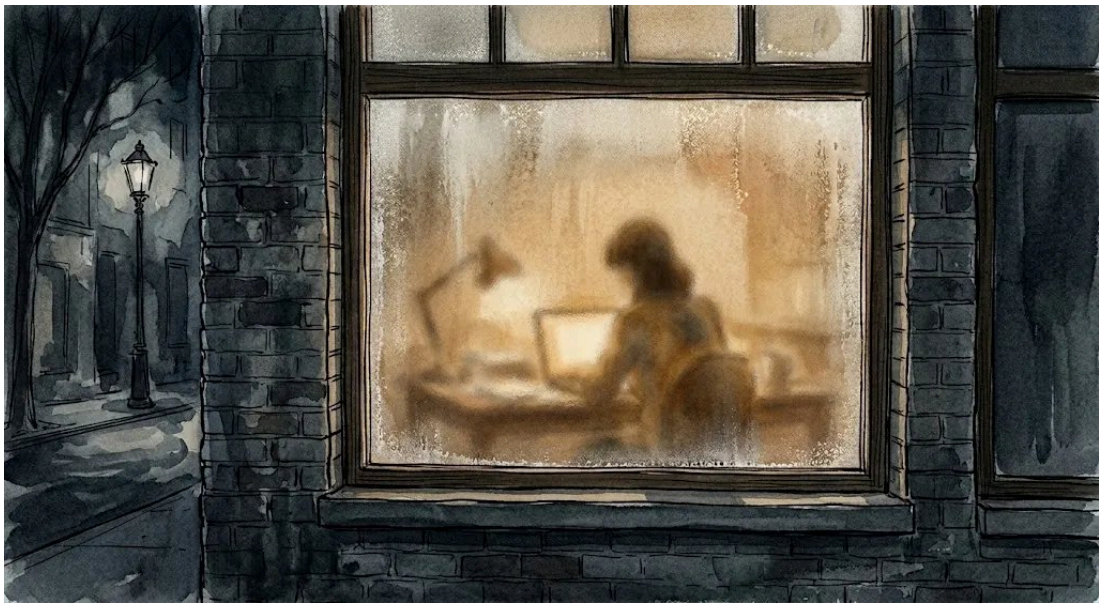
Thinking in Private

The work-product doctrine meets the ai machine

By **Jonathan Franklin**, Shareholder | April 12, 2026



A tugboat sank in the Delaware River. Five of the men aboard drowned, and their families sued. Their lawyer wanted to see the notes that the tug company's attorney had taken while interviewing witnesses— the theories he was developing, the weaknesses he had identified, the shape of the defense he was building. The case reached the Supreme Court of the United States, and the Court said no. *Hickman v. Taylor*, 329 U.S. 495 (1947). The mental work of preparing for litigation — the private act of getting ready for a fight — deserved protection from the adversary.

The principle was codified in Federal Rule of Civil Procedure 26(b)(3) in 1970. The rule protects documents and tangible things "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)." Five years later, Federal Rule of Criminal Procedure 16(b)(2) adopted similar

language: "reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense." Neither rule conditions protection on the involvement of an attorney. Rule 26 says "by or for another party." Rule 16 says "made by the defendant." Both protect the person preparing for litigation—the civil party, the criminal defendant—whether or not a lawyer is involved.

Archie Morgan filed his federal pleadings from a Hotmail account. He was suing V2X, Inc., a Department of Defense contractor, for employment discrimination. He had been fired from his position as a senior maintenance manager on Kwajalein Atoll, a remote Army installation in the Marshall Islands. He had no lawyer. He was representing himself against Littler Mendelson, a global employment and labor firm that represents management exclusively.

Morgan had been using AI to analyze evidence in the case. In discovery, he disclosed both the category—"AI Tools & Outputs"—and the function: "AI analysis . . . to look at evidence."

V2X wanted to know what he was using. It wanted the name of his AI tool, and it wanted to amend the protective order to restrict how AI could handle designated confidential discovery material. Morgan resisted. He invoked *Hickman v. Taylor*: the choice of which AI tool to run against which evidence reflected mental impressions, case strategy, and the allocation of legal resources—work product, the kind of strategic decision the rules were designed to protect.

On March 30, 2026, Magistrate Judge Maritza Dominguez Braswell in the District of Colorado ruled on the dispute. Hers was the third federal trial court in seven weeks to address whether AI-assisted litigation preparation qualifies as protected work product. "The Chatbot Confessional" examines the first two orders—one that denied protection, one that granted it. The third made visible what was already there: this was about the text of a rule that hasn't changed since 1970.

Six weeks before Braswell's order, Judge Jed Rakoff in the Southern District of New York ruled the other way. In *United States v. Heppner*, Bradley Heppner, under federal indictment, had prepared about thirty documents using Anthropic's Claude: reports outlining defense strategy, analysis of what the

government might charge. His lawyer had not directed him to do any of it. Rakoff ruled that the documents were protected by neither attorney-client privilege nor the work product doctrine. The government could read every word. On the privilege question, Rakoff found that Claude is not an attorney and that Anthropic's privacy policy permitted disclosure under certain circumstances. Citing a discovery ruling in the OpenAI copyright litigation, he concluded that Heppner had no "reasonable expectation of confidentiality" in his AI communications—that users who voluntarily disclose their conversations to a publicly accessible platform cannot claim substantial privacy interests in those conversations.

That conclusion rests on third-party doctrine logic: if you share information with a platform, you've surrendered any expectation of privacy in it. But in *Carpenter v. United States*, 585 U.S. 296 (2018), the Court took up what cellphones leave behind with their carriers — a running record of where their owners have been, month after month—and refused to apply that reasoning mechanically. The nature, comprehensiveness, and intimacy of the information, the Court held, mattered more than the mechanical fact of disclosure to a third party. Whether *Carpenter*'s principle extends from the Fourth Amendment to discovery doctrine is unresolved, and Rule 26(b)(3) may not need it. Not all voluntary sharing is equal.

Rule 16 says "made by the defendant." Heppner was the defendant. He made the documents. But Rakoff never gave that text operative force. Because the government had seized the documents by search warrant rather than obtaining them through discovery, Rakoff found Rule 16's work product shield inapplicable on its face. He turned instead to the common-law doctrine. There, following binding Second Circuit precedent, he framed work product as protecting materials prepared "by or at the behest of counsel." Because Heppner's lawyer "did not direct Heppner to run Claude searches," the documents fell outside the doctrine's reach.

But the text remains. The rule says "made by the defendant." The gloss says "by or at the behest of counsel." Those are not the same instruction. Read "the defendant" to mean only "the defendant acting at counsel's direction," and the phrase collapses into "the defendant's attorney or agent," categories the rule already lists separately. The defendant's independent role becomes surplusage, words Congress wrote that do nothing.

The same problem infects Rule 26: if "by or for another party" requires attorney involvement, "party" disappears from the provision—absorbed into "representative." The rule defines "representative" separately, with its own parenthetical list of attorneys, consultants, sureties, indemnitors, insurers, and agents. But "party" in Rule 26 stands on its own—separated by a disjunctive "or" from "its representative," which the parenthetical then illustrates. The party is not in the list. The party is the principal the list serves.

The two rules are built on the same design. When Congress revised Rule 16 in 1975, it enacted protection for "reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent"—rejecting a narrower alternative that would have confined protection to attorneys' mental impressions. Read the rules to require attorney involvement, and the consequence in criminal cases follows: a defendant who prepares his own defense materials has no work product protection at all unless his lawyer told him to do it.

These were not casual drafting choices. A court that reads a requirement into the rules that the text does not contain is not interpreting them. It is amending them.

One week before Rakoff, another court had applied the civil rule as written. In *Warner v. Gilbarco*, Magistrate Judge Anthony P. Patti in the Eastern District of Michigan resolved a similar dispute. A pro se plaintiff had used ChatGPT to prepare her litigation materials. The defendants moved to compel everything related to her AI use. Patti denied the AI-specific discovery requests, found the materials protected, and offered the observation that frames the entire landscape: "In the end, both sides of this dispute seek to obtain each other's thought processes, while shielding their opponent from discovery of their own."

Then came Braswell. She started where courts are supposed to start: with the text. She found "any reading that conditions work product protection over AI materials on the involvement of counsel finds no support in the rule's text." The use of AI, she concluded, "closely resembles the kind of confidential, strategy-laden iterative work product that Rule 26(b)(3) was designed to protect." The rule doesn't care what the tool is. The drafters of the 1970

amendments couldn't have imagined ChatGPT, Claude, or Gemini. They didn't need to. They wrote the rule around what the person does, not what the person uses.

Three courts, seven weeks, same question, different answers: Rakoff denied protection; Braswell and Patti granted it.

Braswell's opinion does two separate things, and the distinction matters. Rule 26(b)(3) protects a party who prepares for litigation with AI, regardless of subscription tier or platform—that is the work product holding. That holding is about the person's thinking. The court's amended protective order does something different: it restricts how the parties may handle properly designated confidential information with AI tools. The court required contractual safeguards—no training on inputs, no third-party disclosure beyond what's essential for service delivery, the ability to delete on request. Those are terms-of-service provisions, not privacy-policy provisions. That restriction is about someone else's secrets.

The line between the two is where *Carpenter*'s reasoning echoes. Braswell observed that even where AI use involves disclosure to a platform, "it is highly unlikely the information will fall into the hands of an adversary absent some legal process to compel it." The mechanical fact that a platform receives data does not mean the adversary will. The nature of the disclosure—litigation preparation shared with a tool, not broadcast to the world—matters. Work product protection asks whether your litigation preparation is shielded from your adversary. The protective order directs how you handle someone else's properly designated confidential material. The first turns on what you did. The second turns on what safeguards your platform provides.

"The Court does not intend to leave pro se Plaintiff without the benefits of AI," Judge Braswell wrote. "Nothing in this particular Order restricts those uses." The court cautioned both parties against over-designating information as confidential — recognizing that the more material a party marks as confidential, the narrower the tools available to its opponent. Over-designation is not just an administrative burden. It is a weapon. And the party most likely to face it is the one least equipped to pay for the tools the protective order demands.

As of this writing, no federal appellate court has spoken. No state appellate court. Not the Supreme Court of the United States. What exists is three trial court orders—two civil, one criminal—and rules that have said the same thing for more than fifty years.

The question will keep returning because the technology is here. People still sit in depositions, face juries, argue before judges. AI doesn't change that. It changes how they get ready—and each prompt, each follow-up, each refinement is a private act of preparation.

AI in the hands of parties and criminal defendants is new. The rules are decades old. The Court's concern for protecting work product is older still.

In his *Hickman* concurrence, Justice Robert Jackson wrote that discovery "was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." 329 U.S. at 516. A person preparing for litigation with AI is using their own wits. The prompts are their questions, the follow-ups their judgment, the preparation their own.

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court warned that "an uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Neither doctrine benefits from that kind of uncertainty. Three trial courts, seven weeks, two rules that have said the same thing for half a century, and no appellate court has yet spoken.

Braswell's work product holding doesn't turn on what platform a person uses—or whether that person has a lawyer. But when confidential discovery material enters the picture, courts can impose requirements that commercial accounts can satisfy and consumer accounts typically cannot. The same party whose litigation preparation is protected may need a commercial subscription to handle an opponent's designated confidential documents. Braswell saw it: "a growing problem in the age of AI"—as large firms pour tens of thousands of dollars into enterprise-grade tools, how will a solo, a small firm, or a pro se litigant keep up?

The day after the ruling, Morgan served his AI disclosure on V2X. He identified his platform as Google Cloud Platform. He matched the court's contractual requirements to the specific provisions of Google's terms of service and data processing addendum, one by one.

Ten days after Morgan's disclosure, V2X filed too—not an answering disclosure, but a demand. It wanted more from Morgan. Which product. Which terms. Whether they met the amended order. Morgan had already asked V2X to confirm its own compliance; the protective order ran both ways. About itself, V2X's filing said nothing.

Morgan is still at it. He is still pro se, still filing, still using a machine to help him think, and he claims that work as his own, protected, not theirs to see. The rules say he gets to think in private. They have said so for fifty years. The question is how the next court will read them.

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