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Pennsylvania Rules of Civil Procedure 4003.3. Scope of Discovery.
Trial Preparation Material Generally

Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery . . . **even though prepared “in anticipation of litigation or trial”** by or for another party or by or for that other party's representative, **including his or her attorney**, consultant, surety, indemnitor, insurer or agent.

The discovery **shall not include** disclosure of the **mental impressions** of a party's attorney or his or her **conclusions, opinions, memoranda, notes or summaries, legal research or legal theories**. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics.

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When Does the Protection Start?
(Temporal)

“In Anticipation of Litigation”

Covered		Not Covered

When are you a “Lawyer”?



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What Does the Protection Protect?
(Substantive)

“Mental Impressions”

Covered		Not Covered

Is It a Game?



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- WORK PRODUCT

The United States Supreme Court first addressed the work product doctrine in 1947 in Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385, 91 L. Ed. 451 (1947).

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Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways....Were such materials open to 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 his own. 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.

Hickman v. Taylor, 329 U.S. 495, 510-11, 67 S. Ct. 385, 393-94, 91 L. Ed. 451 (1947).

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FEDERAL RULE OF CIVIL PROCEDURE 26(B)(3)

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are **prepared in anticipation of litigation or for trial by or for another party or its representative** (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

- (i)** they are otherwise discoverable under Rule 26(b)(1); and
- (ii)** the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.



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- (B) *Protection Against Disclosure.*** If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.
- (C) *Previous Statement.*** Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:
- (i)** a written statement that the person has signed or otherwise adopted or approved; or
 - (ii)** a contemporaneous stenographic, mechanical, electrical, or other recording--or a transcription of it--that recites substantially verbatim the person's oral statement.

Fed. R. Civ. P. 26(b)(3).

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The “Prepared in Anticipation of Litigation” Component

The Courts have applies various standards in interpreting the “in anticipation of litigation” component.

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THE CIRCUIT SPLIT

First Circuit – “Prepared for Trial”

Fifth Circuit – “Primary Motivating Factor”

Second Circuit, Third Circuit, Fourth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, Ninth Circuit & DC Circuits – “Because of” Prospect of Litigation

The Tenth, Eleventh, and Federal Circuits have not addressed the issue.

District Courts in the Tenth Circuit have followed the Fifth Circuit’s approach.

A district court in the Eleventh Circuit has aligned itself the majority of circuits and has followed the “because of” prospective litigation test.

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The Majority View – The “Because of” Rule

“Documents should be deemed prepared in anticipation of litigation....if 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.”

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Fifth Circuit – “Primary Motivating Factor”

The work product protection will apply where litigation is not imminent, “as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.”

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First Circuit – “Prepared for Trial”

In United States v. Textron Inc., 577 F.3d 21 (C.A.1., 2009) (en banc), the First Circuit addressed the following question:

Is a document protected by Rule 26(b)(3) if it is not in any way prepared ‘for’ litigation but relates to a subject that might or might not occasion litigation?

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The Textron majority held

It is **not enough to trigger work product protection that the subject matter of a document relates to a subject that might conceivably be litigated....**

Nor is it enough that the materials were prepared by lawyers or represent legal thinking. Much corporate material prepared in law offices or reviewed by lawyers falls in that vast category. **It is only work done in anticipation of or for trial that is protected.** Even if prepared by lawyers and reflecting legal thinking, “[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision.



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Ordinary or “Fact” Work Product versus Core or “Opinion” Work Product

Ordinary work product has been defined as the “written or oral information transmitted to the attorney and recorded as conveyed by the client.”

Opinion work product has been defined as “any material reflecting the attorney’s mental impressions, opinions, conclusions, judgments, or legal theories.”



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Work Product Protection Extended to Expert Witnesses

(2) *Disclosure of Expert Testimony.*

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

Fed. R. Civ. P. 26



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Electronically Stored Information

Tangible v. Intangible

In 2006, Rule 34(a) was amended to confirm that discovery of electronically stored information stood on equal footing with discovery of paper documents.