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Abstract

When an accident occurs which results in injuries or property damage an investigation is usually conducted within a short period of time to determine the rights and liabilities of the parties involved.

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When an accident occurs which results in injuries or property damage an investigation is usually conducted within a short period of time to determine the rights and liabilities of the parties involved. Depending on the magnitude of the harm, the likelihood that some legal action will be taken by one of the parties is high. Many businesses, aware of this potential, often conduct in-house investigations of accidents involving their employees or occurring on their premises to determine the cause and prevent recurrences. Once an action is ultimately filed, one of the questions which frequently arises is whether a party may obtain witness statements and reports gathered by the adverse party during its preliminary investigations.

Section 1.280(b)(2) of the Florida Rules of Civil Procedure1 provides that “documents and tangible things prepared in anticipation of litigation” are considered work product, and are therefore protected from discovery.2 Unfortunately, the phrase “prepared in anticipation of litigation” is not absolute. Once a showing has been made by the party resisting discovery that the materials were prepared in anticipation of litigation, the burden then shifts to the party seeking discovery to show that there is substantial need for the material, and that the substantial equivalent cannot be obtained without undue hardship. If this showing is established, production will be ordered.

1. FLA. R. CIV. P. 1.280(b)(2) states in part:

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(3) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or trial by or for another party or by or for that party’s representative, including his attorney, consultant, surety, indemnitor, insurer or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

2. The protection from discovery is not absolute. Once a showing has been made by the party resisting discovery that the materials were prepared in anticipation of litigation, the burden then shifts to the party seeking discovery to show that there is substantial need for the material, and that the substantial equivalent cannot be obtained without undue hardship. If this showing is established, production will be ordered. FLA. R. CIV. P. 1.280(b)(2).
"litigation" has created considerable confusion among Florida's courts. Some cases are in direct conflict with each other, while others simply lack clarity.

Despite this continued confusion, the Supreme Court of Florida has yet to interpret Rule 1:280(b)(2). Therefore, the only source of guidance has been conflicting decisions from the state's district courts of appeal and the federal courts. Some courts have held that since not all accidents lead to litigation, an investigation following an occurrence is not necessarily prepared in anticipation of litigation. These cases look at the facts of the case before determining whether to accord the material "work product" protection. However, other courts have held that all statements and information secured after an occurrence which might give rise to a claim are prepared in anticipation of litigation. The result is a split among Florida courts.

This Note will focus on Florida's application of work product protection to materials prepared before litigation commenced. First, it will examine the history and development of the protection afforded trial preparation materials, which is essential for an understanding of the policies underlying the protection from discovery provided by Rule 1:280(b)(2). Second, it will discuss the applicable case law in Florida, focusing on the inconsistencies and confusion among the district courts of appeal in applying the work product rule to trial preparation materials. Third, there will be an analysis of the decisions addressing this issue in federal court and the highest courts of other states. Next, this
Note will suggest methods to clarify the existing confusion as to which materials have been prepared in anticipation of litigation. The proposed standards will require a distinction between cases brought by a third party against a liability insurer and those which are claims by the insured against its insurer. It will demonstrate that because the primary purpose of the initial investigation conducted by a liability insurer is different from an insurer's investigation of its insured's loss, a different standard of discovery protection is required. As to other types of businesses which conduct investigations following accidents, this Note will suggest that the courts take a case by case approach focusing on the facts before determining whether materials should be accorded work product protection. Various factors are set forth to aid the court in making the determination. Finally, a suggestion is made that the Florida Supreme Court should adopt these standards, thereby providing a clear precedent for the lower courts to follow. The proposed standards will assure a proper and predictable application of work product protection throughout the state.

II. Development of the Work Product Concept

A. Pre-Hickman v. Taylor

"The adoption in 1937 of the Federal Rules of Civil Procedure initiated a slow revolution in attitude toward pretrial discovery that led to the development of a work product doctrine in the United States." Through the Federal Rules, discovery rather than pleadings became the primary method for adversarial parties in a lawsuit to gather information. Shortly after the enactment of the Federal Rules, district courts often faced situations where the provisions of the Rules were invoked by a party who wanted to prevent the production of his trial preparation material. Discovery of documents was restricted under Rule 34 unless a showing of good cause was made. This showing of

11. Fed. R. Civ. P. 34 was amended in 1970. The amendment eliminated the requirement of "good cause" and made ordinary documents routinely discoverable upon a showing of relevance.
good cause for the production of all documents and things was required whether or not trial preparation material was involved.\textsuperscript{12} However, the courts differed as to the required showing under the "good cause" test.\textsuperscript{13}

The split in the courts led the Federal Rules Advisory Committee to suggest changes in the Rules, which would clear up the confusion over the proper protection to be afforded to trial preparation materials.\textsuperscript{14} However, such changes were not adopted by the United States Supreme Court. Instead, the court "chose to articulate the standard of protection for work product in its forthcoming decision"\textsuperscript{15} of Hickman \textit{v. Taylor}.

\textbf{B. Hickman \textit{v. Taylor}}

\textit{Hickman v. Taylor}\textsuperscript{17} is the leading case setting the standards of the work product concept. In \textit{Hickman}, the tug "J.M. Taylor" sank while towing a car float across the Delaware River.\textsuperscript{18} Five of the nine crew members drowned.\textsuperscript{19} Shortly thereafter counsel for the defendant tug owners interviewed each survivor and obtained statements from them.\textsuperscript{20} One year later plaintiff attempted to obtain copies of the written statements of the witnesses and copies of the memoranda of counsel regarding the oral statements and other matters.\textsuperscript{21} The defendants refused to comply claiming such reports called for "privileged matter obtained in preparation of litigation."\textsuperscript{22}

The issue in \textit{Hickman} was to determine to what "extent . . . a party may inquire into the oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course

\begin{itemize}
\item \textsuperscript{12} \textit{Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery}, 48 F.R.D. 487, 500 (1970) [Hereinafter cited as \textit{Proposed Amendments}].
\item \textsuperscript{13} Since "Rule 34 require[d] a showing of 'good cause' for the production of all documents and things, whether or not trial preparation is involved, courts . . . differed over whether a showing of relevance and lack of privilege [was] enough or whether more . . . [was needed]." \textit{Id.}
\item \textsuperscript{14} Special Project, \textit{supra} note 8, at 771.
\item \textsuperscript{15} \textit{Id.} at 773.
\item \textsuperscript{16} 329 U.S. 495 (1947).
\item \textsuperscript{17} \textit{Id.}
\item \textsuperscript{18} \textit{Id.} at 498.
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} at 499.
\end{itemize}
of preparation for possible litigation after a claim has arisen." 23 Although the United States Supreme Court affirmed the holding of the Third Circuit Court of Appeals denying discovery, it did so on a different basis. While the appellate court previously broadened the attorney-client privilege 24 in discovery proceedings, the Supreme Court instead "created a new privilege to meet the situation opened up by the new breath of discovery." 25

The Supreme Court declined to extend the attorney-client privilege beyond its traditional boundaries. 26 The material being sought in Hickman was not information disclosed by a client to his attorney, but instead, was information gathered by the attorney from "a witness while acting for his client in anticipation of litigation." 27 However, even though the material sought was not privileged, in the traditional sense, the Court nevertheless held discovery was not proper. Instead of adopting the traditional and absolute privilege, which would deny discovery under all circumstances, the United States Supreme Court created a qualified privilege which would generally bar discovery. However, it left the possibility of work product discovery open where the need is great enough. 28

In Hickman, the United States Supreme Court recognized a difference between "written materials obtained or prepared by an adversary's counsel with an eye toward litigation" 29 and "oral statements made by a witness to [the attorney], whether . . . in the form of mental impressions or memoranda." 30 In making the distinction the Court suggested that the written materials may more often be discoverable than oral statements. Written materials were found to be discoverable "[w]here relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the

23. Id. at 497.
24. The court of appeals recognized that the conventional attorney-client privilege was not applicable because the materials in question were obtained by the attorney from third parties, and not the client. Nevertheless, the court stated that the attorney-client privilege should be broader in discovery proceedings than in the law of evidence to exclude testimony. Hickman v. Taylor, 153 F.2d 212, 222 (3d Cir. 1945).
27. Id.
30. Id. at 512.
preparation of one’s case.”31 Other circumstances under which such statements may be discoverable are found where the document is admissible in evidence:32 if it “give[s] clues as to the existence or location of relevant facts . . . [if it is] useful for purposes of impeachment or corroboration, [or if] the witnesses are no longer available or can be reached only with difficulty.”33 However, the Court found that the discoverability of oral statements would be justified only in a “rare situation.”34 The Court stated that if any attorney is forced to “repeat or write out all that witnesses have told him . . . grave dangers of inaccuracy and untrustworthiness”35 would arise.

Although the Supreme Court noted that discovery rules were to be accorded a “broad and liberal treatment”,36 it stressed that “like all matters of procedure, [discovery] has ultimate and necessary boundaries.”37 Further, it noted that in applying this new qualified privilege to limit discovery, various important policies are being furthered. First, lawyers will be free to develop their theories, strategies, and approaches without fear that the opposing party may gain access to same.38 The Court states “[w]here such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten; . . . [t]he effect on the legal profession would be demoralizing.”39 Secondly, Hickman’s policies serve to encourage individual research and investigation, and discourage the use of an opponent’s work as a substitute for their own efforts.40 Finally, the Court believed that the “interests of the clients and the cause of justice would be poorly served”41 by unrestricted discovery practices. Much litigation subsequent to the Hickman decision sought to further these policies in applying the new qualified rule.42 However, for over twenty years the matter was left to the federal courts to decide on a case by case basis.43

31. Id. at 511.
32. Id.
33. Id.
34. Id. at 513.
35. Id. at 512-513.
36. Id. at 507.
37. Id.
38. Id. at 511.
39. Id.
41. Hickman, 329 U.S. at 511.
43. Id. Many states enacted rules to solve some of the troublesome areas left by
C. After Hickman - Rule 26(b)(3)\textsuperscript{44}

Some of the post-Hickman problems were eliminated by certain 1980 Amendments to the Federal Rules. Federal Rule of Civil Procedure 26(b)(3)\textsuperscript{45} partially codified\textsuperscript{46} the Hickman decision. Rule 26(b)(3) extended the work product immunity to non-attorneys engaged in trial preparation.\textsuperscript{47} Additionally, the requirement of “good cause” under the old federal rule was eliminated for one of relevance and absence of privilege.\textsuperscript{48} However, the new rule explicitly required a special showing for trial preparation materials. Therefore, where one party attempts to obtain materials prepared in anticipation of litigation by the opponent, the party seeking discovery must make a “showing of substantial need . . . and an inability without undue hardship to obtain the substantial equivalent of the materials by other means.”\textsuperscript{49} The required special showing before allowing discovery of materials prepared in anticipation of litigation reflects the Federal Rules Advisory Committee’s view that the informal evaluation and investigation of each side should be protected thereby encouraging independent preparation and avoiding one side relying and obtaining the benefit of the other side’s detailed preparatory work.\textsuperscript{50} Further, an even greater protection is given to materials prepared by an attorney or other representative of the client, which reflects their opinions, mental impressions, conclusions or legal theories.\textsuperscript{51}

Despite attempted clarification of the Hickman decision, Rule

\textsuperscript{44} FED. R. CIV. P. 26(b)(3).


\textsuperscript{46} Id.

\textsuperscript{47} Proposed Amendments, supra note 12, at 502.

\textsuperscript{48} Id. at 500.

\textsuperscript{49} Id.

\textsuperscript{50} Id. at 501.

\textsuperscript{51} Special Project, supra note 8, at 784.
26(b)(3) left ambiguities with which the courts must deal. One such ambiguity arises in restricting its scope to materials "prepared in anticipation of litigation." The explicit restriction in the rule adds emphasis to the determination of when anticipation of litigation begins. The determination is difficult to ascertain in many cases where the investigation following an occurrence may have multiple purposes. In making the determination of whether or not the material should be afforded work product protection it is important for the courts to base their decision on the policy justifications of the work product doctrine. The central justification of the work product doctrine is to protect a party's preparatory work from his adversary. Although open and liberal discovery practices are promoted in our system, a party should not be penalized for his promptness in investigating an accident. The U.S. Supreme Court has reaffirmed the Hickman rationales in its most recent decision of Upjohn Co. v. United States. In Upjohn, the Court explicitly stated that the policies underlying the work product doctrine furthered a "strong public policy."

D. Florida's Rule 1.280(b)(2)

Florida's Rule 1.280(b)(2) was enacted to conform with Federal Rule 26(b)(3). The latter codified the principles of the work product doctrine set forth in Hickman. An analysis of a work product claim under Rule 1.280(b)(2) of the Florida Rules is bifurcated between a determination of whether documents constitute work product, and if so, whether the party seeking production is unable to obtain the substantial equivalent of the document by other means.

52. Ambiguities which are beyond the scope of this Note involve the standard of protection to be given to oral statements and other intangible work product; whether use of the material in subsequent litigation should be protected; and the ownership of the work product immunity.
53. Special Project, supra note 8, at 784.
55. Id. at 398.
56. FLA. R. CIV. P. 1.280(b)(2).
57. FED. R. CIV. P. 26(b)(3).
58. See supra note 46.
59. Hickman, 329 U.S. at 495.
60. The focus of this Note is on the first issue under Rule 1.280(b)(2): whether materials were prepared in anticipation of litigation. This Note does not discuss the criteria required to show substantial need and undue hardship. The determination of whether the material was prepared in anticipation of litigation does not affect the reso-
III. Florida Law

Presently, no Florida court has established a clear precedent on the issue of the discoverability of prelitigation material. The existing case law is composed of various confusing and conflicting decisions. Because the facts of each case are important for a proper application of the work product protection, Florida cases will be examined to illustrate how similar cases are yielding different results.

Winn Dixie Stores, Inc. v. Nakutis, 61 a Fifth District Court of Appeal case addressing the issue of the discoverability of prelitigation material, stands for the proposition that accident reports are prepared in anticipation of litigation.62 Winn Dixie involves a slip and fall accident at a grocery store. The plaintiff sought accident reports relating to the same store for a number of years prior to his alleged injury.63 A discovery order was entered and defendant sought review by way of writ of certiorari.64 The plaintiff contended that the reports were prepared by Winn Dixie or its agents in the ordinary course of business, and thus discoverable.65 The court dismissed this argument with the following statement:

It is hardly arguable that an accident report of a slip and fall incident in a grocery store, prepared by the grocery store employees or agents, is not a document prepared in anticipation of litigation. Those reports certainly are not prepared because of some morbid curiosity about how people fall at the market. Experience has shown all retail stores that people who fall in their stores try to be

64. Id.
65. Id.
compensated for their injuries. Experience has also shown those stores that bogus or frivolous or exaggerated claims might be made. A potential defendant's right to fully investigate and memorialize the results of the investigation should not be restricted any more than should a potential plaintiff's. Our system of advocacy and dispute settlement by trial mandates that each side should be able to use its sources of investigation without fear of having to disclose it all to its opponents. This allows for free discussion and communication during preparation for litigation. If all reports and other communications of the litigants were available to the opposition then those communications would certainly be stilted, un-revealing and thus self-defeating in their purpose.66

The Second67 and Fifth68 District Courts of Appeal have followed this approach.

However, in *Hartford Accident & Indemnity Company v. McGann*,69 the Fourth District Court of Appeal, also faced with a slip and fall case at a supermarket, did not follow the *Winn Dixie* standard. The court in reviewing the trial court's discovery order did not make the presumption made by the court in *Winn Dixie*, that all accident reports are prepared in anticipation of litigation. Instead, it found that the defendant failed to make the required showing that the statements taken by employees or agents of the store concerning the accident were prepared in anticipation of litigation, and thus were not protected from discovery.70 This standard has been consistently followed in the Fourth District Court of Appeals.71

The *Winn Dixie* and *McGann* cases are a clear illustration of a conflicting interpretation and application of the work product rule in factually identical cases. The position taken by the court in *Winn Dixie* seeks to protect a litigant's informal evaluation of his case and encourages independent preparation for trial. Additionally, such a view prevents one side from obtaining automatic access to the preparatory work

66. Id.
67. See, e.g., *Florida Cypress Gardens, Inc.*, 471 So. 2d at 203; *Winn-Dixie Stores, Inc.*, 455 So. 2d at 1342; *Nationwide Ins. Co.*, 276 So. 2d at 547.
68. See, e.g., *Winn-Dixie Stores, Inc.*, 435 So. 2d at 307; *Walt Disney World Co.*, 462 So. 2d at 486.
70. Id. at 1362.
of the other side upon a simple showing of relevance,\textsuperscript{22} which is the standard required when the material is not considered work product. However, one major criticism of the approach taken by \textit{Winn Dixie} is that it fails to consider that there may be circumstances where reports are prepared for reasons other than litigation.\textsuperscript{23} For example, there are situations where accident reports are prepared for reasons pertaining to safety, public relations,\textsuperscript{24} or possibly in an attempt to amicably resolve a claim. It is argued that a rule of thumb approach can foreclose such considerations and may lead to an improper application of the work product rule.\textsuperscript{25}

Other cases which have generated much confusion are those involving insurance companies. Courts have failed to recognize that the standards used in evaluating these cases must take into account the nature of the insurance business. Unlike other businesses, an insurance company's regular course of business is to investigate claims. Furthermore, courts often neglect to distinguish between the discoverability of a liability insurer's investigation material and an insurer's investigation material pertaining to a claim brought by its policyholder. The result is confusing precedent which provides little predictability of the protection an insurance company may expect of its investigation material.

An example of a case involving an insurance company, which is confusing and unclear as to its scope, is \textit{Cotton States Mutual Insurance Co. v. Turtle Reef}.\textsuperscript{76} The case involved an action by an insured against its insurer. The Fourth District Court of Appeal held that statements and materials prepared by a party's investigator or insurer are protected from discovery only when prepared in contemplation of

\begin{itemize}
\item \textsuperscript{22} When the materials being sought are not privileged, Florida Rule 1.280(b)(1) requires, in addition to relevancy, that the information sought be "reasonably calculated to lead to discovery of admissible evidence."
\item \textsuperscript{23} Spaulding v. Denton, 68 F.R.D. 342, 345 (D. Del. 1975).
\item \textsuperscript{24} 245 ACAD. FLA. TRIAL LAW J. 10 (February 1983).
\item \textsuperscript{25} Spaulding, 68 F.R.D. at 345.
\item \textsuperscript{26} 444 So. 2d 595 (Fla. 4th Dist. Ct. App. 1984).
\end{itemize}
litigation. The court further explained that "mere likelihood of litigation does not satisfy this qualification." The case was remanded to determine if the investigation material was of the type insurance companies conduct in the ordinary course of business, or whether the investigation file was prepared in anticipation of litigation.

The decision is confusing as it suggests that documents prepared in the ordinary course of business cannot also be prepared in anticipation of litigation. An argument can be made that such an analysis overlooks the possibility that in certain situations the ordinary course of business is anticipation of legal claims. An insurance company's ordinary course of business is to investigate accidents and claims. This does not mean that such an investigation may not also be in anticipation of legal action. Therefore, courts should arguably eliminate the ordinary course of business exception when determining the discoverability of insurance companies' files.

Another ambiguity created by the Cotton States case is whether the standard set forth by the court extends to cases involving actions by a third party against a liability insurer. In Florida Cypress Gardens v. Murphy, a husband and wife brought an action for injuries the husband suffered from an accident in which he was thrown out of a wheelchair at Cypress Gardens. The Second District Court of Appeal reversed the trial court's order to produce the investigation file of Florida Cypress Garden's liability insurer. The court refused to follow the {

77. Id. at 596.
78. Id.
79. Id.

80. The "ordinary course of business" exception is attributable to the statement used by the Advisory Committee on the Proposed Amendments to the Federal Rules indicating that materials assembled in the ordinary course of business are considered equivalent of materials not prepared in anticipation of litigation. Proposed Amendments, supra note 12, at 501. Although this exception is not stated in the Federal Rule, nor the Florida Rule on work product, some courts have used the rationale in deciding whether the material should be protected from discovery. E.g. Thomas Organ Co. v. Jadranska Slobodna Plovdiva, 54 F.R.D. 367, 371 (N.D. Ill. 1972); Proctor & Gamble Co. v. Swilley, 462 So. 2d 1188, 1193 (Fla. 5th Dist. Ct. App. 1985).
82. Special Project, supra note 8, at 855. The Special Project proposes a complete abandonment of the ordinary course of business exception. It suggests an analysis of each case on its facts. Id.
83. 471 So. 2d 203 (Fla. 2d Dist. Ct. App. 1985).
84. Id. at 204.
The court's analysis reflects a misinterpretation of the Cotton States case. The court failed to factually distinguish Cotton States and Florida Cypress Gardens. Cotton States involved an action by an insured against its insurer, while Florida Cypress Gardens involved a claim by a third party injured at Cypress Garden against Cypress Gardens' liability insurer. Notwithstanding the fact that in both cases the material sought was prepared by or for the insurer, the primary purpose for the investigation was different. In Cotton States, it is suggested that the primary purpose of an insurer's investigation into its policyholder's claim is to determine whether to honor the claim or resist it. Although it is true that litigation may result from denial of a claim by an insurer, this decision is reached after preliminary investigation not related to litigation. In Florida Cypress Gardens, the primary purpose of the investigation was, arguably, anticipating some legal action by the injured party, and thus the test of Cotton States was not applicable.

However, the standard followed by the court in Florida Cypress Gardens has been rejected by other courts in determining the extent of protection a liability insurer's file should receive. Florida Cypress Gardens followed the Winn-Dixie standard, which held that all investigative material gathered by a liability insurer is prepared in anticipation of legal action. This standard was not followed by the Fourth District Court of Appeal in Surette v. Galiardo, which involved an action brought by the mother of a minor child who was struck and killed by a school bus. In Surette, the plaintiff sought to obtain the accident report...

85. Id. at 206.
87. E.g., Carver, 94 F.R.D. at 134.
88. Florida Cypress Gardens, 471 So. 2d at 206.
90. Surette, 323 So. 2d at 53.
prepared by the school board and submitted to its liability insurance carrier. 91 Rather than make a presumption that the accident report was privileged, the court required a showing that the report was submitted to the insurer for use in connection with an anticipated settlement or defense of a claim, before protecting the material from discovery. 92

The interpretation of the work product rule is far from consistent. While some courts make a presumption that witness statement and reports are always taken in anticipation of legal action, 93 other courts focus on the facts of each case before making the determination. 94 Additionally, courts have not clearly distinguished actions brought by third parties against a liability insurer from those brought by a policyholder against its insurer. 95 This generates confusion among the lower courts 96 which tend to apply the same standard in both situations.

IV. The Law in Federal and State Courts Applying Work Product Protection to Prelitigation Material

A. Federal Courts

State courts tend to follow federal court decisions in the application of work product protection to trial preparation material. However, the federal courts offer equally conflicting and confusing precedent which has not helped the state courts in resolving the anticipation of litigation issue. 97

There are various positions taken by the federal courts in applying work product protection to trial preparation materials. One approach is to hold that the material cannot be protected under the work product theory unless the reports or statements reflect the employment of an attorney. 98 This view directly contradicts the rule, which explicitly provides protection to documents prepared by or for a party’s “attorney, consultant, surety, indemnitor, insurer or agent.” 99 Other federal courts

91. Id. at 57.
92. Id. at 58.
93. See supra text accompanying notes 61-68.
94. See supra text accompanying notes 69-70.
95. See supra text accompanying notes 76-88.
96. See Florida Cypress Gardens, 471 So. 2d at 203.
97. Fontaine, 87 F.R.D. at 89; Brown, 137 Ariz. at 327, 670 P.2d at 725.
98. E.g., Thomas Organ Co., 54 F.R.D. at 367; McDougall v. Dunn, 468 F.2d 468 (4th Cir. 1972).
have held that investigative material prepared by a company following an occurrence is protected by the work product doctrine.\textsuperscript{100} This test "creates a potential for abuse in the hands of companies seeking to classify virtually everything in their files as work product."\textsuperscript{101} A different standard adopted by federal courts is that enunciated by the Delaware District Court in \textit{Hercules Inc. v. Exxon Corp.}\textsuperscript{102} In \textit{Hercules}, the determination of the anticipation of litigation issue is made by examining the nature of the document and facts of the case.\textsuperscript{103} A similar approach was followed in \textit{Spaulding v. Denton},\textsuperscript{104} where the United States District Court stated: "Should any rule of thumb approach become the general rule, it is not hard to imagine insurers mechanically forming their practices so as to make all documents appear to be prepared "in anticipation of litigation".\textsuperscript{105} Other federal courts have required the presence of specific claims prior to the preparation of the documents in order to accord the material work product protection.\textsuperscript{106} Although the presence of a specific claim makes the determination of the anticipation of litigation issue easier to resolve, it may frustrate the policy of the work product rule which encourages complete trial preparation.\textsuperscript{107}

Furthermore, in \textit{Upjohn Co. v. United States},\textsuperscript{108} the U.S. Supreme Court implied that it is not required that specific claims exist before documents are protected from discovery. In \textit{Upjohn}, the government sought production of documents relating to an internal corporate investigation concerning unauthorized payments to foreign government offi-

\begin{thebibliography}{10}
\bibitem{101} Note, \textit{Discovering Investigative Reports Under The Work Product Doctrine}, 34 \textit{BAYLOR L. REV.} 156, 162 (1982); \textit{see also Spaulding}, 68 F.R.D. at 342.
\bibitem{103} \textit{Id.} at 151.
\bibitem{104} 68 F.R.D. at 342.
\bibitem{105} \textit{Id.} at 345.
\end{thebibliography}
cials in order to secure government business.\textsuperscript{109} Notwithstanding the fact that the company had conducted its investigation prior to the presence of a specific claim,\textsuperscript{110} the Supreme Court held that work product immunity applied to the facts of \textit{Upjohn}.	extsuperscript{111} Therefore the case suggests that materials can be prepared in anticipation of litigation although a specific claim is not present.

Finally, some federal courts have attempted to solve the problem by redefining the phrase "anticipation of litigation." For example, some courts provide that there must be "some possibility"\textsuperscript{112} of litigation, an "eye toward litigation"\textsuperscript{113} or "substantial probability" of "imminent" litigation.\textsuperscript{114} As one commentator put it, this does nothing more than say that "litigation is anticipated when litigation is anticipated."\textsuperscript{115} Thus, courts are free to choose among the wide variety of approaches provided by the cases addressing this issue. The result is a lack of uniformity providing poor guidance for the state courts and confusion among the federal courts.

\section*{B. State Supreme Courts}

Various state supreme courts have addressed the issue of whether witness statements and reports taken after the occurrence of an accident should be considered prepared in anticipation of litigation.\textsuperscript{116} The supreme courts in these states found it necessary to address the issue due to the confusing and conflicting precedent in the lower courts. However, the issue in these states is not completely resolved. The cases decided often involved the discoverability of an insurance company's investigation material. The issue is still unresolved as to the proper

\begin{itemize}
\item \textsuperscript{109} \textit{Id.} at 387-88.
\item \textsuperscript{110} \textit{Id.}
\item \textsuperscript{111} \textit{Id.} at 398-403.
\item \textsuperscript{112} \textit{E.g.}, In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979).
\item \textsuperscript{115} Note, \textit{supra} note 107, at 1278.
\end{itemize}
standard of protection to be accorded to materials prepared prior to litigation by businesses other than insurance companies.

In those states ruling on the discoverability of investigative material prepared by a liability insurer the trend is to accord them work product protection. However, as to prelitigation material prepared by an insurer responding to its insured's claim, the court holdings have varied from state to state. The case of *Fireman's Fund Insurance Company v. McAlpine* is an example of a situation where the investigation conducted by a liability insurer was found to be an investigation conducted in anticipation of litigation. The Rhode Island Supreme Court rejected the case by case approach noting that "it provides for no uniformity in the manner in which the issue is resolved in the lower tribunals." Although a similar approach was taken by the Iowa Supreme Court in *Ashmead v. Harris*, that court clearly stated that its decision was limited to cases involving "routine investigation of an accident by a liability insurer." The court's language indicated that a different test may well apply when it involves the "investigations initiated to adjust the insured's own loss."

In *Brown v. Superior Court In and For Maricopa County*, the Arizona Supreme Court rejected a single test approach. It criticized, as too broad, the approach taken by those courts which hold that "all statements and information secured by insurance company after an occurrence . . . are made in anticipation of litigation." However, the *Brown* case involved an action by various policyholders against their insurer, and not one by a third party against a liability insurer. The approach suggested by the *Brown* court is one which considers various factors before determining whether to accord the material work product protection. Those factors are: 1) the nature of the event that prompted preparation of materials; 2) whether requested materials contain legal analyses and opinions or purely factual contents; 3) whether material was requested or prepared by a party or its representatives; 4) whether the investigative material was routinely prepared; and 5) whether specific claims or settlement negotiations existed at the time.

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119. *Ashmead*, 336 N.W.2d at 197.
120. *Id.* at 201.
121. *Id.*
123. *Id.* at 328, 670 P.2d at 726.
the materials were prepared.\textsuperscript{124}

However, in \textit{Hawkins v. District Court, Inc.},\textsuperscript{125} Colorado's Supreme Court also faced with a claim by an insured against his insurer, adopted a different test in determining whether the material sought to be discovered was work product. The test enunciated by the court was whether the "document was prepared or obtained in order to defend a specific claim . . . [and whether] a substantial probability of imminent litigation. . ."\textsuperscript{126} existed when the documents were prepared. Arguably, this is an opinion which will give Colorado little guidance, and will likely continue the inconsistent application of work product protection in its lower courts.

It is evident that even the state supreme court holdings are not completely uniform. Nevertheless, in those states where the supreme court establishes a clear test, there is a precedent set for lower courts to follow in applying work product protection to cases covered by the scope of the opinion. Furthermore, insurance companies and other businesses conducting preliminary investigations in these states will know with more certainty whether or not their work product will be freely discoverable by the opponent in litigation. Unfortunately, the confusion and misapplication of the work product rule in the lower courts of Florida will continue as long as the Florida Supreme Court continues to deny review\textsuperscript{127} of the anticipation of litigation issue.

V. Suggested Approaches to the Anticipation of Litigation Issue

The anticipation of litigation issue requires application of different standards of protection in order to encompass the variety of factual situations which confront the courts. The following are proposed approaches to three distinguishable and frequently encountered circumstances.

A. \textit{Materials Prepared by Liability Insurers}

"There is little, if any, reason to question . . . that a routine inves-

\textsuperscript{124} Note, \textit{supra} note 115, at 1287.
\textsuperscript{125} \textit{Hawkins}, 638 P.2d at 1372.
\textsuperscript{126} \textit{Id.} at 1379.
tigation by a liability insurer is conducted in anticipation of litigation."\textsuperscript{128} Although it is possible that an action may be settled short of litigation, there is always the possibility that a claim may result in legal action.\textsuperscript{129} The fact that some cases are settled while others may never result in a claim does not negate the fact that a liability insurer's initial investigation is conducted to determine its insured's liability in the event of lawsuit. With this in mind, it seems logical that the material gathered by a liability insurer's investigation should be protected from discovery.

The proposed approach will eliminate the "ordinary course of business" exception. This frequently criticized exception\textsuperscript{130} is not an appropriate test to determine the protection insurance files merit since it overlooks the possibility that a liability insurer's ordinary course of business is anticipating legal claims. Finally, protecting a liability insurer's files assures that routine investigations are thorough and effective, thereby upholding the policy of \textit{Hickman v. Taylor}.\textsuperscript{131} It should be noted, however, that by adopting this approach the opponent may still have access to the material, but only upon the proper showing of substantial need and undue hardship.\textsuperscript{132}

B. Material Prepared by Insurer in Response to Insured's Loss

In contrast to the investigation conducted by a liability insurer, the investigation conducted by an insurance company in response to a claim brought by its policyholder presents a different situation.\textsuperscript{133} An insurer is under a contractual obligation to reimburse its insured, assuming the claim is a valid one. Accordingly, its primary purpose during preliminary investigation is to determine whether its insured's claim will be honored. Although it is possible that legal action may result from a denial of a claim, this determination is reached only after an insurance company decides not to honor a claim. Therefore, the proper approach to take in determining which material should be given work

\textsuperscript{128} Comment, A Routine Investigation of an Accident By a Liability Insurer is Conducted in Anticipation of Litigation within the Meaning of Iowa R. Civ. P. 122(c) — Ashmead v. Harris (Iowa Sup. Ct. 1983), 33 Drake L. Rev. 727, 734 (1983-84).
\textsuperscript{129} Fireman's Fund Ins. Co., 120 R.I. at 753-54, 391 A.2d at 89-90.
\textsuperscript{130} See supra note 80 and accompanying text.
\textsuperscript{131} Hickman, 329 U.S. at 495.
\textsuperscript{132} See supra note 60 and accompanying text.
product protection will require a temporal analysis. This test should be one which ascertains the point at which the insurer's focus shifts from investigating a claim for settlement purposes to an investigation in preparation of litigation. An insurer's denial of a claim or some other action indicating to the insured that the claim will not be honored to the extent expected, is an indication of such change. From this point forward, any material prepared by the insurer should be protected.

C. Material Prepared by a Business Other than an Insurance Company

The material prepared by employees of a store, an employer, a company's agents or other businesses not involving an insurance company may have multiple purposes besides litigation. As such, an absolute rule would be inappropriate. The soundest approach for courts to take is to consider each case on its facts. There are several factors which may serve as guidelines for the court in making a determination of the discoverability of these materials. First, the court must consider the nature and magnitude of the event that prompted the investigation. The greater the degree of injury or loss the more likely it is that a party conducted the investigation anticipating legal action. Second, the content of the document being sought through discovery should be analyzed. For example, where a document contains legal analyses and opinions a clearer showing that the material was prepared in anticipation of litigation is made. Third, a determination must be made as to who requested the investigation or prepared the document. Although it is not required that an attorney be involved before protection is accorded, the presence of an attorney may be an important factor in resolving the anticipation of litigation issue. Finally, the court should determine whether the materials were of the type that the business routinely prepared for reasons other than litigation.

134. See supra text accompanying note 73.
135. Note, supra note 107, at 1287.
136. Id.
137. Id. at 1289.
138. Id. at 1287.
139. Id. at 1292-93.
140. Id. at 1287.
V. Conclusion

Proper application of Florida Rule 1.280(b)(2)\textsuperscript{141} will require clarification of the anticipation of litigation issue. To date, the existing precedent is generating conflicting and unclear decisions.\textsuperscript{142} Such results "undermine the predictability of work product decisions and the atmosphere of security that predictability fosters."\textsuperscript{143}

To provide uniformity in the application of work product protection throughout the state, the Florida Supreme Court must set standards which recognize the factual differences among the cases. In doing so it is important to focus on the primary purpose of a business in conducting an investigation following an accident. A logical and proper application of work product protection will require that courts distinguish between cases involving third party actions against liability insurers and those where insureds bring legal actions against their own insurer following the denial of a claim. As previously noted, the two have different purposes in conducting an initial investigation.\textsuperscript{144} Failure to make a distinction may unduly penalize a liability insurer who diligently and promptly investigated a potential claim while unfairly benefiting a plaintiff who would be able to take advantage of the insurance company's diligence. Therefore, courts must protect the preliminary investigation of a liability insurer. On the other hand, investigations conducted by an insurer of its policyholder's claim requires a temporal analysis to determine at which point the insurer's focus shifted from evaluating the claim to preparing for litigation. As to cases involving prelitigation material gathered by one other than an insurance company, an individual analysis of each case is necessary due to the multiple purposes for which an investigation may have been conducted. Various factors are proposed as guidelines for the courts to follow in analyzing the facts of the case.\textsuperscript{145}

Once Florida courts establish clear standards, the application of the work product rule will be more logical and consistent. Furthermore, the suggested standards offer those who routinely investigate accidents

\textsuperscript{141} FLA. R. CIV. P. 1.280(b)(2).
\textsuperscript{142} See supra text accompanying notes 61-115.
\textsuperscript{143} Special Project, supra note 8, at 854.
\textsuperscript{144} See supra text accompanying notes 128-133.
\textsuperscript{145} See supra text accompanying notes 135-140.
an accurate idea of when their investigative material will be protected from discovery.

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