

Expanding the Federal Work Product Doctrine to Unrepresented Litigants

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ABSTRACT

Clerks' offices in federal courthouses across the country designate individuals who do not have counsel as "pro se," a term that comes from the Latin in propria persona meaning "for oneself." The term is ambiguous as to the reasons why individuals appear without counsel. While some may purposefully choose not to hire a lawyer, for many it is not a choice.

Access to justice in federal courts requires not just entry into the courts for all litigants, but also fair treatment during the course of litigation. Unfortunately, all unrepresented individuals face disadvantages in federal courts. They are, for the most part, expected to abide by the same rules of civil procedure and substantive law as lawyers, without receiving all the benefits therein.

One example of this unequal treatment is Federal Rule of Civil Procedure 26(b)(3), which provides for qualified immunity from production of documents and tangible things that are prepared in anticipation of litigation or trial by or for another party or its representative unless the seeking party can show substantial need. However, even if the court orders discovery of such material, it must protect against disclosure the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. Thus, an unrepresented litigant, unlike those with counsel, can be ordered to produce materials that contain their mental impressions, case strategy and the like.

This article begins with an overview of the experience of unrepresented litigants in the American legal system. It explores the origins of the right to not have counsel, the reasons why litigants might proceed without counsel in civil cases, and the impact this has on these litigants' access to justice (or lack thereof) in the federal civil legal system. In addition, it examines the number and type of cases involving individuals who appear without counsel in federal civil proceedings. The next section explains the genesis of the work product rule and the

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purposes it serves, its inclusion in Rule 26 of the Federal Rules of Civil Procedure, and how unrepresented litigants cannot benefit from its coverage in the same ways as those who have lawyers. We survey federal decisions in which courts have considered the application of Rule 26(b)(3) to unrepresented litigants, and compare the approaches taken by state courts. The article concludes with a recommendation that Rule 26 be amended to expand work product protections to unrepresented litigants to equalize their experience in federal courts and improve access to justice.

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I. INTRODUCTION

We begin with a story about Alonzo Smith.¹ Alonzo is an individual with diabetes who has filed a lawsuit in federal court under Title III of the Americans with Disabilities Act (“ADA”)² against a local restaurant, based on its refusal to permit him to bring his trained service dog into the facility when he went there to eat a meal. Alonzo is seeking injunctive relief in the form of an order that he be permitted to enter the premises with his service dog. He is unable to find a lawyer who will represent him, given that there would be no financial award and any attorneys’ fees would likely be minimal.³ He cannot afford to pay for a lawyer, given that he has only a modest salary, but his income is enough that he does not qualify for free legal services. Therefore, he is representing himself in the action.

Alonzo survived a motion to dismiss filed by the lawyer representing the restaurant and the litigation has now entered the discovery phase. Fortunately, on the day that the restaurant denied Alonzo entry with his service dog, he was able to get the names and contact information from a few sympathetic customers who saw what happened. After he filed the lawsuit, he was able to interview them, and he took copious notes about what they said and recorded his own thoughts about their suitability as witnesses should the case go to trial. Alonzo dutifully provided their names and contact information to the restaurant’s attorney in connection with his initial disclosures.⁴ In a subsequent request for production of written material served on Alonzo, the restaurant’s attorney requested all documents in Alonzo’s possession relating to the litigation. Alonzo reviewed his notes and because of what he wrote about his impressions of the witnesses and other details, he does not want to produce those materials to the defendant. Therefore, he objected to the discovery request to the extent that it would cover these notes and refused to produce them. The restaurant’s lawyer proceeded to file a motion to compel production.⁵

Unfortunately for Alonzo, the current state of the law in federal court does not clearly protect from discovery his mental impressions set forth in those notes because they were not written by an attorney and are therefore not subject to the

1. Alonzo Smith is a fictional name used as an amalgam of clients who have faced similar issues, based on our experience working with unrepresented litigants in federal court in the U.S. District Court for the Eastern District of New York through the Hofstra Law Pro Se Legal Assistance Program. For more information about the program, visit: <https://proseprogram.law.hofstra.edu/about/>.

2. 42 U.S.C. § 12182.

3. *See* 42 U.S.C. § 12188(a) (permitting a private right of action under Title III of the ADA for injunctive relief and attorney’s fees only, the same as those available under Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6).

4. *See* FED. R. CIV. P. 26(a)(1)(A)(i) (provides that unless otherwise exempted from doing so pursuant to Fed. R. 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, “without awaiting a discovery request, provide to the other parties the name and, if known, contact information of each individual with discoverable information—along with the subjects of that information—that the disclosing party may use to supports its claims or defenses . . .”).

5. *See* FED. R. CIV. P. 37(a)(1).

work product protections codified in Rule 26(b)(3)(B).⁶ Alonzo, like all other individuals who participate in federal litigation in our country without the benefit of legal representation, is unable to take advantage of protecting this type of information from discovery because the explicit language of Rule 26 only immunizes the disclosure of “mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.”⁷

Clerks’ offices in federal courthouses across the country designate individuals like Alonzo who represent themselves as “pro se,” a term that comes from the Latin *in propria persona*, meaning “[f]or oneself.”⁸ This term is ambiguous as to the reasons why individuals may appear without counsel. Moreover, “pro se status is socially constructed,” in that court staff and attorneys apply this label to unrepresented people based on their “attributions, expectations, stereotypes, biases, thoughts, feelings, and related behaviors” towards these unrepresented individuals.⁹ For many years, legal scholars and practitioners have called for moving away from Latin terminology and greater use of plain language in court proceedings in order to make the process more accessible to lay people.¹⁰ In response, some federal courts have begun to use the term “self-represented” litigants in lieu of or interchangeably with the Latin phrasing.¹¹

For purposes of this article, we will refer to such individuals as “unrepresented,” rather than “self-represented” litigants. The latter “implies choice and volition, and metaphorically connotes self-empowerment.”¹² While some parties may purposefully choose not to hire a lawyer,¹³ for many it is not a choice but instead a “product of their economic situation and the cost of counsel.”¹⁴ There may be multiple factors that influence whether an individual has counsel.

6. See FED. R. CIV. P. 26(b)(3)(B).

7. *Id.* (emphasis added).

8. See *pro se*, BLACK’S LAW DICTIONARY 1341 (11th ed. 2019) (the term “*pro se*” is a Latin phrase meaning “[f]or oneself; on one’s own behalf; without a lawyer”).

9. See Victor D. Quintanilla, *Doing Unrepresented Status: The Social Construction and Production of Pro Se Persons*, 69 DEPAUL L. REV. 543, 544–45 (2020).

10. See, e.g., Sean McLernon, *Why Courts Need to Embrace Plain Language*, 24 GEO. J. ON POVERTY L. & POL’Y 381, 381 (2017) (noting that “[a]rcane language and legalese serve as significant obstacles to many of the people who have to use court forms—especially lower income individuals and others who are unable to afford representation. Using easy-to-understand language instead of excessively complex jargon will both save courts money and better serve the public.”).

11. See, e.g., *Self Representation, Pro Se Litigants*, U.S. DIST. CT. FOR E. DIST. N.Y., <https://www.nyed.uscourts.gov/self-representation> (last visited Sept. 29, 2022) (providing information for “self-represented” litigants).

12. See Quintanilla, *supra* note 9, at 560.

13. See Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1573–75 (surveying the reasons why pro se litigants represent themselves); Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473 (2010) (noting that some pro se litigants choose to represent themselves to preserve “voice.”).

14. Richard Zorza, *The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications*, 17 GEO. J. LEGAL ETHICS 423, 425 (2004).

Unrepresented litigants may contend with preconceived or incorrect notions about their claims that represented litigants do not. For example, judges, court staff, and lawyers may presume that unrepresented litigants' claims lack merit when statutory attorneys' fees are available for their claims, i.e., if the claims had merit, the litigant would be able to hire a private lawyer to take the case.¹⁵ Alternatively, they may think unrepresented litigants "choose" not to hire lawyers to gain an unfair advantage.¹⁶ As a result, unrepresented litigants may not be treated equally, which can result in further disadvantages.¹⁷

Unrepresented individuals like Alonzo, regardless of the reasons why they don't have legal representation, also must navigate the federal legal system without the guidance or expertise of lawyers. It is true that unrepresented litigants are afforded a measure of leniency in their filings and conduct.¹⁸ Courts give this "special solicitude"¹⁹ to them because "[i]mplicit in the right of self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training."²⁰

And yet, unrepresented litigants are still expected to adhere to the same rules of civil procedure and substantive law that must be followed by lawyers.²¹ Represented litigants, on the other hand, naturally gain advantages from their attorneys' substantive expertise and their legal research tools that are difficult and costly to access by lay people. Moreover, lawyers and their clients benefit in certain ways from the professional relationship that exists between them, and some procedural rules are purposefully designed with that relationship in mind. For the most part, unrepresented litigants must proceed in federal litigation without some of these benefits, including the protections of the work product rule.

Given that unrepresented litigants do not have lawyers and instead must act as their own counsel and take on at least some of the responsibilities that lawyers would have in relationship to their clients, fundamental fairness demands that unrepresented litigants be extended the same protections afforded to attorneys. But the federal rules of discovery include important protections for represented parties that are not afforded to unrepresented parties. Thus, an unrepresented litigant like Alonzo can be ordered to produce materials that contain their mental impressions, case strategy and the like. This asymmetrical

15. See Quintanilla, *supra* note 9, at 548, 580.

16. See generally Russell Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 1988 (1999).

17. See Quintanilla, *supra* note 9, at 549–50, 580.

18. See, e.g., *Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (demonstrating how unrepresented litigants are generally not exempt from pleading standards, but many courts are "obligated to construe a *pro se* complaint liberally").

19. *Ruotolo v. I.R.S.*, 28 F.3d 6, 8 (2d Cir. 1994).

20. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006) (quoting *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983)).

21. *Id.* at 477 ("*pro se* status 'does not exempt a party from compliance with relevant rules of procedural and substantive law'") (quoting *Traguth*, 710 F.2d at 95).

privilege impedes unrepresented litigants' access to justice in our federal system, for access includes not just *entry* into the courts, but also fair treatment and due process during litigation.²² It is also inconsistent with the law in some state courts.²³

Part II provides an overview of the experience of unrepresented litigants in the American legal system, beginning with a discussion about the right to *not* have counsel and exploring the various reasons why litigants do not retain counsel in civil cases generally. This section also analyzes the impact this lack of representation has on their access to justice (or lack thereof) in the federal civil legal system.²⁴ It also examines the number and the types of cases in which individuals appear without counsel in federal civil proceedings.²⁵ Part III explores the genesis of the work product rule and the purposes it serves, its inclusion in Rule 26 of the Federal Rules of Civil Procedure, and how unrepresented litigants cannot benefit from its coverage in the same ways as those who have lawyers.²⁶ It also compares how lower federal courts have applied the rule with alternative approaches taken in state courts.²⁷ Part IV recommends that Rule 26 be amended to expand work product protections to unrepresented litigants in an effort to equalize their experience in federal courts and improve access to justice, and explains how this will further the rights of unrepresented litigants.²⁸

II. UNREPRESENTED LITIGANTS IN FEDERAL COURTS

As was noted by the late Judge Harold Greene of the United States District Court for the District of Columbia, “[o]ne of the basic principles, one of the glories, of the American system of justice is that the courthouse door is open to everyone.”²⁹ The right of individuals to represent themselves in civil cases in federal courts was recognized by the United States Congress (“Congress”) in the Judiciary Act of 1789:

[a]nd be it further enacted, [t]hat in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.³⁰

22. See Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 476 (2002).

23. See *infra* Part III.D.

24. See *infra* Part II. A.

25. See *infra* Part II. B.

26. See *infra* Part III. A–B.

27. See *infra* Part III. C–D.

28. See *infra* Part IV.

29. NAACP v. Meese, 615 F. Supp. 200, 205–06 (D.D.C. 1985).

30. Judiciary Act of 1789, 1 Stat. 73, 92 (1789).

This right is now codified in 28 U.S.C. § 1654.³¹

The United States Supreme Court (“Court”) has held that the Sixth Amendment³² of the United States Constitution guarantees the right to counsel in criminal proceedings,³³ and has further found that this includes the right to waive that right and represent oneself.³⁴ The Court has never held that there is such a constitutional right to represent oneself in federal civil proceedings; however, it has been argued that preventing a civil litigant from representing himself would violate the constitutional right of access to the courts if that individual could not afford an attorney.³⁵ Many states also include statutory and/or constitutional rights to represent oneself.³⁶

A. *Why Litigants Proceed Without Representation*

Given the right not to have counsel, some litigants choose to proceed without a lawyer. The reasons for exercising this right may stem from the belief, right or wrong, that the legal issues of the case are simple and do not require the services of a lawyer.³⁷ This may happen even if the individual has the funds to hire a lawyer.³⁸ Alternatively, some litigants may feel that self-representation provides them with a better opportunity to be heard and to control decision-making.³⁹ When individuals do have lawyers, the represented litigants lose the opportunity to directly address the court, which may impact their feeling of being heard.⁴⁰ Still others may mistrust lawyers or believe that they will have a strategic advantage if they represent themselves.⁴¹ Indeed, surveys and our own anecdotal experience suggest that some savvy and experienced unrepresented litigants may in fact be better able to represent their interests than if they hired a lawyer.⁴²

However, many who proceed without legal representation in a civil case in federal court may view it as more of a burden than a right. Often it is not a choice

31. 28 U.S.C. § 1654 (“In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.”).

32. U.S. CONST. amend. VI.

33. See *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

34. See *Faretta v. California*, 422 U.S. 806, 819–21 (1975).

35. See, e.g., Matthew Longobardi, *Unlawful Practice of Law and Meaningful Access to the Courts: Is Law Too Important to Be Left to Lawyers?*, 35 CARDOZO L. REV. 2043, 2053 n.73 (2014).

36. See Helen B. Kim, *Legal Education for the Pro Se Litigant: A Step Towards A Meaningful Right to be Heard*, 96 YALE L.J. 1641 n.2 (June 1987) (referencing various state constitutional and statutory provisions).

37. See Drew A. Swank, *The Pro Se Phenomenon*, 19 B.Y.U. J. PUB. L. 373, 378 (2005) (citing study finding that 45% of surveyed unrepresented litigants chose to represent themselves because their case was simple) (citations omitted).

38. *Id.* at 378 (citing study finding that almost fifty percent of surveyed unrepresented litigants who chose to represent themselves had the funds to hire a lawyer but chose not to) (citations omitted).

39. See Zimmerman & Tyler, *supra* note 13, at 473 (noting that some pro se litigants choose to represent themselves to preserve “voice”).

40. *Id.* at 480.

41. See Swank, *supra* note 37, at 379 (citing surveys of pro se litigants) (citations omitted).

42. *Id.*

but instead their inability to afford to pay for a lawyer's fees.⁴³ In addition, if the remedy sought is equitable in nature or the damages sought are not significant enough to make it worthwhile for an attorney to accept the case, the legal market may provide a challenge for a party like Alonzo to secure legal representation unless he can afford to pay out of pocket.⁴⁴ Studies have shown that as the cost of legal services continues to increase, so too does the number of people who cannot afford to hire lawyers, which also has a disparate impact on racial and ethnic minorities who make up a higher percentage of those who are unrepresented.⁴⁵

Unfortunately, the Court has never extended the constitutional right to appointment of counsel in civil cases for indigent individuals, even where their fundamental rights are at stake. Unlike for criminal proceedings, the Court has repeatedly declined to extend that right to civil proceedings⁴⁶ because the interest in life or liberty is not as great.⁴⁷ Although there are examples of federal legislation that provide for the right to counsel in some civil proceedings⁴⁸ or at least the right to request appointment of counsel,⁴⁹ many individuals who cannot afford to hire a lawyer nevertheless proceed without one, thereby increasing the number of unrepresented litigants in federal court.

B. The Number of Unrepresented Litigants Involved in Federal Civil Proceedings Remains High

At the federal level, based on data made available from the U.S. Judiciary Data and Analysis Office ("JDAO"), the number of federal civil cases involving unrepresented litigants remained relatively stable from 2000 to 2019, with only

43. Zorza, *supra* note 14, at 425.

44. See Swank, *supra* note 37, at 380.

45. See Zimmerman & Tyler, *supra* note 13, at 478 (citations omitted). See also Amy Myrick et al., *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705, 713–20 (citing statistics showing that African-American, Asian, and Hispanic men are more likely to lack a lawyer in their employment cases in federal courts); *Report of the Special Committee on Race and Ethnicity to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias*, 64 GEO. WASH. L. REV. 189, 263 (1996) (noting that "problems facing pro se litigants fall disproportionately on the minority community" in the D.C. Circuit).

46. See, e.g., *Lassiter v. Dep't of Soc. Serv. of Durham Cnty.*, 452 U.S. 18, 33 (1981) (finding that the U.S. Constitution does not require appointment of counsel for indigent parties in parental termination proceedings); *Turner v. Rogers*, 564 U.S. 431, 435 (2011) (finding that the U.S. Constitution does not require appointment of counsel for indigent parties who potentially face incarceration for civil contempt for unpaid child support).

47. See, e.g., *Ake v. Oklahoma*, 470 U.S. 68, 78 (1985) ("The private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."); *Lassiter*, 452 U.S. at 26–27. (recognizing a rebuttable presumption in civil cases that no due process right to counsel exists absent a potential deprivation of personal freedom).

48. See, e.g., 18 U.S.C. § 983(b)(2)(A) (codifying the Civil Asset Forfeiture Reform Act of 2000, which amended civil forfeiture laws by, among other things, creating defenses for homeowners in such proceedings and requiring that appointed counsel be made available for those who are indigent, or made indigent by seizure of their assets, when their primary residences are involved).

49. See, e.g., 28 U.S.C. § 1915(e)(1) (for those proceeding *in forma pauperis*, "the court may request an attorney to represent any person unable to afford counsel"). However, appointment of counsel in civil proceedings occurs only in exceptional circumstances, and at the court's discretion. See Julie M. Bradlow, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659, 662–63 (1988) (discussing standards for considering when to appoint counsel).

two exceptional years.⁵⁰ In 2019, for example, there were 76,100 civil case filings that included an unrepresented plaintiff or defendant.⁵¹ Notably, the percentage of civil cases filed that involved unrepresented litigants in comparison to the total number of civil cases filed dropped from twenty-nine percent in 2000 to twenty-one percent in 2019, for an average of twenty-seven percent during that time period.⁵² During those twenty years, a total of almost 2.5 million federal civil cases involving unrepresented litigants were filed.⁵³

However, the past two years saw a dramatic increase in overall civil case filings, as well as civil cases filed by unrepresented litigants. In 2021, there were 344,567 total civil cases filed in federal district courts, 145,970 of which involved unrepresented litigants, roughly forty-two percent.⁵⁴ In 2020, there were 470,581 civil case filings, 267,373 of which were filed by unrepresented litigants, roughly fifty-seven percent.⁵⁵ Thus, in only two years, close to half a million cases were filed involving unrepresented litigants, although these increases were primarily based on a large number of filings in the Northern District of Florida.⁵⁶ The increases may be a result of a series of events in our country over the past few years, including the COVID-19 pandemic, greater public awareness and activism around police shootings, and various economic stressors.

Until 2020, unrepresented incarcerated individuals' petitions made up the overwhelming number of civil cases filed in federal courts, roughly twice as many as all other cases involving unrepresented litigants.⁵⁷ Those numbers also changed in 2020⁵⁸ and 2021⁵⁹: incarcerated individuals' petitions were approximately one-third of the overall civil filings involving unrepresented litigants.

From 2000 to 2019, civil rights cases made up the majority of the remainder of unrepresented litigants' cases on the federal docket, with over 200,000 filings.⁶⁰ The next highest number of cases fell into a catchall "other statutes" category, with roughly 66,000 filings. The remaining largest categories included: (1) contracts actions, approximately 50,000 filings, (2) personal injury, almost 44,000 filings, and (3) real property, slightly over 41,000.⁶¹ Plaintiffs are far more

50. *Just the Facts: Trends in Self-Represented Civil Litigation from 2000 to 2019*, U.S. COURTS, fig. 1 (Feb. 11, 2021), <https://www.uscourts.gov/news/2021/02/11/just-facts-trends-pro-se-civil-litigation-2000-2019> [hereinafter *Just the Facts*].

51. Statistical Tables for the Federal Judiciary, tbl.C-13 (2019), ADMIN. OFFICE U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2019.pdf.

52. *Just the Facts*, *supra* note 50, at fig. 1

53. *Id.* at fig. 1 (total from all years included).

54. Statistical Tables for the Federal Judiciary, Table C-13 (2021), ADMIN. OFFICE U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2021.pdf.

55. Statistical Tables for the Federal Judiciary, Table C-13 (2020), ADMIN. OFFICE U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2020.pdf.

56. *Id.*

57. *Just the Facts*, *supra* note 50, at fig. 4.

58. Statistical Tables for the Federal Judiciary, tbl.C-13 (2020), ADMIN. OFFICE U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2020.pdf.

59. Statistical Tables for the Federal Judiciary, tbl.C-13 (2021), ADMIN. OFFICE U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2021.pdf.

60. *Just the Facts*, *supra* note 50, at fig. 6.

61. *Id.*

likely to be unrepresented than defendants, and a very small number of cases involve unrepresented litigants on both sides.⁶²

The large number of individuals who lack representation in federal courts is consistent with the number of unrepresented litigants in state courts across the country, especially in family, housing, and small claims courts. In particular, many poor, working poor, and even middle-income individuals are unable to afford to pay for legal representation, and they are either not eligible for or unable to obtain free legal assistance.⁶³

III. THE ORIGINS OF THE WORK PRODUCT DOCTRINE AND ITS ADOPTION IN THE FEDERAL RULES OF CIVIL PROCEDURE

The work-product doctrine owes its genesis to the legal field's profound uneasiness about "the extent to which a party may compel disclosure of materials collected by an adverse party's counsel in the course of preparation for possible litigation."⁶⁴ This uneasiness was first substantively addressed in *Hickman v. Taylor*, the landmark Supreme Court case that established the foundation of the work-product doctrine.⁶⁵ However, even before this decision, lower federal courts had struggled with the issue and state common law and English law had for some time recognized the doctrine.⁶⁶

A. Hickman v. Taylor and the Supreme Court's Recognition of the Work Product Doctrine

In 1943, a tugboat sank on the Delaware River and several crew members died.⁶⁷ Three days after the accident, Samuel Fortenbaugh was hired as the attorney for the tug boat company.⁶⁸ A little over a month after the accident, Fortenbaugh interviewed the survivors and took written, signed statements from them.⁶⁹ In some cases, he also wrote notes about what they told him.⁷⁰ Several months later, George Hickman brought a wrongful death action in federal court on behalf of the estate of Norman Hickman, one of the crew members who died in the accident, against Taylor and Anderson Towing and Lighterage Company, as well as individual defendants.⁷¹

62. *Id.*

63. See, e.g., Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Persons*, 85 CAL. L. REV. 79, 80 (1997) (noting studies that have found that many poor litigants appear without counsel); Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1785 (2001) (noting studies about the unmet civil legal needs of the poor and middle-income individuals).

64. Jeffrey F. Ghent, Annotation, *Development, Since Hickman v. Taylor, of Attorney's "Work Product" Doctrine*, 35 A.L.R.3d § 2[a] (1971).

65. *Hickman v. Taylor*, 329 U.S. 495, 511–513 (1947).

66. See *In re Grand Jury Subpoena*, 220 F.R.D. 130, 141 (D. Mass. 2004).

67. *Hickman*, 329 U.S. at 498.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

During the discovery phase of the case, the plaintiff originally served interrogatories on the tugboat owners, asking whether there were any statements taken of the crew members and, if so, requesting copies of any written statements, and, if taken orally, to set forth in detail what statements were made in connection with the incident.⁷² Supplemental interrogatories were later served requesting *any* oral or written statements, records, reports or other memoranda had been made concerning any matter relative to the incident, and requesting to set forth the nature of all such records.⁷³ Fortenbaugh responded by admitting that statements had been made, but declined to summarize them or provide the contents, arguing that the requests sought “privileged matter obtained in preparation for litigation” and was “an attempt to obtain indirectly counsel’s private files,” in that it would involve turning over “not only complete files, but also the telephone records and, almost, the thoughts of counsel.”⁷⁴

After ordering discovery and a hearing on the discovery dispute, the district court judge concluded that the requested information was not privileged and ordered Fortenbaugh to answer the interrogatories, produce the written statements, state any facts learned through oral statements made by the witnesses, and either produce his notes or submit them to the court for a decision about what should be revealed.⁷⁵ When he refused, Fortenbaugh was held in contempt and jailed until he complied.⁷⁶ The contempt charge was appealed to the Third Circuit Court of Appeals, which reversed, and based on a split among the circuits at the time, the Supreme Court granted certiorari.⁷⁷

In support of his argument before the Court, the plaintiff contended that to prohibit discovery of the statements would give unfair advantages to corporate defendants, who could “pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents,” but individual plaintiffs who often have direct knowledge of the matter but don’t have counsel until some time after the claim arises could be compelled to disclose all the intimate details of the case.⁷⁸ The Court, however, found this argument unconvincing, noting that the “broad and liberal” discovery rules can work to the advantages or disadvantages of either party.⁷⁹

After recognizing that attorney-client privilege would not protect the information sought by the plaintiff, the Court concluded that no discovery rules contemplated production of the information sought.⁸⁰ Specifically, the Court noted

72. *Id.* at 498–99.

73. *Id.* at 499.

74. *Id.*

75. *Id.* at 499–500.

76. *Id.* at 500.

77. *Id.*

78. *Id.* at 506.

79. *Id.* at 507.

80. *Id.* at 508–09.

that the plaintiff had made no “showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner’s case or cause him any hardship or injustice.”⁸¹ Indeed, the plaintiff (or more accurately, his lawyer) was capable of gathering much of what he requested by examining the public testimony of witnesses or communicating directly with the witnesses themselves.⁸² Without establishing necessity or justification, the Court concluded that even under the liberal rules of discovery, the written statements, private memoranda and mental impressions prepared or formed by lawyers “falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims.”⁸³

The Court justified this limitation on the discovery rules by examining the historical roles of lawyers, not only as officers of the court but in protecting their clients.⁸⁴ The Court reasoned:

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.⁸⁵

The Court expressed concern that if “work product” of a lawyer were “open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten” and “[a]n attorney’s thoughts, heretofore inviolate, would not be his own.”⁸⁶ As a result, the Court suggested, lawyers’ legal advice and case preparation would be negatively impacted by “[i]nefficiency, unfairness and sharp practices,” with a “demoralizing” effect on the profession.⁸⁷ Moreover, “the interests of clients and the cause of justice would be poorly served.”⁸⁸ If an attorney was forced to produce to an adversary all that witnesses had told him, there is the added danger of inaccuracy and untrustworthiness, as the attorney would have to “testify as to what he remembers or what he saw fit to write down regarding witness’ remarks.”⁸⁹

The Court did recognize that the work product doctrine is not absolute in protecting the underlying written witness statements, rather than an attorney’s mental

81. *Id.* at 509.

82. *Id.*

83. *Id.* at 510.

84. *Id.*

85. *Id.* at 510–11.

86. *Id.* at 511.

87. *Id.*

88. *Id.*

89. *Id.* at 512–13.

impressions drawn from oral or written statements made by witnesses.⁹⁰ “Where relevant and non-privileged facts remain hidden in an attorney’s files and where production of those facts is essential to the preparation of one’s case, discovery may properly be had” because it might be admissible, provide clues as to the existence or location of relevant facts, and/or be useful for purposes of impeachment or corroboration.⁹¹ Alternatively, the Court suggested that production might be justified when witnesses are unavailable or can only be reached with difficulty.⁹² However, the Court made clear that the burden rests on the seeking party to show justification, and concluded that the plaintiff had not done so.⁹³

B. The Adoption of Federal Rule of Civil Procedure 26(b)(3) and Its Protection of Work Product Material

After the *Hickman* decision, many states that had adopted the Federal Rules of Civil Procedure amended their rules in light of the decision.⁹⁴ However, despite attempts through the years by the Advisory Committee on Rules of Civil Procedure (“Advisory Committee”) to codify the rule articulated in that decision, the federal courts were left to address work product issues on a case-by-case basis with no further direction from the Supreme Court.⁹⁵ For example, courts disagreed about whether *Hickman* should be extended to include a *party’s* work product, as well.⁹⁶ It was not until 1970 that the Advisory Committee finally amended Rule 26 to include work product protections mostly in line with the *Hickman* decision, but with more expansive protections.⁹⁷

The 1970 amendments to Rule 26(b)(3) defined the scope of work product material to be protected, established the showing required to obtain discovery of such material, and extended absolute immunity from production of an attorney’s mental impressions.⁹⁸ The current version of Rule 26(b)(3), which has not been significantly altered since then, provides that “[o]rordinarily, 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).”⁹⁹ However, such

90. *Id.* at 511.

91. *Id.*

92. *Id.*

93. *Id.* at 512–13.

94. CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 8 FED. PRAC. & PROC. § 2022CIV. § 2023 (3d ed. 2022).

95. For example, in 1955, the Advisory Committee recommended an amendment to Rule 34 that would have provided that a court could order production of documents protected by *Hickman* only “[u]pon motion of any party showing good cause therefor,” whereas all other documents not requiring a showing of “necessity or justification” would be discoverable without a court order. ADVISORY COMM. ON RULES FOR CIV. PROC., REP. OF PROPOSED AMENDS. TO THE RULES OF CIV. PROC. FOR THE U.S. DIST. CTS. 39 (Oct. 1955).

96. *Sea-Roy Corp. v. Sunbelt Equip. & Rentals, Inc.*, 172 F.R.D. 179, 183 (M.D.N.C. 1997).

97. FED. R. CIV. P. 26 advisory committee’s note to Subdivision (b)(3).

98. WRIGHT & MILLER, *supra* note 94.

99. FED. R. CIV. P. 26(b)(3)(A).

materials may be discoverable if they are otherwise within the scope of discoverable materials as defined in Rule 26(b)(1) and the seeking party can show “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.”¹⁰⁰ Even “[i]f 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.”¹⁰¹ Consistent with *Hickman*, the Rule does not protect underlying facts learned, or the names of persons from whom such facts were learned.¹⁰²

Prior to the 1970 amendments, some federal courts had not recognized protection for a work product material prepared by a party other than that party’s lawyer or other representative.¹⁰³ This was consistent with *Hickman*, which had limited application of the doctrine to attorneys’ work product.¹⁰⁴ But the plain language of the Rule’s text now broadly refers to “documents and tangible things that are prepared in anticipation of litigation or for trial by . . . another party.”¹⁰⁵ The text would seem to include material created by a party before retaining a lawyer¹⁰⁶ as well as a party who never actually hires an attorney. Thus, the Rule extends qualified immunity from disclosure of work product material prepared by an unrepresented party, as long as it otherwise satisfies the requirements of Rule 26(b)(3)(A).

However, pursuant to Rule 26(b)(3)(B), absolute immunity from production is not explicitly given to a party’s “mental impressions, conclusions, opinions, or legal theories,” but only those of “a party’s attorney or other representative.”¹⁰⁷ Therefore, an unrepresented litigant may still be ordered to disclose, for example, written notes about the credibility of a potential witness interviewed by the

100. *Id.*

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

102. WRIGHT & MILLER, *supra* note 94, at § 2023.

103. *See, e.g.*, Groover, Christie & Merritt v. LoBianco, 336 F.2d 969, 973 (D.C. Cir. 1964) (no work product protection for memorandum created by a doctor following the death of a patient summarizing results of his interviews of various witnesses); Blanchet v. Colonial Tr. Co., 23 F.R.D. 118, 120 (D. Del. 1958) (no work product protection for plaintiff’s recordings of conversations with defendants, and later transcriptions); Sturm v. Great Atl. & Pac. Tea Co., 16 F.R.D. 476, 477 (D. Conn. 1954) (no work product protection for statements given to party).

104. *See In re Grand Jury Subpoena*, 220 F.R.D. 130, 141 (D. Mass. 2004).

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

106. *See In re Tier 2 Jeg Telecomm. Cases*, 2012 WL 13033192 at *3 (N.D. Iowa Sept. 26, 2012) (noting that “[t]here is simply no textual support in Rule 26(b)(3) for the idea that the existence of an attorney-client relationship is a condition precedent to application of the work product rule”); *Otto v. Box U.S.A. Grp., Inc.*, 177 F.R.D. 698, 699 (N.D. Ga. 1997) (noting that a plaintiff who creates work-product material before hiring an attorney is still permitted to take advantage of the work-product doctrine); *Haigh v. Matsushita Elec. Corp. of Am.*, 676 F. Supp. 1332, 1357 (E.D. Va. 1987) (finding that secret tape recordings of conversations with others made by plaintiff before retaining counsel, which were then turned over to counsel and used to prepare court filings and discovery requests, constituted work product pursuant to Rule 26(b)(3)(A), but ordered disclosure because of substantial need).

107. Fed. R. Civ. P. 26(b)(3)(B). *See*; *see also* *Ross v. Sejin Am., Inc.*, 2021 WL 6973877, at *2 (M.D. Ala. April 9, 2021) (noting that Rule 26’s protections against disclosure of “mental impressions” does not state that it offers protection to pro se parties).

litigant, or be forced to testify about his or her own opinions, theories, or strategy with respect to the case.

Federal courts occasionally grapple with deciding what types of material constitute “mental impressions, conclusions, opinions, or legal theories.”¹⁰⁸ At issue in *Hickman* was protection of the thought processes of lawyers.¹⁰⁹ For example, it may be in the form of notes made to facilitate the provision of legal advice to a client.¹¹⁰ Or, it might include information about questions posed by a lawyer to a third party, or even discussions with a third party, in the lawyer’s efforts to evaluate a case.¹¹¹ It is clear that unrepresented litigants could and do create this type of material as they prepare their cases. But as will be discussed in the next section, federal courts have drawn different conclusions from even the plain language of the text and how to apply it to unrepresented litigants.

C. *The Federal Courts’ Treatment of Unrepresented Litigants’ Work Product*

No federal appellate court has ruled on the question of whether Rule 26(b)(3) (B)’s language can be read broadly to protect the mental impressions of an unrepresented litigant. However, there is a split among the lower federal courts on this issue.

Federal courts have generally recognized, pursuant to the language of Rule 26(b)(3)(A), protection of materials “prepared in anticipation of litigation or for trial” by an unrepresented litigant.¹¹² For example, in *Nielsen v. Society of New York Hospital*, an unrepresented plaintiff brought employment discrimination claims against his employer.¹¹³ During discovery, the defendant’s attorneys filed a motion to compel the production of notes used by the plaintiff during a deposition.¹¹⁴ The judge denied the motion on the grounds that the notes, which were made by the plaintiff on reviewing earlier portions of the deposition, were trial preparation materials protected by Rule 26(b)(3)(A), as to which defendant made no showing of “substantial need.”¹¹⁵ The judge noted that “[i]f plaintiff were represented by counsel, his attorney’s notes in similar circumstances would not be subject to production. A plaintiff appearing self-represented is entitled to no less protection.”¹¹⁶

Consistent with *Hickman* and the language of Rule 26(b)(3), most courts distinguish between the “ordinary” work product referenced in Subparagraph (A) of the Rule, and the “opinion” work product addressed in Subparagraph (B).¹¹⁷

108. See Ghent, 35 A.L.R.3d §B (1971).

109. WRIGHT & MILLER, *supra* note 94, at § 2026.

110. See Tatum v. R.J. Reynolds Tobacco Co., 247 F.R.D. 488, 496 (M.D.N.C. 2008).

111. See, e.g., Aetna Cas. & Sur. Co. v. Nationwide Mut. Ins. Co., 724 F. Supp. 204 (W.D. Pa. 1989); Ford v. Philips Elecs. Instruments Co., 82 F.R.D. 359, 360–61 (E.D. Pa. 1979).

112. See, e.g., Kannan v. Apple Inc., 2019 WL 5589000 *3 (N.D. Cal. Oct. 30, 2019).

113. Nielsen v. Soc’y of New York Hosp., 1988 WL 100197, at *1 (S.D.N.Y. Sept. 22, 1988).

114. *Id.* at *2.

115. *Id.*

116. *Id.*

117. See *In re Grand Jury Subpoena*, 220 F.R.D. 130, 144 (D. Mass. 2004).

However, courts continue to disagree about the extent of protection given to each category of material,¹¹⁸ although the language of Rule 26(b)(3)(B) appears to be absolute: “the court *shall* protect against disclosure of the mental impressions, conclusions, opinions, or legal theories”¹¹⁹ As one court noted, different treatment is appropriate given that “[t]he substantive content of . . . so-called opinion work product is almost certainly of no legitimate use to an opponent.”¹²⁰

A few courts have expressly decided to extend absolute immunity to an unrepresented litigant’s mental impressions, conclusions, opinions or legal theories, although some courts have simply assumed that because Rule 26(b)(3)(A) applies to a party’s work product, 26(b)(3)(B) must also.¹²¹ Some courts have suggested or assumed, without deciding, that unrepresented litigants would be permitted to invoke Rule 26(b)(3)(B)’s protection from disclosure of such material.¹²²

118. *Id.* at 144–45 (surveying decisions).

119. Fed. R. Civ. P. 26(b)(3)(B) (emphasis added).

120. *Fleet Nat’l Bank v. Tonneson & Co.*, 150 F.R.D. 10, 14–15 (D. Mass. 1993).

121. *See, e.g., Moore v. Tri-City Hosp. Auth.*, 118 F.R.D. 646, 649–50 (N.D. Ga. 1988) (granting work product protection over the plaintiff’s diary, which reflected his thoughts on witnesses and attorneys who could assist him, as well as legal arguments he might make on his behalf); *Ortega v. New Mexico Legal Aid, Inc.*, 2019 WL 5864784 at *3 (D.N.M. Nov. 8, 2019) (finding that “because the work product doctrine applies to documents prepared by a party, it applies equally to pro se parties,” such that unrepresented plaintiff’s journals, diaries, calendars, letters, appointment books, agendas, notebooks, notes and correspondence referring to alleged events encompassed mental impressions, conclusions, opinions or legal theories concerning the litigation was thus protected from disclosure) (citation omitted); *Kannan v. Apple Inc.*, 2019 WL 5589000 at *2–3 (N.D. Cal. Oct. 30, 2019) (protecting from disclosure documents prepared by unrepresented litigant prepared by himself in anticipation of litigation, finding that defendant had made no showing of substantial need and concluding that a party may assert work product protection under Rule 26(b)(3) regardless of whether he is represented by counsel); *Anderson v. Furst*, 2019 WL 2284731 at *4 (E.D. Mich. May 29, 2019) (finding that plaintiff, as a pro se litigant, has a right to assert work product protection over material indicated in Rule 26(b)(3) (A) and (B)) (citation omitted); *Yates v. Cobb Cnty. Sch. Dist.*, 2016 WL 9444452 at *2 (N.D. Ga. Aug. 4, 2016) (concluding that documents or notes that relate to plaintiff’s claims, to the extent prepared in anticipation of litigation or for trial and constituting mental impressions, conclusions, opinions, or legal theories would not be subject to production absent showing of substantial need); *Carrier-Tal v. McHugh*, 2016 WL 9185306 at *3 (E.D. Va. Feb. 3, 2016) (upholding magistrate judge’s report and recommendation in an employment discrimination case which extended protection over unrepresented plaintiff’s “work product files, legal theories, strategy, beliefs, correspondence, communications, and mental impressions” to the extent such files were kept confidential, including those contained on defendant’s electronic database); *Moore v. Kingsbrook Jewish Med. Ctr.*, 2012 WL 1078000 at *8 (E.D. N.Y. Mar. 30, 2012) (affirming magistrate’s order denying motion to compel production of unrepresented plaintiff’s deposition notes which included mental impressions, finding that they constituted work product).

122. *See, e.g., Boegh v. Harless*, 2021 WL 1923365 at *6 n.5 (W.D. Ky. May 13, 2021) (noting that there are “certainly circumstances where the work product of a *pro se* plaintiff is protected by privilege” but ordering plaintiff to produce the requested documents because he failed to make anything other than boilerplate objections) (citations omitted); *Bataski Bailey v. Transunion LLC*, 2020 WL 13132941 (N.D. Ga. Apr. 24, 2020) (noting authority that an unrepresented litigant can assert work product as to notes prepared in anticipation of litigation that reveal mental impressions and/or legal strategies, but finding that the discovery requests did not implicate work product) (citations omitted); *Carbajal v. St. Anthony Cent. Hosp.*, 2014 WL 2459713 at *2 n.1 (D. Colo. June 2, 2014) (assuming, without deciding, that the work product doctrine applies to the work of a pro se, non-lawyer party, but denying its application to the

One of the earliest cases to expressly hold that unrepresented litigants are entitled to protection of their mental impressions was *Brockmeier v. Solano County Sheriff's Department*, which involved civil rights claims brought by an unrepresented litigant against a county sheriff's department and various officers alleging unreasonable search and seizure.¹²³ During discovery, the defendants sought production of the plaintiff's contemporaneously created handwritten notes from the day of the alleged incident about the events that took place.¹²⁴ The plaintiff objected on the basis of work product, claiming that the notes were made in anticipation of litigation and included her mental and legal impressions.¹²⁵ In its decision, the court noted the distinction between Rule 26(b)(2)(A)'s "qualified work product" protections, which permits production of "fact investigations," and Rule 26(b)(2)(B)'s "absolute work product," which protects "mental impressions, legal strategies, and so forth."¹²⁶ For the former, the party seeking work product must establish "substantial need" for production, as well as an inability to obtain the information from other sources without undue hardship.¹²⁷ For the latter, the court explained absolute work product is only discoverable when there is a "compelling need" for it, and the mental impressions of the attorney or the party are "at issue."¹²⁸ The court further noted that an attorney's notes and memoranda from witness interviews can "reveal an attorney's legal conclusions because, when taking notes, an attorney often focuses on those facts that she deems legally significant."¹²⁹ Although the court ordered the plaintiff to produce her notes to the extent that they provided a factual account of the events, the court concluded that any notes she prepared in anticipation of litigation, which revealed her mental impressions and/or legal strategy, would be protected from disclosure pursuant to Rule 26(b)(3)(B).¹³⁰

However, other courts have ruled to the contrary, finding no work product protection for unrepresented litigants.¹³¹ Still others have suggested, without

requested materials) (citations omitted); *Dessault Systemes v. Childress*, 2013 WL 12181774 at *1-3 (E. D. Mich. Nov. 22, 2013) (assuming that unrepresented defendant could assert work product protection over draft affidavits and related documents, and concluding that such documents were protected); *Carbajal v. Warner*, 2013 WL 1129429 at *8 n.3 (D. Colo. Mar. 18, 2013) (assuming, without deciding, that the work product doctrine applies to the work of a pro se, non-lawyer party); *McKenzie v. McNeil*, 202 WL 695108 at *1 (N.D. Fla. Mar. 1, 2012) (assuming without deciding that plaintiff's handwritten notes were protected work product, but ordered production because he had waived any protection by not timely asserting it and made no showing that the notes fell within work product protections of Rule 26(b)(3)).

123. *Brockmeier v. Solano Cty. Sheriff's Dep't, et al.*, 2010 WL 148179 (E.D. Cal. Jan. 12, 2010).

124. *Id.* at *4.

125. *Id.* at *5.

126. *Id.* at *4.

127. *Id.*

128. *Id.*

129. *Id.* at *5.

130. *Id.* at *6.

131. *See, e.g., Simmons v. Adams*, No. 10-CV-01259, 2013 WL 2995274 *2 (E.D. Cal. June 14, 2013) (concluding "there is no such thing as 'pro se plaintiff work product'" and the doctrine nonetheless would not shield the requested information because the contention interrogatories and

deciding, they would not extend such protection under the plain language of Rule 26(b)(3)(B).¹³² The few courts that have explained their reasoning for expanding the Rule's protections to unrepresented litigants have rooted their decisions in the fundamental equivalency of an unrepresented litigant and an attorney.¹³³

In short, the law is unsettled. Unrepresented litigants who don't have access to legal research tools are unlikely to marshal the necessary arguments they could make to prevent disclosure of their work product materials. Moreover, the courts that have ruled in favor of protecting such materials have not extrapolated at great length about the reasons for doing so.

D. Representative State Courts' Decisions Protecting Unrepresented Litigants' Work Product

Although few state court decisions address this issue, rulings in California and New Jersey present persuasive arguments for extending protection over unrepresented litigants' mental impressions and similar material.

1. California

California courts explicitly recognize the right of unrepresented litigants to the work product doctrine. The question was first squarely addressed in *Dowden v. Superior Court*.¹³⁴ In *Dowden*, two brothers, Daniel and Douglas Dowden, allegedly agreed to divide property held in joint tenancy following their mother's death.¹³⁵ Daniel filed suit against Douglas for breach of contract and property damages.¹³⁶ Douglas filed a cross-complaint for conversion and breach of contract.¹³⁷ Although Douglas had legal representation in his capacity as a defendant, his lawyer did not represent him in his cross-complaint.¹³⁸ Despite the fact that

requests for eyewitness names and contact information concerned "very basic facts relevant to plaintiff's claim").

132. See, e.g., *Ross v. Sejin Am., Inc.*, 2021 WL 6973877 at *2 (M.D. Ala. Apr. 9, 2021) (noting Rule 26's protection against disclosure of "mental impressions" does not offer protection to *pro se* parties, but finding waiver of any assumed protections); cf. *In re Sanctuary Belize Litig.*, No. 18-3309, 2019 WL 6717771 at *5 (D. Md. Dec. 10, 2019) (noting the question of whether the work product privilege applies to unrepresented defendants has not been conclusively answered by courts, although some courts, including district courts in the Fourth Circuit, have suggested in dicta that the privilege applies, but deciding on other grounds to deny defendant's motion for protective order) (citations omitted); *Harrison v. Spellings*, No. 03-2514, 2005 WL 8168153 at *1 (D.D.C. May 25, 2005) (noting no published opinion of any judge in that court had expressly extended the work product privilege to confer qualified immunity for material prepared by a self-represented plaintiff, and concluding any such objection had been waived and defendant had shown substantial need for recordings of conversations with her managers about matters relevant to her claims and journals in which she wrote information regarding her claims).

133. See, e.g., *Nielsen v. Soc'y of New York Hosp.*, 1988 WL 100197, at *1 (discussing that materials would be protected if the litigant were an attorney).

134. *Dowden v. Superior Court*, 73 Cal. App. 4th 126, 126 (1999).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

Douglas was proceeding as a unrepresented litigant on that claim, Douglas' defense counsel allegedly advised him to keep a diary in anticipation of litigation of his claims.¹³⁹ During the discovery process, Daniel moved to compel the production of this diary.¹⁴⁰ Douglas refused, asserting the diary was his work product and therefore protected by Section 2018 of the California Code of Civil Procedure.¹⁴¹

At the time of the case,¹⁴² Section 2018 stated in relevant part that “the work product of an attorney [was] not discoverable unless the court determine[d] that denial of discovery [would] unfairly prejudice the party seeking discovery in preparing that party’s claim or defense or [would] result in an injustice.”¹⁴³ It also noted that “[a]ny writing that reflect[ed] an attorney’s impressions, conclusions, opinions, or legal research or theories” was not discoverable under any circumstances.¹⁴⁴

In the case of Dowden’s diary, the trial court adopted the recommendation of a referee that the diary should be produced.¹⁴⁵ The referee had interpreted Section 2018’s protection of work product as solely applicable to attorneys.¹⁴⁶ An appeal ensued, and the California Court of Appeals reversed.¹⁴⁷

Noting that questions of statutory construction are reviewed *de novo*, the Court of Appeals concluded that while the statute’s use of the term might appear straightforward, the meaning of “attorney” under Section 2018 was in fact ambiguous.¹⁴⁸ The Court had two primary grounds for its conclusion: (1) at least one other jurisdiction – New York – included in its definition of attorney “any party prosecuting or defending an action in person,” and (2) “other provisions of the Code of Civil Procedure and California Rules of Court which require[d] that ‘attorneys’ follow certain procedures, appl[ied] to litigants appearing *in propria persona* as well.”¹⁴⁹

The Court then analyzed Section 2018’s legislative history to determine whether the California Legislature intended to limit the work product privilege to attorneys.¹⁵⁰ The Court found that the legislature consistently expressed a preference for broader terms than ‘attorney’ in crafting discovery protection laws, often using ‘litigant’ or ‘party.’ Further, the Court felt the policy rationale of Section

139. *Id.*

140. *Id.*

141. *Id.*

142. *Civil Discovery: Correction of Obsolete CrossReferences*, 34 CAL. L. REV. COMM. REPORTS 161, 161 (2004), <http://www.clrc.ca.gov/pub/Printed-Reports/REC-CivDiscXref.pdf>. On July 1, 2005, Section 2018 was “repealed to facilitate nonsubstantive reorganization of the rules governing civil discovery.”

143. CAL. CIV. PROC. CODE § 2018(b) (West) (repealed 2005).

144. *Id.* at § 2018(c).

145. Dowden, 73 Cal. App. 4th at 128.

146. *Id.*

147. *Id.*

148. *Id.* at 130.

149. *Id.* at 129.

150. *Id.* at 130.

2018 was “important not only for attorneys, but also for litigants acting *in propria persona*.”¹⁵¹

Concluding that both legislative intent and history supported Section 2018’s application to unrepresented litigants, the Court moved on to consider California’s case law on the matter. After reviewing relevant case law to that point, the Court noted that California courts consistently looked to the intended purpose of Section 2018 when determining who may assert a work product privilege.¹⁵² The intended purpose of the Section 2018, the Court concluded, was “to promote the adversary system.”¹⁵³ On those grounds, the Court affirmatively ruled that “*in propria persona* litigants may assert Section 2018’s work product privilege” because doing so “furthers that purpose.”¹⁵⁴

Dowden sparked an enduring legacy of unrepresented work product doctrine in California and its courts continue to recognize its protections, relying on the language of Section 2018.¹⁵⁵

2. New Jersey

New Jersey has adopted the language of Federal Rule 26(b)(3), but has extended absolute immunity to the mental impressions of an unrepresented litigant who happened to be a lawyer representing himself.¹⁵⁶ For example, in one case, a New Jersey trial court denied a plaintiff’s lawyer the ability to question an unrepresented defendant, who was also an attorney, about why he prepared certain letters submitted to the court before having obtained counsel. The court explained that the unrepresented defendant “was acting no less as an attorney when he invoked the work product privilege simply because he was proceeding pro se” and as such, the “legal theories he formulated on his own behalf are deserving of the same measure of protection as would be afforded those he formulated on behalf of another client.”¹⁵⁷

IV. EXPANDING WORK PRODUCT PROTECTIONS TO UNREPRESENTED LITIGANTS

A. *Equity Necessitates the Expansion of Absolute Protection for the Mental Impressions of Unrepresented Litigants*

As noted in Section II, *supra*, individuals have the right to proceed without representation in federal courts. But unrepresented litigants, like attorneys and those they represent, are still bound by complex procedural rules, including those

151. *Id.* at 133.

152. *Id.* at 133–34.

153. *Id.* (citing *BP Alaska Exploration, Inc. v. Superior Court*, 199 Cal.App.3d 1240, 1256 (1988)).

154. *Dowden*, 73 Cal. App. 4th at 134, 136.

155. *See, e.g.*, *Meza v. H. Muehlstein & Co.*, 176 Cal. App. 4th 969, 977, 98 Cal. Rptr. 3d 422, 429 (2009) (citing *Dowden*, 73 Cal. App. 4th, at 134); CAL. CIV. PROC. CODE § 2018.020 (West).

156. *See, e.g.*, *Halbach v. Boyman*, 872 A.2d 120, 121 (N.J. Super. 2005).

157. *Id.* at 124.

involving discovery requirements.¹⁵⁸ While there may be some benefits for individuals who represent themselves in federal court, there are many factors that contribute to the denial of equal access and inequitable experiences they will inevitably face during litigation.

Federal courts have recognized that latitude should be given to unrepresented litigants. For example, despite the Supreme Court's recent requirement of more exacting pleading standards,¹⁵⁹ unrepresented litigants' pleadings continue to be assessed by less stringent standards than formal pleadings drafted by lawyers.¹⁶⁰ Federal courts tend to liberally grant unrepresented litigants leave to amend their pleadings at least once before dismissing with prejudice.¹⁶¹ Districts have also adopted local rules that provide special notice provisions or other treatment concerning unrepresented litigants.¹⁶²

However, despite the limited examples of deference shown to unrepresented litigants described above, the hurdles they face throughout the litigation process are far, far greater. The effects of these hurdles are compounded for indigent and uneducated litigants. Unrepresented litigants suffer significant structural and procedural disadvantages.¹⁶³ For example, they lack familiarity and access to procedural and substantive legal rules, which makes them more likely to miss deadlines and lack the ability to make favorable arguments.¹⁶⁴ Moreover, they will likely find it far more challenging to gather evidence relevant to their claims or defenses and to appropriately protect evidence from production during discovery.¹⁶⁵ The impact of these disadvantages becomes particularly critical at summary judgment stage.¹⁶⁶ Given that the majority of unrepresented litigants are

158. *Agiwali v. Mid Island Mortgage Corp.*, 555 F.3d 298, 302 (2d Cir. 2009) (citation omitted).

159. *See Bell Atlantic Corp., et al. v. Twombly et al.*, 550 U.S. 544 (U.S. 2007); *Ashcroft, et al., v. Iqbal, et al.*, 560 U.S. 662 (U.S. 2009) (requiring "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face'").

160. *See Erickson v. Pardus*, 551 U.S. 89, 94 (U.S. 2007) ("a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers") (quoting *Haines v. Kerner*, 404 U.S. 519, 521 (1972)).

161. *See Denton v. Hernandez*, 504 U.S. 25, 34 (1992); *Shlomo v. City of N.Y.*, 579 F.3d 176, 183 (2d Cir. 2009) (noting that unrepresented litigants should be granted leave to amend a complaint at least once "when a liberal reading of the complaint gives any indication that a valid claim might be stated.").

162. *See, e.g.,* Joint Local Rules, S.D.N.Y. and E.D.N.Y. (eff. Oct. 15, 2021): Civ. R. 7.2 requires that for cases involving unrepresented litigants, counsel "shall, when serving a memorandum of law (or other submissions to the Court), provide the pro se litigant . . . with copies of cases and other authorities cited therein that are unpublished or reported exclusively on computerized databases"; Civ. R. 12.1 and 56.2 (requiring defendant's counsel to provide notice to an unrepresented plaintiff of the need to oppose a motion for summary judgment with affidavits or other papers).

163. *See Bloom & Hershkoff*, *supra* note 22, at 512.

164. *Bradlow*, *supra* note 49, at 664.

165. *See, e.g., Phillips v. United States Bd. of Parole*, 352 F.2d 711, 714 (D.C. Cir. 1965) (per curiam) (noting that incarcerated self-represented litigant had neither the "facilities" nor the "opportunity" to submit evidence in support of his opposition to a summary judgment motion).

166. *See Jessica Case, Pro Se Litigants at the Summary Judgment Stage: Is Ignorance of the Law an Excuse?*, 90, Ky. L.J. 701, 703 (2001–02) (noting that unrepresented litigants may not understand their obligation to come forth with affidavits and evidence).

plaintiffs,¹⁶⁷ the inability to understand and apply discovery rules becomes all the more important as they will bear the burden of production at trial.¹⁶⁸

As previously noted, although federal courts have initiated some measures to protect the interests of unrepresented litigants, such individuals have the added disadvantage that judges and clerks are not well-positioned to provide them with assistance on procedural or substantive issues. For example, judges must remain impartial, and clerks are often told they cannot provide legal advice to unrepresented litigants. The result is that unrepresented litigants are often left to figure out for themselves what papers need to be filed or when, and what arguments they can make to protect their interests.¹⁶⁹

Given that individuals have a right to represent themselves in federal court, the rules of procedure should not undermine that right. An unrepresented litigant “must act in the role of client and attorney simultaneously.”¹⁷⁰ In addition, it furthers the purpose of promoting the adversary system.¹⁷¹ The work product doctrine “provides a zone of privacy for a lawyer,” allowing “counsel an opportunity to think or prepare a client’s case without fear of intrusion by an adversary.”¹⁷² As the Supreme Court has noted, “[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client’s case.”¹⁷³ These same interests are at play for an unrepresented litigant like Alonzo, who stands in the shoes of counsel by representing himself. As one court noted (although not specifically with respect to unrepresented parties), “[a]lthough non-attorneys are not officers of the court, and thus do not have the same public responsibilities as attorneys, there can be little doubt that their role in assembling an effective case for a party is often at least as important as an attorney’s.”¹⁷⁴

Furthermore, the Notes of Advisory Committee on 1983 Amendments specifically distinguished between “party” and attorney, and further references the fact that either may be able to claim privilege under FRCP 26. Unfortunately, the language of the Rule does not reflect this position and, as a result, the federal courts have been left to draw their own conclusions about how to interpret it.

167. See *supra* at Part II.B.

168. See *Celotex v. Catrett*, 477 U.S. 317, 323 (1986) (“In our view, the plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”).

169. Benjamin H. Barton, *Against Civil Gideon (and For Pro Se Court Reform)*, 62 FL. L. REV. 1227, 1233 (Dec. 2010). With that in mind, some federal courts like our own in the Eastern District of New York have assigned staff or arranged for funding of independent organizations like the Hofstra Law Pro Se Legal Assistance Program, to provide limited help to unrepresented litigants.

170. *Boegh v. Harless*, No. 18-CV-00123, 2021 WL 1923365 *6 n.5 (W.D. Ky. May 13, 2021).

171. *Dowden*, 73 Cal. App. 4th at 186.

172. *In re Six Grand Jury Witnesses*, 979 F.2d 939, 944 (2d Cir. 1992).

173. *United States v. Nobles*, 442 U.S. 225, 238 (1975).

174. See *In re Grand Jury Subpoena*, 220 F.R.D. 130, 142 (D. Mass. 2004).

B. Proposed Amendment of Rule 26

Our solution to the problem discussed above is quite simple: Federal Rule of Civil Procedure 26(b)(3)(B) should be amended to allow for the absolute protection from discovery of unrepresented litigants' mental impressions. The proposed amendment is as follows in underlined text:

(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 an unrepresented party, a party's attorney or other representative concerning the litigation.

This simple amendment would allow for the necessary procedural protections for unrepresented litigants like Alonzo to object to disclose any materials that fall into the category described in the Rule.

With the enactment of The Rules Enabling Act¹⁷⁵ in 1934, Congress authorized the United States Supreme Court to prescribe general rules of practice and procedure, as well as rules of evidence, for the federal courts. That work has since been delegated by the Court to the Judicial Conference of the United States, which has established procedures to govern the work of the Standing Committee on Rules of Practice and Procedure, as well as its advisory rules committees.¹⁷⁶ The committees engage in continuous study of the operation and effect of the Federal Rules of Civil Procedure and evaluate suggestions for amendments to those rules. This proposed amendment falls squarely within their jurisdiction and should be taken up immediately.

The current text of Rule 26(b)(6)(B) has been in place for decades and yet, as was noted in Part III.C., no federal appellate court has decided the issue of whether unrepresented litigants' mental impressions deserve the more substantial protections allowed for that of attorneys. Nor have there been many reported lower court decisions that have explicitly ruled on the matter, and there is a split among those that have. Instead, magistrate judges and district court judges have been left to decide, or merely suggest without deciding, what is to be done. The thousands of unrepresented litigants who appear in federal courts every year deserve more decisive language in the Rule.

The proposed amendment to Rule 26(b)(3)(B) would further equalize a legal system that already disadvantages unrepresented litigants in several ways. The absence of counsel can lead judges, court staff and lawyers to perceive, rightly or wrongly, that an unrepresented litigant's claims lack merit or value.¹⁷⁷ This, in

175. 28 U.S.C. §§ 2071–2077.

176. Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees (as codified in Guide to Judiciary Policy, Vol. 1. § 440), <https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees-0>.

177. See Quintanilla, *supra* note 9, at 551.

turn, can negatively influence how they treat unrepresented litigants. For example, lawyers might exploit their unique vulnerabilities, and judges may be too quick to rule against them.¹⁷⁸ If it is left to the individual discretion of judges to extend (or not) the work product rules to unrepresented litigants' mental impressions and the like, this creates greater risks that such decisions will be made based on incorrect assumptions and implicit biases.¹⁷⁹ Judges' "procedural treatment of pro se civil litigants is at best highly case-specific, at worst inconsistent."¹⁸⁰

An alternative solution would be to ensure that all litigants who want to have an attorney can have one, regardless of whether they can afford to pay for legal representation, thereby protecting from disclosure any attorney work product currently included within Rule 26(b)(3)(B). Many lawyers, judges, and scholars have argued that *Gideon*¹⁸¹ should be extended to provide the constitutional right to counsel in at least some civil proceedings.¹⁸² For example, some have argued for appointment of counsel in federal civil rights lawsuits brought by incarcerated individuals.¹⁸³ Others have argued that the denial of appointed counsel in federal court proceedings for individuals with disabilities can violate the Rehabilitation Act.¹⁸⁴ However, it seems unlikely that this will happen any time soon given the Court's recent decisions in this area and its current make-up¹⁸⁵

Moreover, even if *Gideon* was extended to at least some civil proceedings in federal courts, it is unclear where the funding would come from to pay for court-appointed lawyers. Congressional funding for the provision of free legal services

178. *Id.*

179. Stephan Landsman, *Pro Se Litigation*, 8 ANN. REV. L. & SOC. SCI. 231, 245 (2012) (discussing judicial attitudes towards unrepresented litigants).

180. Bradlow, *supra* note 49, at 659–60 (citing Donald H. Zeigler and Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157, 160 (1972)).

181. *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963).

182. See, e.g., Symposium, *Special Issue, A Right to a Lawyer? Momentum Grows*, 40 CLEARINGHOUSE REV. 163, 295 (2006); Paul Marvy, *Thinking About a Civil Right to Counsel Since 1923*, 40 CLEARINGHOUSE REV. 170 (2006); Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, 32 HUM. RTS. 8, 8 (2005) (arguing that the right to counsel in civil cases is a basic right, because, based on *Gideon*, unrepresented litigants are no more equipped to navigate the legal system in civil cases than in criminal cases); John Nethercut, "This Issue Will Not Go Away": *Continuing to Seek the Right to Counsel in Civil Cases*, 38 CLEARINGHOUSE REV. 481 (2004); Hon. Earl Johnson, Jr., *Will Gideon's Trumpet Sound A New Melody? The Globalization of Constitutional Values and its Implications for a Right to Equal Justice in Civil Cases*, 2 SEATTLE J. FOR SOC. JUST. 201, 201 (2003) (noting decision by Europe's highest court that European Convention on Human Rights and Fundamental Freedoms required the government to provide free counsel to indigent litigants in civil matters); Jeffrey M. Mandell, Note, *The Emerging Right of Legal Assistance for the Indigent in Civil Proceedings*, 9 U. MICH. J.L. REFORM 554 (1976); Note, *The Indigent's Right to Counsel in Civil Cases*, 76 YALE L.J. 545 (1967); Note, *The Right to Counsel in Civil Litigation*, 66 COLUM. L. REV. 1322 (1966).

183. See Tasha Hill, *Inmates' Need for Federally Funded Lawyers: How the Prison Litigation Reform Act, Casey, and Iqbal Combine with Implicit Bias to Eviscerate Inmate Civil Rights*, 62 U.C.L.A. L. REV. 176 (2015).

184. See Lisa Brodoff et al., *The ADA: One Avenue to Appointed Counsel Before a Full Civil Gideon*, 2 SEATTLE J. FOR SOC. JUST. 609, 614–17 (2004).

185. See Barton, *supra* note 169, at 1231–32 (explaining the reasons why extension of *Gideon* to civil matters is unlikely to occur and arguing in the alternative for pro se court reforms).

via the Legal Service Corporation (“LSC”)¹⁸⁶ has fluctuated through the years and often has not kept up with cost of inflation.¹⁸⁷ Nor have private lawyers been required or shown willingness to provide pro bono legal services in federal courts on the broad scale that would be necessary to ensure equitable protection of work product material in a range of federal civil matters.¹⁸⁸ And although limited scope representation can be a successful method for providing at least some legal assistance for unrepresented litigants,¹⁸⁹ it is unclear whether Rule 26(b)(3)(B)’s protections would sufficiently extend to cover work product material generated by an attorney operating in that capacity, much less that of the litigant. Some have argued that even representation in federal civil cases would not be sufficient to achieve equal access to justice, given the limitations of what can be accomplished with litigation.¹⁹⁰

V. CONCLUSION

Access to justice has often focused on the competence and availability of legal representation in court proceedings, but for unrepresented litigants in particular, it should more broadly encompass what happens during the proceedings themselves.¹⁹¹ Unrepresented litigants make up a significant portion of the federal courts’ dockets, some by their own choosing but many because of an inability to hire and/or pay for a lawyer.¹⁹² And yet, our procedural rules are constructed to assume representation.¹⁹³ As a result, failure to provide unrepresented litigants with the necessary procedural tools to prepare and advance their claims amounts to a miscarriage of justice.

Given the unsettled and inconsistent state of how the work product rules are applied by the lower federal courts, amendment of Rule 26(b)(3)(B) is a

186. 42 U.S.C. § 2996b(a) (1986) (stating LSC is an autonomous, non-profit organization created in 1974 and funded annually by Congress to provide “financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance.”).

187. See Libby Pearl, CONG. RSCH. SERV., RL34016, LEGAL SERVICES CORPORATION: BACKGROUND AND FUNDING, 5 (2016) (detailing a historical overview of LSC funding).

188. See Howard A. Matalon, *The Civil Indigent’s Last Chance for Meaningful Access to Federal Courts: The Inherent power to Mandate Pro Bono Publico*, 71 B.U. L. REV. 545, 545–48 (1991) (noting that the needs for pro bono services in federal courts are lacking in part because the practice of law is a “legal market”, there is a lack of federal funding to pay lawyers for such services, and the Supreme Court has refused to authorize federal courts to require appointment of counsel for those who can’t afford it).

189. See, e.g., Jennifer A. Gundlach et al., *A Call for Action to Increase the Provision of Legal Services for Unrepresented Civil Litigants in Our Federal Courts*, N.Y. L. J. (Sept. 23, 2019), <https://www.law.com/newyorklawjournal/2019/09/20/a-call-for-action-to-increase-the-provision-of-legal-services-for-unrepresented-civil-litigants-in-our-federal-courts/> (providing a further discussion of the role of limited scope representation in providing greater access to justice in federal courts and more generally); Krista A. Hess, *The Broad Reach of Limited Scope Representation: A Pathway to Access to Justice*, 39 W. NEW ENG. L. REV. 263, 267 (2017).

190. See Katherine S. Wallat, *Reconceptualizing Access to Justice*, 103 MARQ. L. REV. 581, 617 (2019).

191. See Bloom & Hershkoff, *supra* note 22, at 476.

192. See Zorza, *supra* note 14.

193. See Zimmerman & Tyler, *supra* note 13, at 477.

necessary solution and one that should be immediately considered by the Standing Committee on the Rules of Practice and Procedure. If the Rule is revised to create equity in its application to represented and unrepresented litigants alike, this may well influence the latter's perception of procedural fairness and, therefore, legitimacy of our federal system.¹⁹⁴ In turn, this perception of fairness can enhance their compliance with the rules and ultimate acceptance of the courts' decisions.¹⁹⁵ Such a result benefits judges, lawyers, litigants, and our society as a whole.

194. See Zimmerman & Tyler, *supra* note 13, at 482–84 (discussing findings of study that the primary factor shaping litigants' willingness to accept decisions was the perceived fairness of court procedures).

195. *Id.* at 486–87 (noting that some pro se litigants choose to represent themselves to preserve “voice”).