“Discovery” is the process by which attorneys on opposing sides attain access to witnesses and documents after a lawsuit has been filed. Assume you represent a client who was in a motor vehicle accident. He called you immediately and asked what to do. You told him to take pictures with his cell phone. You do not wish to disclose the existence of the pictures or the pictures themselves to the opposing counsel before trial. In order to determine whether you have to provide the pictures to the other side, you must develop the applicable rule.

1. Take apart the following statute. Present it in outline form, element by element.

   [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. . . . But . . . those materials may be discovered if:

   (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.


2. Take apart the following case law passages. Identify the rule language in each passage.

   Even if the documents are prepared in anticipation of litigation, the protection afforded in Rule 26(b)(3) is not absolute. Discovery may still be had upon a showing of “substantial need” and an inability “without undue hardship” to obtain the information by other means. The factors to be considered by the master in deciding whether to recommend an order of disclosure are (1) the importance of the information
sought and (2) the difficulty the party seeking discovery will face in obtaining substantially equivalent information from other sources if discovery is denied. *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 43 (D. Md. 1974)

[D]ocuments containing the work product of attorneys which contain the attorneys' thoughts, impressions, views, strategy, conclusions, and other similar information produced by the attorney in anticipation of litigation are to be protected when feasible. . . . [T]he critical factor becomes the availability of the non-privileged facts from other sources; and where no other sources exist, then a balance must be struck in favor of distilling, if possible, the non-privileged facts from the attorney's documents. *Xerox Corp. v. IBM Corp.* 64 F.R.D. 367, 381 (S.D.N.Y. 1974).

As to these documents prepared in anticipation of litigation, plaintiff has not shown substantial need for these materials or the inability without undue hardship to obtain the substantial equivalent of these materials. Defendant already has disclosed numerous documents relating to the substance of its internal investigation. . . . Additionally, plaintiff has been free to depose those individuals involved in the decision-making process; there has been no showing that any of the relevant witnesses are unavailable. Discovery of work product may be denied if the same information can be obtained by deposition. *Miller v. Fed. Express Corp.*, 186 F.R.D. 376, 388 (W.D. Tenn. 1999).

Attorney opinion work product, unlike ordinary or fact work product, cannot be ordered disclosed simply on showing of substantial need and inability to obtain equivalent without undue hardship; immunity from discovery for opinion work product is absolute or nearly absolute. *U.S. ex rel. Yannacopoulos v. Gen'l Dynamics*, 231 F.R.D. 378, 382 (N.D. Ill. 2005).

3. What, if anything, does each case add to the rule you originally outlined? If a case adds something to the rule, you should add that to your rule as well. To
do that, integrate the case law passages into your outline of the statute’s language, adding transitions as needed.