No. 09-750

IN THE
Supreme Court of the United States

TEXTRON, INC. AND SUBSIDIARIES,
Petitioner,
v.
UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The Product Liability Advisory Council (PLAC) is a non-profit association with 100 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 800 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A.

As explained below, the work product privilege is essential to the ability of product manufacturers to obtain full and candid legal counsel in anticipation of litigation. Not only are such assessments prepared directly for use in court, product manufacturers rely

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[1] In accordance with Rule 37.6, *amicus curiae* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. All parties consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court.

upon analyses of potential litigation prepared by counsel in making a variety of business and regulatory compliance decisions. It is not uncommon for lawyers to develop such advice in consultation with engineers, technical experts, or suppliers, making the attorney-client privilege unavailable and work product privilege all the more critical.

The First Circuit's divided *en banc* opinion creates confusion within the circuit's own jurisprudence, in addition to division on the standard for application of the privilege among sister circuits. This case provides the Court with the opportunity to bringing needed clarity to the scope of the work product privilege based on sound public policy.

SUMMARY OF ARGUMENT

Clarity in the law of work-product privilege is essential to fulfilling its purpose. Without confidence that a document assessing litigation is protected, attorneys will be hesitant to provide full and candid legal advice to clients.

The First Circuit's ruling takes attorneys down this problematic path. The divided *en banc* decision holding that work papers developed by Textron's lawyers assessing the company's strengths and weaknesses in a likely tax dispute with the Internal Revenue Service (IRS) lack work-product protection has significant implications beyond tax law that warrant this Court's consideration.

In rejecting Textron's claim of work-product privilege, the First Circuit took an unduly narrow interpretation of its scope, finding that the privilege applies only to materials prepared "for use" at trial. *See United States v. Textron Inc. and Subsidiaries*,

Pet. App., 11a. In so doing, the First Circuit held that materials that include a candid assessment of actual or potential litigation by corporate counsel are subject to inspection by adverse parties if the materials were prepared to assist in complying with government regulations or for a business purpose rather than for direct use in an actual or anticipated trial.

Limitation of the work-product privilege in this manner would have serious adverse implications for product manufacturers. There are a wide range of situations in which manufacturers rely upon an assessment of anticipated litigation in making business or regulatory compliance decisions. For instance, a manufacturer may consider its potential liability, including the strengths and weaknesses of possible claims and defenses, in deciding whether to bring a new product to market, merge with another company, obtain additional insurance coverage, or, like Textron, evaluate the adequacy of its reserve fund. A manufacturer may also evaluate its potential liability when complying with regulatory obligations, such as determining whether to report a "substantial product hazard" to the Consumer Product Safety Commission. While such assessments may be motivated by a business or regulatory purpose and are not intended for use at trial, they are conducted *because of* anticipated litigation and reflect an attorney's mental impressions and strategy regarding how he or she would proceed in that litigation.

The public policy purpose of the work-product privilege would be severely curtailed if there is a considerable risk that an attorney's thought process about actual or potential litigation, composed during the course of his or her legal duties, will be subject to

inspection by an adverse party. "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). The law would create an incentive for manufacturers to make decisions about product safety, business issues, and regulatory matters, each of which may reflect consideration of anticipated litigation, based on incomplete written analyses, verbal assertions, and un-memorialized communications.

In light of these public policy considerations, several circuits apply a "because of" litigation test for work product privilege, which appropriately applies the privilege to documents that assess anticipated litigation in the context of making a business decision or complying with regulatory obligations. That line of demarcation is well-reasoned and understood.

The Fifth Circuit asks whether the document was prepared for the "primary purpose" of litigation or anticipated litigation, a narrower and more ambiguous test. The *Textron* decision takes an even more restrictive view—inquiring as to whether the attorney created the document "for use in" litigation. Pet. App., 11a.

In practical terms, the *Textron* majority places work-product privilege on par with Justice Potter Stewart's famous "I know it when I see it" observation with respect to obscenity, *Jacobellis v. Ohio,* 378 U.S. 184, 197 (1964) (Stewart, J., concurring), when it asserts, "Every lawyer who tries cases knows the touch and feel of materials prepared for a current or possible (i.e., 'in anticipation of') law suit." Pet. App., 17a. Of course, the district court and First Circuit panel are composed of lawyers. Nevertheless, after a

split First Circuit panel affirmed the district court's finding of work-product privilege, a bare majority in the *en banc* court's decision rejected it. Clearly "every lawyer" who tries cases could only speculate as to whether the privilege applies. In sum, application of the privilege might come out differently under tests used in other circuits and possibly in the First Circuit itself as lower court judges try to divine the applicable test from First Circuit law. Thus, "a great divergence of views" has emerged in an area that is "so essential to an orderly working of our system of legal procedure." *Hickman*, 329 U.S. at 499, 512.

The First Circuit's ruling has sent a confusing message to the legal community and created unsound public policy incentives. In that regard, as the Court considers whether to grant certiorari, law firms are already counseling their clients to engage in the very type of inefficiency and "sharp practices" that this Court predicted would occur in the absence of protection of an attorney's mental impressions from unnecessary intrusion. *Id.* at 511.

This case provides the Court with an opportunity to clarify that the work-product privilege places function over form. The Court can provide the clarity that attorneys rely upon in their everyday work by firmly establishing that an attorney's assessment of actual or anticipated litigation is protected regardless of the "primary motivation" underlying the document at issue or whether it is developed for "use in" litigation.

For the foregoing reasons, the Court should grant certiorari.

ARGUMENT

I. THE PURPOSE AND POLICY UNDERLYING THE WORK PRODUCT PRIVILEGE AND ITS APPLICATION IN THIS CASE

The work-product privilege recognizes that, in order to provide the highest quality and most useful advice to a client regarding current or future litigation, a lawyer may need to consult with professionals in various fields, such as engineers, investigators, accountants, and technical experts. *See id.* As the *Hickman* Court recognized, "Proper presentation 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." 329 U.S. at 511. Information gathered by the attorney, including analyses prepared by counsel for his or her own use, generally qualify for work-product protection. *United States v. Nobles*, 422 U.S. 225, 238-39 (1975).

Unlike the attorney-client privilege, the work-product privilege places function over form. *See id.* at 238 ("[T]he doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system."). The work-product privilege protects such analyses so long as the material was generated "with an eye toward litigation," *Hickman,* 329 U.S. at 511, and it was not disclosed to third parties in a manner that would substantially increase the opportunity for potential adversaries to obtain the information. *See* Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, 8 Federal Practice & Procedure § 2024, at 343 (1994 & Supp. 2009).

The Court crafted this privilege, codified in Federal Rule of Civil Procedure 26(b), to carefully protect the ability of an attorney to prepare for litigation without the risk that his or her theories could fall into the hands of opposing counsel. The work-product privilege is proprietary in nature, recognizing an attorney's interest in privacy in his or her work. *See Hickman,* 329 U.S. at 497. It applies to documents that the attorney prepares for his or her own use even if not shared with a client. This is demonstrated by the fact that, unlike the attorney-client privilege, both the attorney and the client can invoke the privilege. Without the work-product privilege, attorneys would be abundantly cautious in documenting their theories and strategies related to litigation, providing a disservice to clients who seek the most thoughtful, accurate, and detailed legal advice.

While the work-product privilege is broader than the attorney-client privilege, its protection is more qualified. Unlike the attorney-client privilege, the work-product privilege can be overcome through a showing of substantial need in certain circumstances to permit discovery of essential facts in an attorney's file that are not otherwise available. *See id.* at 512; Fed. R. Civ. Proc. 26(b)(3) (permitting an adverse party to obtain work-product material only upon a showing of "substantial need," *i.e.* when the information cannot be obtained from other sources without undue hardship). "But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify produc-

tion through a subpoena or court order." *Hickman*, 329 U.S. at 512.

In the case before this Court, the First Circuit acknowledged that the IRS is seeking the "blueprint" prepared by Textron's lawyers of the positions the company took on its tax returns that they viewed as likely be challenged by the IRS, how Textron would defend its positions, and the likelihood, expressed as a percentage, that the IRS would prevail if the matter was litigated in court. Textron's lawyers prepared these documents, known as tax accrual workpapers to analyze the company's potential tax liability in connection with estimating its necessary reserves in a Securities and Exchange Commission filing. *See* Pet. App., 2a-7a. An assessment of anticipated litigation and the firm's potential liability exposure was integral to this task.

The First Circuit did not take issue with the IRS's explicit motivation for seeking the subpoenaed workpapers – having Textron's blueprint would save the time and expense of the IRS undertaking its own legal analysis of the 4,000-page tax return. *See id.* at 20a. From the perspective of the IRS, its job is made easier if it can use Textron's own assessment of "weak spots" in its return and Textron's own assessment of the likelihood that the IRS would prevail in litigation, rather than undertake its own assessment. Certainly, such knowledge would also facilitate a favorable settlement for the IRS.

The IRS does not contend that the information it seeks is otherwise unavailable or that obtaining it would constitute an undue burden. That is likely because the IRS already possesses all of the information on the factual circumstances underlying Tex-

tron's transactions in the company's filed tax return or responses provided to the IRS upon its request. Rather, the IRS candidly acknowledges that it seeks a shortcut in pursuing Textron for additional taxes based on Textron's lawyer's own assessment of gray areas in tax law. As this Court recognized in *Hickman*, however, "the work product of the lawyer" should not be open to the "free scrutiny of their adversaries." 329 U.S. at 511.

Work product comes in a variety of forms and contexts—"interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Id.* Assessments of anticipated litigation and liability exposure included in tax accrual workpapers is but one variant that should qualify for work-product protection. This case provides the Court with an opportunity to restore a reasonable degree of predictability and certainty to an area that is essential to an attorney's everyday work. The Court can do so by firmly establishing that an attorney's assessment of actual or anticipated litigation is protected regardless of subjective and inconsequential determinations as to the "primary motivation" underlying the document at issue or whether it is developed for "use in" litigation.

II. MANUFACTURERS RELY UPON ASSESSMENTS OF ANTICIPATED LITIGATION IN A WIDE RANGE OF BUSINESS AND REGULATORY DECISIONS

Limitation of the work-product privilege to preclude its application to materials that include an attorney's evaluation of the strengths and weaknesses

of potential claims and defenses, and strategic thinking regarding current or anticipated litigation when they are not prepared for use at trial would have severe adverse implications for product manufacturers.

There are a wide range of situations in which manufacturers rely upon an assessment of anticipated litigation in making business or regulatory compliance decisions. The Second Circuit explored several hypothetical cases in *United States v. Adlman*, 134 F.3d 1194, 1199-1200 (2d Cir. 1998):

- A company contemplating a transaction recognizes that the transaction will lead to litigation. In deciding whether to proceed with the transaction, the company has its attorneys evaluate the likelihood of success in the litigation and, if it loses, its potential liability exposure. For instance, a manufacturer may decide whether to produce a product that arguably infringes on a competitor's patent based on its assessment of its potential liability exposure.

- A firm that is considering a merger with another company might ask its attorney to conduct a candid assessment of that company's likelihood of success in current litigation and its future liability exposure. For example, a manufacturer might closely investigate whether a company with which it is considering a merger produced, sold, or had asbestos-containing products on its property, and, if so,

the number of potential claims, possible defenses, and settlement value.[2]

- A bank that is considering lending funds to a firm may request a report from the company's attorneys concerning its likelihood of success in litigation.

- A securities underwriter contemplating a public offering of the company's securities may wish to see such a study to decide whether to go ahead with the offering without waiting for the termination of the litigation.

In each of these scenarios, as well as the very situation before this Court, the assessment is not intended for use at trial and is motivated by a business purpose. Nevertheless, the document reveals the attorney's "most intimate strategies and assessments concerning the litigation." *Id.* at 1200. In such instances, the Second Circuit properly recognized:

> the company involved would require legal analysis that falls squarely within *Hickman's* area of primary concern—analysis that candidly discusses the attorney's litigation strategies, and perhaps the feasibility of a reasonable settlement. . . . If the company declines to make such analysis or scrimps on candor and

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[2] Such an evaluation can be extraordinarily important. For instance, businesses that did not produce asbestos products, but purchased a company that earlier produced asbestos-containing products are subject to substantial successor liability. *See* James A. Henderson, Jr., *Asbestos Litigation Madness: Have the States Turned a Corner?*, 20-3 Mealey's Litig. Rep.: Asbestos 19 (2006).

> completeness to avoid prejudicing its litigation prospects, it subjects itself and its co-venturers to ill-informed decisionmaking. On the other hand, a study reflecting the company's litigation strategy and its assessment of its strengths and weaknesses cannot be turned over to litigation adversaries without serious prejudice to the company's prospects in the litigation.

Id.

There are many other potential situations where allowing the *Textron* decision to stand would place product manufacturers at a substantial risk of losing the work-product privilege. Consider, for example, the questionable applicability of the privilege under the First Circuit's decision to a manufacturer whose attorneys evaluate its potential liability, including the strengths and weaknesses of possible claims and defenses in litigation, when deciding whether to bring a new product to market or alter a proposed design, or how to price the product to incorporate potential liability.

Questions about the applicability of the privilege will also arise as manufacturers strive to comply with regulatory obligations. For instance, under the First Circuit's rule, it is uncertain whether the privilege would apply when a company attorney, after learning of an injury involving its product, investigates whether there is a defect that constitutes a "substantial product hazard" or an "unreasonable risk of serious injury or death," triggering an obligation to file report with the Consumer Product Safety Commission (CPSC). *See* 15 U.S.C. § 2064(b). Such an analysis, while triggered by regulatory obliga-

tions, might explore matters such as whether there is a reasonable alternative design, the adequacy of instructions and warnings, and potential misuse of the product by consumers—issues at the core of potential state product liability litigation.

In addition, product manufacturers may instruct their attorneys to consider anticipated litigation and estimate liability exposure when making decisions involving the purchase of insurance, opening a new plant given variations in state law, or estimating necessary reserve funds.

While such assessments may be motivated by a business or regulatory purpose and are not intended for use at trial, they are conducted *because of* anticipated litigation and reflect an attorney's mental impressions and strategy. *Id.* ("The fact that a document's purpose is business-related appears irrelevant to the question of whether it should be protected under Rule 26(b)(3).").

The public policy purpose of the work-product privilege would be severely curtailed if there is a considerable risk an attorney's thought process about actual or potential litigation, composed during the course of his or her legal duties, will be subject to inspection by an adverse party. "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten." *Hickman*, 329 U.S. at 511; *see also In re Sealed Case*, 146 F.3d 881, 884 (9th Cir. 1998) ("Without a strong work-product privilege, lawyers would keep their thoughts to themselves, avoid communicating with other lawyers, and hesitate to take notes."). The law would create an incentive for manufacturers to make decisions about product

safety, business issues, and regulatory matters, each of which may reflect consideration of anticipated litigation, based on incomplete written analyses, verbal assertions, and un-memorialized communications.

III. CLARITY IN THE LAW OF PRIVILEGE IS ESSENTIAL

Clarity in the law of privilege is essential to fulfilling its purpose. Without confidence that a document assessing litigation is protected, attorneys will be hesitant to provide full and candid legal advice to clients. The First Circuit's decision takes attorneys further down the road of uncertainty.

A. Divergent Tests Among the Circuits and Within the First Circuit

As attorneys go about their daily work, they cannot, with a reasonable degree of certainty, know whether the advice provided to a client with respect to anticipated litigation is protected from disclosure under the work-product privilege, particularly when it is not directly applicable to a specific case or is rendered to provide guidance in a business or regulatory decision.

Courts applying the majority rule for work-product protection appropriately consider whether the assessment at issue was generated "because of" actual or anticipated litigation. *See, e.g., Adlman*, 134 F.3d at 1202; *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979); *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.3d 980, 984 (4th Cir. 1992); *United States v. Roxworthy*, 457 F.3d 590, 593 (6th Cir.

2006); *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1118-19 (7th Cir. 1983); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987); *In re Grand Jury Subpoena*, 357 F.3d 900, 907 (9th Cir. 2004); *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *Senate of the Commonwealth of Puerto Rico ex rel. Judiciary Committee v. United States Dep't of Justice*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987).

These courts generally adopted the approach expressed in Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, 8 Federal Practice & Procedure § 2024, at 343 (1994 & Supp. 2009), which finds that that a document should be considered "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 the litigation") (emphasis added).

The 2009 supplement to Federal Practice & Procedure takes the position that "'[d]ual purpose' documents created because of the prospect of litigation are protected even though they were also prepared for a business purpose." *Id.*, Supp. 2009 at 198. Indeed, courts adopting the "because of" test recognize that when a lawyer's work is motivated by a need to inform a business decision or comply with government regulations and also because of the prospect of litigation, it is subject to work-product protection. *See, e.g., Adlman*, 134 F.3d at 1202 (finding work-product privilege protected memorandum prepared by an accountant and lawyer to evaluate the tax implications of a proposed merger); *In re Special September 1978 Grand Jury Subpoena*, 640 F.2d

49, 61-62 (7th Cir. 1980) (finding work-product privilege protected materials that were produced for the filing of Board of Elections reports required under state law); *In re Grand Jury Subpoena*, 357 F.3d at 908-09 (finding work-product privilege protected advice rendered to cooperate with U.S. Environmental Protection Agency).

The Fifth Circuit, however, takes a different approach. In a case with facts similar to that before this Court, the Fifth Circuit has inquired as to whether the "primary motivating force" underlying preparation of the document was to ready a party for litigation, a subjective, narrower test. *United States v. El Paso Co.*, 682 F.2d 530, 543 (5th Cir. 1982); *see also Kaiser Aluminum & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000) (continuing to apply the "primary motivating force" standard). Application of the work-product privilege to "dual-purpose" documents remains undecided in several other circuits.

The *Textron* decision adopts an even more stringent test than the minority approach, inquiring as to whether the attorney created the document for "use in" litigation. Pet. App., 11a.

While the *Textron* majority suggests that "Every lawyer who tries cases knows the touch and feel of materials prepared for a current or possible (i.e., 'in anticipation of') law suit," *id.* at 17a, the progress of the very case before the Court demonstrate the confusion in the law. Of course, the district court and First Circuit panel are composed of lawyers. Nevertheless, after a split First Circuit panel affirmed the district court's finding of work-product privilege, Pet. App., 89a, a bare majority in the *en banc* court's decision rejected it, *id.* at 21a. The dissenting judges

would have sustained the privilege. *See id.* at 21a-46a (Torruella, J., joined by Lipez, J., dissenting). Clearly "every lawyer" who tries cases could only speculate as to whether the privilege applies. In sum, application of the privilege might come out differently under tests used in other circuits and possibly in the First Circuit itself as lower court judges try to divine the applicable test from First Circuit law.

Thus, "a great divergence of views" has emerged in an area that is "so essential to an orderly working of our system of legal procedure." *Hickman*, 329 U.S. at 499, 512.

B. Inefficiency and "Sharp Practices"

The First Circuit's ruling has sent a confusing message to the legal community and created unsound public policy incentives that are not in the public interest. In that regard, as the Court considers whether to grant certiorari, law firms are already counseling their clients to engage in the very type of inefficiency and "sharp practices" that this Court predicted would occur in absence of protection of an attorney's mental impressions from unnecessary intrusion. *Id.* at 511.

For instance, following the *en banc* opinion, law firms alerted their clients that "litigation opponents may be able to discover a company's analysis of the hazards posed by the claim if the analysis is prepared in connection with auditor review or other business uses aside from trial team preparation."[3]

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[3] Mayer Brown, *US First Circuit Changes Course in Textron; Holds Tax Accrual Workpapers Are Not Protected After All*,

In-house corporate counsel are warned that "preparation of documents required for a business purpose may trump a claim of work product protection where the documents were also relevant to anticipated litigation."[4] Given the common practice of undertaking litigation assessments in internal documents, one firm cautioned that "prudent litigators should take care in these very uncertain times.'"[5]

For these reasons, law firms are urging their corporate clients to "proceed cautiously in revealing attorney work product in documents that serve a business or regulatory function. Taxpayers should limit such disclosures to the extent possible."[6] As this Court foresaw in *Hickman*, law firms have counseled their clients about the need to "implement[ ] . . . practices and procedures to minimize the risk of being forced to disclose legal opinions and other sensitive information that have historically fallen within the zone of privacy protected by the work product

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Tax Controversy Update, Aug. 19, 2009, *at* http://www.mayerbrown.com/publications/article.asp?id=7417&nid=6.

[4] Stuart F. Pierson, *Circuit Holds that Tax Accrual Work Papers Are Not Protected Work Product*, Aug. 28, 2009, *at* http://www.troutmansanders.com/taxaccrual/.

[5] Kaye Scholer LLP, *Blurred Vision: Courts, Corporations Don't See Eye to Eye on Attorney Work Product Protection*, Oct. 19, 2009, *at* http://www.kayescholer.com/news/client_alerts/20091019/_res/id=sa_File1/LCA10192009.pdf.

[6] Shearman & Sterling LLP, *Client Publication: First Circuit Denies Work Product Protection to Litigation Risk Assessments Provided to Financial Auditors*, Aug. 21, 2009, *at* http://tiny.cc/zPaM2.

privilege" when analyzing litigation risks.[7] Similarly, another firm suggested "contemplat[ing] potential approaches . . . to maximize the possibility that their tax accrual workpapers and other potentially privileged documents remain protected by the work product doctrine under the new test created by *Textron*."[8] "Sharp practices," necessitated to prevent providing an adversary with the gift of a roadmap to an attorney's litigation strategy, have arrived.

Given the current state of the law, one can only imagine the types of creative devices that lawyers might employ to increase the probability that a court will maintain protection of sensitive assessments of litigation that also relate to a business or regulatory purpose. For instance, out of an abundance of caution, attorneys may begin legal memoranda by stating, "This analysis is undertaken for use in anticipated litigation. . . ." and then repeatedly refer to "litigation" throughout in order to gain confidence that a court will view the document as prepared for use in litigation or primarily motivated by litigation. They may prominently label documents "for potential use at trial." Attorneys may also draft separate memoranda, rather than a single document—a detailed assessment of the anticipated litigation at issue and a separate document providing no more than

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[7] Michelle M. Henkel, *Textron: Its Impact On the Viability of the Work Product Privilege*, 50 Tax Management Memorandum 515 (BNA, Dec. 7, 2009), *at* http://tiny.cc/srj9q.

[8] Sullivan & Cromwell LLP, *Work Product Doctrine: Federal Appeals Court Holds Tax Accrual Workpapers Are Not Protected by Work Product Doctrine and May Be Subject to Discovery*, Aug. 14, 2009, *at* http://tiny.cc/vJNXm.

a bare conclusion to inform business decision or comply with a regulatory obligation.

The public policy purpose of *Hickman* and Rule 26(b)—to protect an attorney's mental impressions of anticipated litigation from disclosure to an adversary—should not create an incentive for such maneuvers. It is against the public interest. In granting certiorari, this Court has an opportunity to make clear that an attorney's assessment of anticipated litigation is subject to work-product protection and that the privilege applies regardless of a document's form, consideration of the litigation in the context of business or regulatory objectives, or potential use in litigation.

CONCLUSION

For the foregoing reasons, *amicus curiae* the Product Liability Advisory Council respectfully requests that this Court grant the Petition for Writ of Certiorari in this action.

Respectfully submitted,

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