How A 1947 Tugboat Ruling May Shape Work Product In AI Era

By **Larry Silver and Sasha Burton** (January 21, 2026)

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The tugboat sinking that gave rise to the U.S. Supreme Court's decision in Hickman v. Taylor has implications that stretch far beyond 1947, continuing to influence discovery law while raising new questions in the era of generative artificial intelligence.[1]

The Supreme Court's articulation of the work-product doctrine remains central to modern litigation, shaping practice in contexts ranging from internal investigations to complex e-discovery.

Rapid advances in generative AI now test principles first articulated in Hickman, as courts, ethics bodies and technology providers confront how attorneys' thought processes are created, preserved and potentially exposed when lawyers collaborate with algorithms rather than their own legal pads.

When the Use of AI May Constitute Work Product

New generative AI tools, including CoCounsel Legal, MARC, Lexis+ AI and Westlaw's AI-assisted research platforms, now participate directly in litigation preparation. These systems draft research memoranda, generate deposition outlines, summarize transcripts, organize discovery and assist in evaluating litigation risk through conversational prompts.

What was once prepared solely by an attorney can now emerge from an exchange between lawyer and machine, raising questions about whether such materials may be compelled in discovery and, if so, under what circumstances.

Recent opinions have not held that the use of legal AI tools waives privilege or work-product protection. Courts have, however, begun requiring parties to disclose whether generative AI was used in preparing filings — not to evaluate work product, but to ensure accuracy, attorney supervision and the absence of hallucinated citations.[2] These orders reflect courts' recognition that AI is now an active participant in drafting, rather than a clerical tool.

At the same time, litigation over AI training data has influenced how legal technology companies design their products. In February 2025, the U.S. District Court for the District of Delaware in Thomson Reuters Enterprise Centre GmbH v. ROSS Intelligence Inc. rejected ROSS' fair-use defense, reinforcing limits on the use of proprietary legal content to train AI models.[3]

In response to such decisions, legal AI providers increasingly promise not to train models on user inputs, to restrict human access to prompts and outputs, and to provide enterprise-grade security controls.[4]

These technical design choices affect privilege and protection analyses. If AI platforms retain logs, maintain detailed usage records or process data through third-party infrastructure, litigants may seek those materials in discovery. Opponents of such subpoenas are likely to argue that prompts, drafts and system outputs reveal counsel's

mental impressions and therefore constitute protected work product.[5]

Legal ethics authorities have reinforced that concern. The American Bar Association has warned that prompts submitted to generative AI tools may themselves contain opinion work product when they reflect theory testing, risk assessment or strategic judgment.[6]

The ABA further encourages attorneys to use secure, enterprise-grade systems rather than consumer-facing models to reduce the risk that protected materials will be retained, accessed or later discovered by adversaries.[7]

Generative AI exists within a gray zone between a research database, a litigation-support vendor and an associate capable of producing substantive legal analysis. Its ability to generate professional evaluations challenges traditional ideas of work product.

When a lawyer enters case facts and asks the AI to identify weaknesses in a theory, the prompt alone may disclose protected reasoning, and the output may reflect or refine strategic judgment. AI-assisted content is composed of attorneys' mental impressions, whether independently generated or a chimera that is nevertheless worthy of protection.

How courts address these issues will shape whether future litigants can compel disclosure of AI drafts, internal prompt logs or system-generated annotations.

Hickman: The Origins of the Work-Product Doctrine

Understanding how courts may resolve these issues requires returning to the origins of the work-product doctrine, which arose not from technology but from a maritime tragedy on the Delaware River.

In 1943, a tugboat accident near Philadelphia set the stage for one of the most influential discovery decisions in American law. On Feb. 7, 1943, the tugboat J. M. Taylor capsized while assisting in towing a car float belonging to the Baltimore & Ohio Railroad, resulting in the deaths of five crew members, including Norman E. Hickman, who was asleep in the forecastle.[8]

The Supreme Court described the cause of the sinking as "apparently unusual in nature."[9] Following the accident, a public hearing before U.S. Steamboat Inspectors was held on March 4, 1943, during which survivor testimony was recorded and made available.[10]

Shortly thereafter, attorneys for the tugboat owners obtained signed witness statements and prepared memoranda summarizing interviews conducted in anticipation of litigation.[11] Among those attorneys was Samuel B. Fortenbaugh Jr., a Philadelphia practitioner whose firm represented the tugboat owners and their insurers.

The estate of Hickman later filed suit under the Jones Act, which provided the basis for the wrongful death claim and enabled discovery into the causes of the sinking. The plaintiff's counsel then served interrogatories seeking copies or detailed summaries of all witness statements.[12]

Fortenbaugh refused to produce his interview notes and memoranda, asserting that they were prepared in anticipation of litigation and "would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts, of counsel."[13]

The U.S. District Court for the Eastern District of Pennsylvania, sitting en banc because of the importance of the question, ordered production of the materials and found Fortenbaugh in contempt, ordering him "imprisoned until [he] complied."[14]

The U.S. Court of Appeals for the Third Circuit reversed, and the Supreme Court affirmed that reversal, holding unanimously that the requested materials were protected absent a showing of necessity or undue hardship.[15]

Justice Frank Murphy emphasized that the adversarial system depends on allowing attorneys to prepare their cases "with a certain degree of privacy," shielding mental impressions, conclusions, opinions and legal theories from compelled disclosure.[16] The court distinguished this protection from attorney-client privilege, explaining that work product safeguards the lawyer's own thought processes rather than confidential communications with the client.[17]

The doctrine articulated in Hickman was later codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure and continues to guide courts evaluating materials prepared in anticipation of litigation. Appellate decisions have reaffirmed that protection extends to strategic analyses, even when they also inform business or compliance decisions.[18]

Applying Hickman's Work-Product Principles to Generative AI

The same principles apply to generative AI. The work-product doctrine exists to protect the lawyer's mental process, not necessarily a particular medium.[19]

Fortenbaugh's notes were protected because they reflected selection, emphasis and judgment applied to facts, not because the facts themselves were secret.[20] Prompts crafted to test liability theories, assess risk or organize evidence similarly reflect internal reasoning, and AI-generated outputs often refine that reasoning.

Compelling disclosure of such materials could risk allowing adversaries to appropriate strategic thinking without incurring the cost of developing it themselves — precisely the imbalance Hickman sought to prevent.[21] In Hickman, the Supreme Court warned that broad discovery into attorney's preparatory materials would allow opponents to ride "on wits borrowed from the adversary" discouraging careful preparation and distorting the adversarial process.[22]

The work-product doctrine is the result of a comprehensive concern for fairness in litigation, ensuring that each party develops its own legal theories and strategies, rather than reaching them through compelled disclosure. [23] That concern applies equally in the generative AI context, where compelled disclosure of prompts or AI-assisted drafts may expose the same attorney mental impressions and strategic judgments that Hickman deemed worthy of protection, despite the involvement of a technological intermediary.

At the same time, Hickman rejected absolute immunity, emphasizing that work-product protection must yield where necessity or undue hardship is shown.[24] That functional approach is well suited to generative AI. Courts will be required to distinguish between AI-assisted materials that merely summarize information, and those that reveal litigation strategy or legal theory.

As discovery disputes arise over AI prompt logs, draft outputs or system-generated annotations, Hickman directs attention away from the novelty of the technology and toward

a familiar inquiry: whether disclosure would expose the protected process of legal reasoning on which the adversarial system depends.

In other words, courts must look past the fact that AI is involved and ask whether disclosure would reveal the attorney's mental impressions or strategic reasoning.

By focusing on the content and purpose of AI outputs, rather than the technology itself, courts can extend established doctrines to modern tools without compromising the fairness of the litigation process. This approach ensures that AI-generated work is evaluated under the same protective principles as conventional work product, maintaining the integrity of the adversarial system.

Conclusion

From a tugboat accident on the Delaware River, a doctrine emerged that has shaped American discovery law for nearly 80 years. That same doctrine continues to guide discovery law, even as the tools of legal preparation evolve.

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[1] Hickman v. Taylor, 329 U.S. 495 (1947).

[2] See Tremblay v. OpenAI Inc., No. 23-cv-03223-AMO (E.D. Pa.) (standing orders dated 6/6/2023 and 3/3/2025).

[3] Thomson Reuters Enterprise Centre GmbH v. Ross Intelligence Inc.,765 F. Supp. 3d 382 (D.Del. 2025).

[4] See Oliver Roberts, Legal AI Unfiltered: Legal Tech Execs Speak on Privacy and Security, Nat'l L. Rev. (Mar. 31, 2025), http://bit.ly/4pd4AcV.

[5] See Kelly A. Lavelle, Discovery Risks of ChatGPT and Other AI Platforms, Legal Intelligencer, republished by Kang Haggerty (Aug. 25, 2025), https://bit.ly/4p3dzgx.

[6] See ABA Formal Op. 512 (2024); ABA Standing Comm. on Ethics & Prof'l Responsibility, Guidance on Lawyers' Use of Generative Artificial Intelligence (2024–2025).

[7] Id.

[8] Hickman v. Taylor, 329 U.S. at 498-99.

[9] Id. at 498.

[10] Id. At 498.

[11] Hickman v. Taylor, 329 U.S. at 498–99.

[12] Id. at 499.

[13] Id. at 499.

[14] He was sentenced to Moyamensing Prison indefinitely, though he never served any time. See Samuel Byrod Fortenbaugh Jr. (1902–1985), Find a Grave Memorial No. 130833203 (June 3, 2014), https://www.findagrave.com/memorial/130833203/samuel_byrod-fortenbaugh.

[15] Hickman, 329 U.S. at 509-12.

[16] Id. at 510-11.

[17] Id. at 508-09.

[18] See, e.g., United States v. Deloitte LLP, 610 F.3d 129, 136–37 (D.C. Cir. 2010); In re: Kellogg Brown & Root Inc., 756 F.3d 754, 760–61 (D.C. Cir. 2014).

[19] Hickman, 329 U.S. at 510-11.

[20] Id. at 511.

[21] Id. at 512.

[22] Id. at 495, 516.

[23] Id. at 510-12; Fed. R. Civ. P. 26(b)(3)

[24] Id. at 511; Fed. R. Civ. P. 26(b)(3).