 52 (S.D.N.Y. 1966); *Koss v. America S.S. Co.*, 27 F.R.D. 511, 512 (E.D. Mich. 1960); *Dean v. Superior Ct.*, 84 Ariz. 104, 113, 324 P.2d 764, 770; 73 A.L.R.2d 1 (1958)).

74. W.H. BRYSON, NOTES ON VIRGINIA CIVIL PROCEDURE 111 (1979).

75. 468 F.2d 468 (4th Cir. 1972).

The facts of *McDougall* indicate that the plaintiff sustained serious brain injuries, resulting in amnesia, while riding in the defendant's car. As a result of his injuries, the plaintiff was in the hospital under treatment almost continuously for a year after the accident. Furthermore, because of his amnesia, he did not remember the events surrounding the accident. Shortly after the accident, the defendant's insurance carrier took written statements from the three occupants of the car. It was not until almost two and one-half years after the accident that the plaintiff employed counsel to represent him in filing his own suit. During trial preparation, the plaintiff moved to require the defendant to produce and to permit the plaintiff to copy the statements of the defendant and the third-party occupant taken shortly after the accident. The defendant refused, claiming that he had a work product protection.

The Fourth Circuit Court of Appeals disagreed that the statements were taken "in anticipation of litigation."⁷⁶ "We are not at all convinced that the statements demanded met the definition of materials embraced within Section (b)(3) of Rule 26."⁷⁷ The Fourth Circuit cited two reasons in support of its holding: First, the court stated that "[t]he statements sought for production were secured by a claims adjuster of the insurance carrier of the defendant more than two and one-half years before any claim was made or suit begun or before the plaintiff had retained counsel."⁷⁸ The logic behind reasoning based upon a time element is difficult to accept.

If, upon viewing the totality of the circumstances, a reasonable man anticipates a suit, it only follows that he will commence preparation for it.⁷⁹ For all practical purposes, most defendants have no

76. *Id.* at 473.

77. *Id.*

78. *Id.*

79. See 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2023 (1970 & Cum. Supp. 1981).

Prudent parties anticipate litigation, and begin preparation prior to the time suit is formerly commenced. Thus the 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.

Id. § 2024 at 198 (1970) (citing, in part, *United States v. Lipsy*, 492 F. Supp. 35, 45 (D.C. Tex. 1979); *Osterneck v. E.T. Barwick Industries, Inc.*, 82 F.R.D. 81, 87 (D.C. Ga. 1979); *Stix Prods., Inc. v. United Merchants & Mfr's, Inc.*, 47 F.R.D. 334, 337 (D.C.N.Y. 1969); *Ownby v. United States*, 293 F. Supp. 989 (D.C. Okla. 1968); *Vilastor Kent Theater Corp. v. Brandt*, 19 F.R.D. 522 (D.C.N.Y. 1956); *Stark v. American Dredging Co.*, 3 F.R.D. 300 (D.C. Pa. 1943)).

control over the timing of their potential adversary's filing. The eventual timing of the adversary's action does not relate back to the preparer's state of mind when litigation is first anticipated. If one truly anticipates litigation will he sit passive for two years until his adversary publicly files suit and challenges him to defend himself? It seems highly unlikely. Pursuant to this logic, any plaintiff could wait until toward the end of the running of the applicable statute of limitations of his case and thereby make his opponent's research discoverable. A plaintiff could easily document and prove that his research or trial files were compiled in anticipation of litigation since from the day of his injury, he knew he would sue. To permit such an absurd practice would frustrate the anti-indolence policies of the federal rule and the doctrine of *Hickman v. Taylor*. Consequently, such a position is in direct conflict with the purpose and policy of Rule 4:1(b)(3).

Relying upon *Thomas Organ Co.*,⁸⁰ the *McDougall* Court provided its second reason:

This trend which was followed in the framing of Rule 26(b)(3) compels the Court to conclude that *any* report or statement made by or to a party's agent (other than to an attorney acting in the role of counsellor), 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 and thus not within the purview of the limited privilege of new Rule 26(b)(3) and (b)(4).⁸¹

The "trend" referred to is discussed in the *Thomas Organ Co.* opinion:

[W]hen the Advisory Committee undertook the reorganization of all discovery rules, the trend of the federal decisions had settled in the direction of requiring the production of reports made by parties and their agents in the regular course of business, i.e., not in conjunction with or for an attorney (thus indicating such products were not considered to be work-product), although a showing of good cause in the sense outlined in *Hickman* was still required for discovery of *trial preparation* reports made by non-lawyers.⁸²

80. 54 F.R.D. 367 (N.D. Ill. 1972).

81. 468 F.2d at 473 (quoting *Thomas Organ Co.*, 54 F.R.D. at 372) (emphasis in original).

82. 54 F.R.D. at 372 (emphasis in original).

This language misses the thrust of the Advisory Committee's comment. The Advisory Committee did not equate "regular course of business" with "not in conjunction with or for an attorney."⁸³

As noted by the Advisory Committee, prior to the 1970 amendments to the Federal Rules of Civil Procedure, Federal Rule 34 required a showing of "good cause" for the production of all documents and things, whether or not trial preparation was involved. The Advisory Committee further noted that within the "good cause" requirement the courts had divided into two primary practices. For documents "not obtained or prepared with an eye to litigation, the decisions, while not uniform, reflect[ed] a strong and increasing tendency to relate good cause to a showing that the documents are relevant to the subject matter of the action."⁸⁴ On the other hand, there was a growing trend to require more than relevance for the production of trial preparation material.⁸⁵ Regarding work prepared by non-lawyers, some courts ignored work product and equated good cause with relevance, however, "the more recent trend [was] to read 'good cause' as requiring inquiry into the importance of and need for the materials as well as into alternative sources for securing the same information."⁸⁶ The Advisory Com-

83. The Advisory Committee's words were as follows:

Materials assembled in the ordinary course of business, or pursuant to the public requirements *unrelated to litigation, or for other nonlitigation purposes* are not under the qualified immunity provided by this subdivision. *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); *cf. United States v. New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962). No change is made in the existing doctrine, noted in the *Hickman* case, that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is not itself discoverable.

Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. at 501 (emphasis added). This clearly indicates that materials prepared in the "regular course of business" are those materials unrelated to litigation or for nonlitigation purposes. Consequently, if an insurance adjuster regularly prepares reports in anticipation of litigation his reports are *not* prepared in the "regular course of business" for purposes of the above-quoted paragraph—the only mention by the Advisory Committee of "regular course business." *See, e.g., Hopkins v. Chesapeake Utilities Corp.*, ___ Del. Supr. ___, ___, 300 A.2d 12 (1972). "It continues to be the rule under the amended Federal Rules and the Delaware counterparts that any document which was prepared in the ordinary course of business and *not in anticipation of trial* is discoverable without any showing of need. . . ." *Id.* at 14 (emphasis added). *Thomas Organ Co.'s* reliance upon a "regular course of business" test cannot be found in the humble paragraph quoted above. Nor can it be found—and, indeed, is consistently refuted by—the rest of the Advisory Committee's comments.

84. *Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. at 500.

85. *Id.*

86. *Id.*

mittee then went on to say that

[s]ubdivision (b)(3) reflects the trend of the cases by requiring a special showing, not merely as to materials prepared by an attorney, but also as to materials prepared in anticipation of litigation or preparation for trial by or for a party or any representative's action on his behalf. The subdivision then goes on to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories concerning the litigation of an attorney or other representative of a party.⁸⁷

The language of the Advisory Committee is clear. It is difficult to explain how the *Thomas Organ Co.* court could have missed or ignored this clear language. The court in *Thomas Organ Co.* inaccurately stated that the Advisory Committee followed a "trend" in framing Rule 26(b)(3) which compelled the conclusion that

any report or statement made by or to a party's agent . . . 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 and thus not within the purview of the limited privilege of new Rule 26(b)(3) and (b)(4).⁸⁸

A primary fault of this premise, in addition to those discussed above, is that it maintains that "in the regular course of business" and "in anticipation of litigation" must be disjunctive. This is not the case.⁸⁹ Much or all of one's normal routine can be in anticipation of litigation. The language of the state and federal rule appear explicitly to recognize this and make clear that those whose routine business is in anticipation of litigation receive the same protection as others.⁹⁰ To hold otherwise merely serves to trample clear legislative intent and to punish those who are prompt in their investigations. Such punishment is, of course, contrary to the whole underlying policies of the federal and state rules and *Hickman v. Taylor*. Consequently, McDougall's reliance on the *Thomas Organ*

87. *Id.* at 502.

88. 54 F.R.D. at 372. A similar argument is set forth in *Virginia Elec. & Power Co. v. Sun Shipping & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975).

89. *See supra* note 83.

90. Both the federal and state rules are expressly made applicable to a party's attorney, consultant, surety, indemnitor, and insurer.

Co. interpretation of Rule 26(b)(3)⁹¹ is misplaced. Unfortunately, other courts have adopted this "routine business" distinction.⁹²

More importantly, the "routine business test" fails to adequately set forth the dividing line between materials prepared by an attorney or at his direction pursuant to "routine business" and those prepared "in anticipation of litigation."⁹³ It delays the inevitable; it restates the problem without setting forth a viable means of resolving it. Obviously a demarcation must be made at some point. The demarcation point cannot be after an action is instituted because at that time the documents would no longer truly be prepared *in anticipation* of litigation, but, rather, *commensurate with* pending litigation. This demarcation point, therefore, would have to occur prior to the filing of a motion for judgment. This dilemma is properly resolved through the careful weighing of all pertinent facts to determine whether documents are indeed prepared "in anticipation of litigation." This, of course, brings us back to the "test" which potentially weeds out all documents, routine or otherwise, not prepared in anticipation of litigation. A specific "routine document rule" coupled with an examination of relevant facts, serves only to muddy the waters while adding no substance to the test already advocated herein. The "routine document" test should not be applied as an independent test.

At first blush it may appear that Virginia may have once followed the routine document rule. In *Robertson v. Commonwealth*,⁹⁴ the Supreme Court of Virginia noted that

[a] statement made by an employee to his employer, in the course of his ordinary duty, concerning a recent accident, and before litigation has been brought or threatened, is not privileged either in the hands of the employer or in the hands of the latter's attorney to whom it has been transmitted. We so

91. 297 F.2d at 921.

92. See, e.g., *Henry Enterprises, Inc. v. Smith*, 225 Kan. 615, 592 P.2d 915 (1979).

93. Cf. *Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co.*, 61 F.R.D. 115 (N.C. Ga. 1972). The court expressed concern about permitting a rule which would insulate much of the insurance industry from discovery. Therefore, it adopted the routine business rule test. However, the court's legislative concern is not well taken.

An implementation of Rule 4:1(b) and (c) as adopted in this article might or might not insulate much of the insurance industry from discovery. What is important, however, is that it will not shelter information which is: 1) relevant; and 2) necessary. If information which is not relevant and necessary is sheltered from discovery, wherein lies the harm? In fact, it is arguable, that the greater harm to the legal system would be to permit forced discovery of information which is neither relevant nor necessary.

94. 181 Va. 520, 25 S.E.2d 352 (1943).

held in *Virginia-Carolina Chemical Company v. Knight*, 106 Va. 674, 679, 680, 56 S.E. 725.⁹⁵

However, if one looks at the history of this holding, it becomes clear that this language is not dispositive on the routine document issue. As cited above, the basis for the *Robertson* language is the earlier case of *Virginia-Carolina Chemical Co. v. Knight*.⁹⁶ In *Virginia-Carolina Chemical Co.*, the Virginia Supreme Court stated:

It appears from the evidence of the cashier and chief clerk at the defendant company that it is a matter of routine, whenever an accident occurs for the superintendent to report the accident to the main office of the defendant, as we understand the evidence, and that office sends the report to the insurance company which has undertaken to indemnify the defendant. It appears that the report in question was made by the superintendent of the Richmond Chemical Works, the place where the accident occurred in a branch of the defendant company's works. It would, therefore, seem that the report was made in the line of the superintendent's duty, which would, if otherwise unobjectionable, render it admissible in evidence against the defendant under the case of *Lynchburg Telephone Co. v. Booker*, 103 Va. 594, 50 S.E. 148; see also *Western Union Tel. Co. v. Yopst*, 118 Ind. 148, 20 N.E. 222, 3 L.R.A. 224; 1 Ellitt on Ev., Section 225; 16 Cyc. 1019, 1023.⁹⁷

Tracing back further to the *Lynchburg Telephone Co.* and *Western Union Telephone Co.* cases, the courts discussed the issue of whether an agent's statements are admissible against his principal as the principal's own statements. These holdings, therefore, are simply matters of agency relationship exceptions to the hearsay rule. Viewed in this light, the above-quoted language of their ultimate ancestors is not dispositive of the "routine document rule" issue.

The *Robertson* court, however, went further and qualified the admissibility of an agent's hearsay statement against his employer:

A statement concerning an accident which is obtained by the employer from his servant for *bona fide* purpose of being later transmitted to the employer's attorney for advice, or to be used by the attorney in connection with pending or threatened litigation as

95. *Id.* at 539, 25 S.E.2d at 360.

96. 106 Va. 674, 56 S.E. 725 (1907).

97. *Id.* at 679, 56 S.E. at 727.

privileged.⁹⁸

The court cited, among other cases, *Davenport Co. v. Pennsylvania Railroad*⁹⁹ for this proposition. In *Davenport Co.*, a conductor's accident report was not discoverable, even though it was made before institution of litigation. The court found that the report was prepared "so that if suit was brought it might be placed in the hands of counsel to guide them in making defense."¹⁰⁰

It is true, however, that the report was made after the prospective plaintiff sent a letter to the prospective defendant. The advent of the letter apparently put the litigation situation into one of "threatened" litigation.¹⁰¹ "Threatened or pending" litigation was the old standard. This aspect of *Robertson* has been overruled, in part, by Rule 4:1(b)(3) which now incorporates an "in anticipation of litigation" standard. As noted above, *Robertson* and *Davenport Co.* indicate that in-house accident reports become "privileged" when made for threatened or pending litigation. Rule 4:1(b)(3) has extended the nature and quality of the time in which such reports can be made with resulting limited protection. Pending litigation presumably meant that the action had been commenced. Threatened litigation presumably meant that there was a requirement of some overt act by the prospective plaintiff, other than the accident itself, which signaled to the prospective defendant that a suit was being "threatened." In *Davenport Co.*, a letter by the prospective plaintiff apparently satisfied this condition. Now, because of Rule 4:1(b)(3), the focus is on the "anticipated litigation" standard.

As previously discussed, this new focus contemplates a reasonable man standard. It contemplates consideration of all the facts which a person in the shoes of the prospective defendant would weigh in determining whether or not subsequent litigation is rea-

98. 181 Va. at 539, 25 S.E.2d at 360. Virginia, therefore, like *Hopkins v. Chesapeake Utility Corp.*, ___ Del. ___, 300 A.2d 12 (1972) and unlike *Thomas Organ Co.*, 54 F.R.D. 367 (N.D. Ill. 1972) and *McDougall*, 468 F.2d 468 (4th Cir. 1972) has not historically held that one's routine business materials cannot be limitedly protected when prepared for bona fide purposes of anticipating trial. Therefore, although the language is the same, the judicial purposes and policies behind the Virginia and Fourth Circuit rules are divergent.

99. 166 Pa. 480, 31 A. 245 (1895).

100. *Id.* at ___, 31 A. at 246.

101. As cited in the text, *Robertson* enunciated a protection for an agent's statements which are prepared "in connection with pending or threatened litigation." See *supra* note 82 and accompanying text.

sonably foreseen. With this limited modification of *Robertson, Robertson*, read in light of *Davenport Co.*, is on all fours with the position advocated in this article.

Consequently, upon analysis, the two-tiered foundation of *Thomas Organ Co.* crumbles, and *Thomas Organ Co.* is not good law. Because *Thomas Organ Co.* is the foundation for the McDougall decision, Virginia should not look to *McDougall* for guidance.

VI. CONCLUSION

With the interpretation of Rule 4:1(b)(3) advocated in this article, reasonable discovery would remain. The proposed implementation of Rule 4:1(b)(3) asserts that as a matter of public policy it is in the best interest of the courts, the justice system, and the ascertainment of truth, for each party to prepare its own case as thoroughly and as completely as practicable. When such preparation is insufficient so that a party's interest will not be represented thoroughly and fully, then, and only then, should one be entitled to dip into the work product of an adversary. If it is determined that one does, in fact, need the work product of another, there is nothing in the advocated interpretation which bars discovery.

Further, the test advocated by the author is in line with the purposes and policies of *Hickman v. Taylor*, our notions of justice and fair play in the adversary system, and the Virginia rules of statutory construction: It would give effect to clear, statutory language; it would ensure whole and adequate preparation; it would provide for discovery of work product materials when needed for the adequate representation of a client. The test also would prevent judicial legislation in writing into the rule a prescriptive clause designed to punish those who have established mechanisms which enable them to promptly investigate accidents. Hair-splitting as to which organizations are to be penalized under the liberal reading of the Rule would be obviated by the test, which is consistent with the comments of the Advisory Committee to the Supreme Court. Therefore, it should be adopted and applied by the circuit courts in Virginia.

