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DISCOVERY UNDER THE FEDERAL RULES OF CIVIL PROCEDURE OF ATTORNEY OPINION WORK PRODUCT PROVIDED TO AN EXPERT WITNESS

INTRODUCTION

In the course of preparing his case, an attorney may find it necessary to show trial preparation materials, including opinion work product, to


This Note will distinguish factual trial preparation material from opinion trial preparation material. The former will be identified as factual work product and the latter as opinion work product. The issue whether material is actually opinion work product within the meaning of Rule 26(b)(3) is a question of fact to be decided by the court. See Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595-96 (3d Cir. 1984) (when ordering production of factual work product, trial judge should review documents in camera to guard against disclosure of opinion work product); see also Fed. R. Civ. P. 26(b)(3) (when ordering discovery of factual work product court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney"). If opinion work product and factual work product are embodied in the same document, the documents should be produced in redacted form in order to prevent disclosure of opinion work product to an adversary. See Fed. R. Civ. P. 26(b)(3) advisory committee note.


Factual work product is "less a matter of creative legal thought and more a mere recognition of observed fact." Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1199-1200 (D.S.C. 1974). Unlike opinion work product, factual work product does not contain an attorney's mental impressions, strategies or legal theories. Factual work product consists merely of the factual materials obtained by an attorney and the manner in which such materials are organized. See Note, Waiver of the Work Product Immunity, 1981 U. Ill. L. Rev. 953, 959 [hereinafter cited as Waiver of Immunity].

3. An expert witness may be characterized as someone who has "the power to draw inferences from the facts which a jury would not be competent to draw." C. McCormick, McCormick on Evidence § 13, at 33 (E. Cleary 3d ed. 1984) [hereinafter cited as McCormick on Evidence]; see 7 J. Wigmores, Evidence in Trials at Common Law §§ 1923, 1925 (J. Chadbourn rev. ed. 1978). The Federal Rules of Evidence state that a witness may be qualified as an expert by virtue of his "scientific, technical, or other specialized . . . knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Typically, a witness qualifies as an expert if he has sufficient knowledge of a subject to offer opinions that are likely to aid the trier of fact. See 7 J. Wigmores, supra, § 1925; see, e.g., Sweet v. United States, 687 F.2d 246, 249 (8th Cir. 1982); Mannino v. International Mfg. Co., 650 F.2d 846, 851 (6th Cir. 1981); Holmgren v. Massey-Ferguson, Inc., 516 F.2d 856, 857-58 (8th Cir. 1975); Stoody Co. v. Royer, 374 F.2d 672, 677 (10th Cir. 1967) (quoting Restatement Model Code of Evidence § 402). Under the Federal Rules of Evidence, an expert may give both opinion and nonopinion testimony. See Fed. R. Evid. 702 & advisory committee note.

4. Fed. R. Civ. P. 26(b)(3) provides in part:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.


5. Fed. R. Civ. P. 26(b)(3). For material to be considered as having been prepared in "anticipation of litigation," litigation need not actually have been commenced, but the prospect of litigation must be real and identifiable. See 4 Moore's Federal Practice, supra note 1, ¶ 26.64[2], at 26-352 to -353; 8 C. Wright & A. Miller, supra note 1, § 2024, at 197-98; see, e.g., Coastal States Gas Corp. v. United States Dep't of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980) (some articulable claim must exist); In re Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979) (some possibility of litigation must actually exist); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 143 (D. Del. 1982) ("mere fact that a document is prepared before litigation actually commences does not preclude a finding that it constitutes work product"); Hercules Inc. v. Exxon Corp., 434 F. Supp.
undue hardship. By requiring a significant showing to justify discovery,


The protection accorded opinion work product is not limited solely to materials prepared by an attorney. Materials prepared in anticipation of litigation by or for a party's representative "including his attorney, consultant, surety, indemnitor, insurer, or agent" are also immunized. Fed. R. Civ. P. 26(b)(3). This Note is concerned only with trial preparation materials that are provided by an attorney to an expert witness. It will not examine the problems attendant on the discovery of material prepared by an expert witness for an attorney, which is governed by Rule 26(b)(4).

6. Fed. R. Civ. P. 26(b)(3). The district courts have broad discretion in determining whether substantial need and undue hardship has been shown. See In re International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1240 (5th Cir. 1982); Southern Ry. v. Lanham, 403 F.2d 119, 126 (5th Cir. 1968); United States v. Chatham City Corp., 72 F.R.D. 640, 644 (S.D. Ga. 1976); 4 Moore's Federal Practice, supra note 1, ¶ 26.64[3]-1, at 26-362. A mere showing that material is relevant to a party's case is insufficient to compel discovery. See id. ¶ 26.64[3]-1, at 26-362 to -363. To compel discovery under the substantial need and undue hardship standard, a party must demonstrate that the materials are important to his case and that he cannot obtain the substantial equivalent of the materials elsewhere. See Fed. R. Civ. P. 26(b)(3); 4 Moore's Federal Practice, supra note 1, ¶ 26.64[3]-1, at 26-362; 8 C. Wright & A. Miller, supra note 1, § 2025, at 224-25; Note, Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules, 88 Yale L.J. 390, 397 & n.46 (1978) [hereinafter cited as Memory Refreshment Doctrine].

Substantial need and undue hardship have been shown when witnesses are no longer available. See, e.g., In re Grand Jury Investigation, 599 F.2d 1224, 1231-32 (3d Cir. 1979) (witness deceased); McDougall v. Dunn, 468 F.2d 468, 473-74 (4th Cir. 1972) (amnesia victim entitled to statements taken by defendant's insurer); In re Grand Jury Subpoena, 81 F.R.D. 691, 695 (S.D.N.Y. 1979) (witness refused to testify unless granted immunity, hence unavailable to government); Teribery v. Norfolk & W. Ry., 68 F.R.D. 46, 47-48 (W.D. Pa. 1975) (only known living witness unable to remember certain facts); Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974) (witnesses unable to remember who in defendant's employ had access to trade secrets). Substantial need and undue hardship have also been shown when information is in the exclusive possession of one party. See, e.g., Loctite Corp. v. Fel-Pro, Inc., 667 F.2d 577, 582 (7th Cir. 1981) (defendant's test results to establish plaintiff's claim in patent infringement action); Gallambus v. Consolidated Freightways Corp., 64 F.R.D. 468, 473 (N.D. Ind. 1974) (photographs taken immediately after accident); Rackers v. Siegfried, 54 F.R.D. 24, 26 (W.D. Mo. 1971) (precise measurements and diagrams of accident scene). Statements taken contemporaneously with or shortly after an accident have been held to be unique, see, e.g., Gillman v. United States, 53 F.R.D. 316, 319 (S.D.N.Y. 1971); 8 C. Wright & A. Miller, supra note 1, § 2025, at 220-21, and hence subject to discovery under the substantial need and undue hardship standard, cf. Southern Ry. v. Lanham, 403 F.2d 119, 128-29 (5th Cir. 1968) (statements taken shortly after accident subject to discovery under then-existing good cause standard) (quoting Johnson v. Ford, 35 F.R.D. 347, 350 (D. Colo. 1964)); 8 C. Wright & A. Miller, supra note 1, § 2025, at 220-24.
Rule 26(b)(3) in effect furnishes the attorney with "a zone of privacy"7 in which to prepare his client's case. The Rule further provides that in ordering such discovery the court shall guard against disclosure of opinion work product—notably the mental impressions, thought processes, opinions and legal theories of counsel.8 Thus, Rule 26(b)(3) accords attorney work product a qualified immunity from discovery9 that rises to a virtual absolute immunity for opinion work product.10

When opinion work product is shown to an expert witness in preparation for trial, however, the policies underlying this immunity come into conflict with the policies embodied in the liberal discovery of Rule 26(b)(4).11 Promulgated to allow for broader discovery of facts known

7. In re Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980); Coastal States Gas Corp. v. United States Dep't of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 142-43 (D. Del. 1982); see, e.g., United States v. Nobles, 422 U.S. 225, 238 (1975); Bogosian v. Gulf Oil Corp., 738 F.2d 587, 592 (3d Cir. 1984); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 482-83 (4th Cir. 1974); cf. Hickman v. Taylor, 329 U.S. 495, 510-12 (1947) (witness interview notes and opinion work product not discoverable). Examination of the issue whether work product immunity can be invoked only by the attorney or by both the attorney and his client is beyond the scope of this Note.
10. See In re Sealed Case, 676 F.2d 793, 809-10 (D.C. Cir. 1982) (extraordinary showing required for discovery of opinion work product); In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (opinion work product discoverable only in "special circumstances"); In re Murphy, 560 F.2d 326, 336 (8th Cir. 1977) (opinion work product entitled to near absolute protection); Fed. R. Civ. P. 26(b)(3) advisory committee note ("[t]he courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories"); see also Upjohn Co. v. United States, 449 U.S. 383, 399 (1981) ("Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes."); cf. Hickman v. Taylor, 329 U.S. 495, 513 (1947) (witness interview notes discoverable only in "rare situations"). Some courts have gone so far as to hold that opinion work product is in fact entitled to absolute protection. See infra note 17 and accompanying text.
11. See Fed. R. Civ. P. 26(b)(4). In pertinent part, this Rule provides:
    Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
    (A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.
Fed. R. Civ. P. 26(b)(4). Rule 26(b)(4) was intended to overcome obstacles to discovery of the identity, findings and underlying data of expert witnesses. See Fed. R. Civ. P. 26(b)(4) advisory committee note; Fed. R. Evid. 705 advisory committee note. Rule
and opinions held by trial experts. Rule 26(b)(4) provides that a party may discover the identity of experts designated as trial witnesses together with the basis and substance of the expert witness' opinion. Further discovery may be obtained upon motion. The Rule has been interpreted as depriving the expert witness' findings of the immunity granted to attorney work product. Under Rule 26(b)(4), therefore, a party may theoretically seek to compel production of the opinion work product that Rule 26(b)(3) counsels the courts to protect.

To ask whether opinion work product shown to an expert witness should be discoverable under Rule 26(b)(4) is another way of asking whether and under what circumstances opinion work product should be absolutely immune from discovery. Some courts have held that opinion work product is entitled to absolute immunity from discovery in all situations; by inference, this would also include 26(b)(4) discovery requests.


See Fed. R. Civ. P. 26(b)(4). Rule 26(b)(4)(A) distinguishes between experts expected to be called as trial witnesses, see Fed. R. Civ. P. 26(b)(4)(A)(i), and experts utilized in anticipation of litigation but who are not expected to testify, see Fed. R. Civ. P. 26(b)(4)(B). Facts known or opinions held by the latter may be discovered “upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.” Id. Facts and opinions may also be discovered pursuant to Rule 35(b), which governs discovery of reports prepared by a physician following a court-ordered medical examination of a party. See Fed. R. Civ. P. 35(b). This Note will be limited to an examination of the interaction of Rules 26(b)(3) and (b)(4) only as it pertains to experts designated as trial witnesses.


See id.


Other courts entertain a very limited exception for this immunity that would permit discovery of opinion work product only when that material relates directly to a crime or fraud\textsuperscript{19} or is itself at issue.\textsuperscript{19} Like the first view, this view would not subject opinion work product to (b)(4) discovery.\textsuperscript{20} Still other courts employ a balancing test in deciding whether opinion work product is discoverable;\textsuperscript{21} because discovery is ordered largely at the judge’s discretion, this could conceivably result in discovery of opinion work product under (b)(4). Another view holds that the immunity accorded opinion work product is qualified and may be waived.\textsuperscript{22} Under this fourth view, disclosure of opinion work product to

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18. See, e.g., In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982); In re Doc, 662 F.2d 1073, 1079-80 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); In re Murphy, 560 F.2d 326, 336 n.19 (8th Cir. 1977); American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706, 709 (W.D. Mo. 1978); see also Protection of Opinion Work Product, supra note 2, at 341-45 (crime or fraud exception maintains integrity of judicial system).


21. See, e.g., Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), aff’d per curiam by an equally divided Court, 400 U.S. 348 (1971); Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974); IT&T Corp. v. United Tel. Co., 60 F.R.D. 177 (M.D. Fla. 1973). In United Tel. Co., the court concluded that opinion work product is entitled to greater protection than factual work product, see 60 F.R.D. at 186-87, but did not specify what showing was necessary to compel discovery of opinion work product, see id. In Harper & Row Publishers, the court, in holding that opinion work product was not discoverable, concluded that “the less the lawyer’s ‘mental processes’ are involved, the less will be the burden to show good cause.” 423 F.2d at 492. The court in Xerox Corp., found itself confronted with a situation in which factual work product and opinion work product were intertwined. See 64 F.R.D. at 381-82. The court concluded that if a “distillation” of the factual from the opinion work product was impossible, the entire document must be produced. See id.

22. See, e.g., In re Sealed Case, 676 F.2d 793, 824-25 (D.C. Cir. 1982) (participation in SEC’s voluntary disclosure program constitutes waiver); Boring v. Keller, 97 F.R.D. 404, 407 (D. Colo. 1983) (showing opinion work product to expert witness constitutes waiver); see also United States v. Nobles, 422 U.S. 225, 239-40 & n.14 (1975) (using witness interview notes to discredit witnesses at trial constitutes waiver of notes’ protec-
an expert amounts to a waiver, so that (b)(4) discovery would be accomplished despite (b)(3) constraints.\(^\text{23}\)

The approach that is most consistent with the policies behind Rules 26(b)(3) and 26(b)(4) is one that would protect opinion work product from Rule 26(b)(3) discovery requests in all but a few narrowly defined circumstances, and that would protect opinion work product from Rule 26(b)(4) discovery requests at all times.\(^\text{24}\) This interpretation elevates the protection afforded by Rule 26(b)(3) over the liberal discovery embodied in Rule 26(b)(4). This Note therefore concludes that opinion work product utilized by an expert witness in preparation for trial should be absolutely immune from discovery under Rule 26(b)(4). Part I of this Note analyzes the language, history and purpose of Rules 26(b)(3) and 26(b)(4) and concludes that according opinion work product absolute immunity from a Rule 26(b)(4) discovery request is not inconsistent with the policies underlying either rule. Part II discusses various theories of waiver of work product immunity and concludes that they are either incorrect or inapposite to the issue at hand.

I. OPINION WORK PRODUCT ENTITLED TO NEAR ABSOLUTE IMMUNITY

A. Origin and Language of Rule 26(b)(3)

The history and policies underlying Rule 26(b)(3) make opinion work product discoverable only in rare and narrowly defined circumstances. The Rule is essentially a codification of the Supreme Court's decision in Hickman v. Taylor.\(^\text{25}\) In that case, the Court upheld a refusal by defendant's counsel to produce notes taken during interviews of witnesses who had testified at an earlier public hearing.\(^\text{26}\) The Supreme Court, acknowledging a lawyer's need for privacy in order to prepare his client's


\(^{24}\) See Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984). That court concluded that the value of using opinion work product to cross-examine an expert witness did "not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product." Id. This approach essentially applies to Rule 26(b)(4) discovery requests the general rule set forth in the second view, which recognizes only the crime, fraud and "at issue" exceptions to the otherwise absolute immunity accorded to opinion work product. See supra notes 18-20 and accompanying text. For the purposes of this Note, the phrase "absolute immunity" will be used only when discussing the protection from Rule 26(b)(4) discovery enjoyed by opinion work product. When discussing the opinion work product protections in terms of other discovery requests, the expression "near absolute immunity" will be used.

\(^{25}\) 329 U.S. 495 (1947).

\(^{26}\) See id. at 509.
case properly,\textsuperscript{27} made clear that interview notes and writings reflecting the attorney's mental impressions, conclusions or legal theories are entitled to broad if not absolute protection from discovery.\textsuperscript{28} The Court observed: "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."\textsuperscript{29} The \textit{Hickman} Court reasoned that an attorney must be able to plan his strategy and outline his legal theories without undue interference.\textsuperscript{30}

Rule 26(b)(3) was adopted to implement the \textit{Hickman} principle of broad immunity from discovery for opinion work product.\textsuperscript{31} As noted above, the substantial showing required for disclosure of factual work product\textsuperscript{32} is enhanced for opinion work product:\textsuperscript{33} When ordering discovery of trial preparation materials, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."\textsuperscript{34} This language indicates that something more than a showing of substantial need and undue hardship is required to compel discovery of this special type of work product.\textsuperscript{35} To many courts this protection rises almost to the level of absolute immunity that should not be abrogated.

\textsuperscript{27} See \textit{id.} at 510-11.


\textsuperscript{30} See \textit{Hickman}, 329 U.S. at 510-11. The Court observed: "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." \textit{id.} at 511.


\textsuperscript{32} See \textit{supra} note 6 and accompanying text.
\textsuperscript{33} See \textit{supra} notes 8-10 and accompanying text.
\textsuperscript{34} Fed. R. Civ. P. 26(b)(3).

even when the policies of another rule may conflict. It could be argued, however, that the liberal discovery principles of Rule 26(b)(4) take precedence over the protections afforded by Rule 26(b)(3). The first sentence of Rule 26(b)(3) indicates that the discovery rules contained therein are “subject to” the provisions of Rule 26(b)(4), which provides the exclusive mechanism for the discovery of facts known and opinions held by an expert witness. Because the basis of an expert witness’ findings is often derived from the factual work product shown to him by the attorney, arguably the practical effect of this “subject to” provision is to make such work product discoverable without any showing of substantial need and undue hardship. Thus, the protection provided by Rule 26(b)(3) for factual work product necessarily yields to Rule 26(b)(4)’s broad discovery rule.

The “subject to” provision, however, does not pertain to, and therefore does not limit the effect of, the second sentence, which requires courts to provide heightened protection for opinion work product when factual trial preparation materials are produced. The second sentence operates independently of the “subject to” provision. As an outgrowth of the Hickman doctrine, it exempts opinion work product from the discovery permitted in the first sentence, however accomplished. As written, the Rule implies a two step process in ordering discovery of trial preparation materials: First, the party seeking discovery must satisfy the requirements of Rule 26(b)(3)’s first sentence—the substantial need/undue hardship standard or the more flexible rules of Rule 26(b)(4)—as appro-

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42. See id.
priate; second, the court must prevent disclosure of opinion work product among the materials sought and obtained. There is no suggestion in the language of Rule 26(b) that would call for abandoning the heightened protection that Rule 26(b)(3) provides for opinion work product. Accordingly, opinion work product—shielded by Rule 26(b)(3)—would not be discoverable under Rule 26(b)(4). This conclusion is reinforced by the policies underlying both rules.

B. Policy Considerations of Rules 26(b)(3) and 26(b)(4)

1. Policy of Heightened Protection: Rule 26(b)(3)

The practice of according opinion work product shown to an expert witness absolute immunity from 26(b)(4) discovery follows directly from the greater principle that opinion work product should be protected from disclosure in all but a few exceptional circumstances. Recognizing these exceptions is necessary in order to maintain the integrity of the adversary system, which requires each attorney to prepare his case fully and without undue interference. While a trial should be a search for truth rather than a "battle of wits" between counsel, the federal discovery rules were not intended "to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary." The Hickman Court recognized that a lawyer needs privacy to prepare

43. See Fed. R. Civ. P. 26(b)(3) (court's obligation to protect opinion work arises "when the required showing [for discovery of factual work product] has been made").

44. See id. See supra notes 4, 11.

45. See infra notes 46-66, 84-94 and accompanying text.


49. See 8 C. Wright & A. Miller, supra note 1, § 2001, at 14 (prior to adoption of federal discovery rules, "judicial proceeding was a battle of wits rather than a search for the truth").

his client's case properly.\textsuperscript{51}

The work product doctrine seeks to promote an atmosphere in which counsel can prepare their clients' cases "without the stifling self-editing that would be necessary if an attorney's work product was subject to unchecked discovery."\textsuperscript{52} These policies apply with even greater force to opinion work product.\textsuperscript{53} Compelling an attorney to reveal his innermost thoughts or legal theories would frustrate the goals of the adversary system by forcing an attorney to provide materials incorporating his reasoning and ideas to his opponent.\textsuperscript{54}

The Court in Hickman also concluded that an immunity for work product was necessary to maintain the ethical standards of the legal profession.\textsuperscript{55} If an attorney could not prepare for litigation in privacy, "[a]n attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial."\textsuperscript{56} Without an immunity for work product, situations could arise in which the attorney would in effect be a witness or would have his credibility placed in question.\textsuperscript{57} Counsel would also be reluctant to take written notes.\textsuperscript{58}
thus placing greater dependence on memory. Furthermore, broad discovery of work product might discourage complete preparation and first-hand investigation.

The protections ensured by opinion work product immunity cannot be achieved by any other safeguard. The attorney-client privilege is inadequate because it protects only confidential communications between the attorney and his client and does not pertain to information that an attorney acquires from agents or his own investigation. Moreover, it

Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.

Hickman, 329 U.S. at 512-13; see In re Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (discovery of interview memoranda risks converting attorney from advocate to witness); see also Hickman, 329 U.S. at 516-17 (1947) (Jackson, J., concurring) (if attorney was compelled to produce notes of witness interviews, adversary might be able to use them to impeach witness, thus placing attorney's credibility in question).


60. See United States v. AT&T Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980); see also Cohn, supra note 5, at 919-20 (discovery of opinion work product would cause attorneys to rely on adversary's work); Protection of Opinion Work Product, supra note 2, at 335 (same).

61. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Fisher v. United States, 425 U.S. 391, 403 (1976); Hickman v. Taylor, 329 U.S. 495, 508 (1947); In re Sealed Case, 676 F.2d 793, 808-09 (D.C. Cir. 1982); United States v. AT&T Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980); In re Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 62 (7th Cir. 1980). The attorney-client privilege and the work product doctrine protect different interests. See Upjohn, 449 U.S. at 397-98; Hickman, 329 U.S. at 508; Sealed Case, 676 F.2d at 808-09; AT&T Co., 642 F.2d at 1299; 1978 Grand Jury (II), 640 F.2d at 62; McCormick on Evidence, supra note 3, § 87, at 204-06; 4 Moore's Federal Practice, supra note 1, ¶ 26.60[2], at 26-189 to -193; 8 C. Wright & A. Miller, supra note 1, § 2024, at 210. As one court observed:

The purpose of the attorney-client privilege is to encourage full disclosure of information between an attorney and his client by guarantying the inviolability of their confidential communications. The "work product of the attorney," on the other hand, is afforded protection for the purpose of preserving our adversary system of litigation by assuring an attorney that his private files shall, except in unusual circumstances, remain free from encroachments of opposing counsel.


62. See, e.g., Hickman v. Taylor, 329 U.S. 495, 508 (1947) (attorney-client privilege does not extend to opinion work product); In re Sealed Case, 676 F.2d 793, 808-09 (D.C. Cir. 1982) (information other than attorney-client communications not protected by at-
may be invoked only by the client or the client’s attorney or agent on his behalf. 63 Finally, the attorney-client privilege is subject to strict waiver rules 64 that, if broadly construed, 65 might sanction discovery of confidential work product without regard for Rule 26(b)(3)’s equally compelling policy interests discouraging disclosure. 66 For these reasons, the attorney-client privilege would serve to protect only a fraction of the litigation materials vital to the effective prosecution of a claim. Unless opinion work product shown to expert witnesses is absolutely immune from Rule 26(b)(4) discovery, it would be improperly vulnerable to disclosure.

It has been argued that allowing an adversary access to opinion work product is necessary for impeachment or rebuttal—in order, for example, to challenge the origin or validity of the expert’s opinion. 67 Discovery of an attorney’s mental impressions and theories, is, however, a needlessly intrusive means of accomplishing these goals, particularly because Rule 26(b)(4) allows for liberal discovery of the facts underlying the expert’s opinion 68 to impeach or cross-examine that expert. 69 Access to these

References:

63. See In re Grand Jury Investigation, 604 F.2d 672, 675 (D.C. Cir.), cert. denied, 444 U.S. 915 (1979); United States v. Partin, 601 F.2d 1000, 1009 (9th Cir. 1979), cert. denied, 466 U.S. 964 (1980); Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967); McCormick on Evidence, supra note 3, § 92, at 221; 4 Moore’s Federal Practice, supra note 1, ¶ 26.64[4], at 26-390.


65. See infra notes 94-102 and accompanying text.


67. See Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984) (Becker, J., dissenting); Boring v. Keller, 97 F.R.D. 404, 407-08 (D. Colo. 1983); see also Fed. R. Civ. P. 26(b)(4) advisory committee note (“The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary’s expert will take or the data on which he will base his judgment . . . . Effective rebuttal requires advance knowledge of the line of testimony of the other side.”) (citations omitted).

facts is sufficient for effective impeachment. Acquisition of the attorney's opinions and theories from which the expert's opinion was derived would contribute little of significance and hence would be unnecessary.\textsuperscript{70}

Rule 26(b)(4) vests the trial court with broad discretion to order expansive discovery of an expert's findings.\textsuperscript{71} Under Rule 26(b)(4), a court should permit discovery of all relevant and nonprivileged material if there is no unfairness to the party from whom discovery is sought.\textsuperscript{72} Arguably, disallowing discovery of opinion work product provided to an expert frustrates the purposes of Rule 26(b)(4).\textsuperscript{73} However, an adverse

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\textsuperscript{69} See Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984); United States v. IBM Corp., 66 F.R.D. 215, 218 (S.D.N.Y. 1974); Fed. R. Civ. P. 26(b)(4) advisory committee note; 4 Moore's Federal Practice, supra note 1, § 26.66[3], at 26-410 to -411; 8 C. Wright & A. Miller, supra note 1, § 2030, at 251. As the court in Bogosian observed:

"The thrust of Rule 26(b)(4) is to permit discovery of facts known or opinions held by the expert. Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory."

Bogosian, 738 F.2d at 595.

\textsuperscript{70} See Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984).

\textsuperscript{71} See Fed. R. Civ. P. 26(b) advisory committee note (courts have broad powers of discovery when materials are sought under Rule 26(b)); Connors, \textit{A New Look at an Old Concern—Protecting Expert Information From Discovery Under the Federal Rules}, 18 Duq. L. Rev. 271, 272 (1980) ("in this area of the law very much is left to the whim, sometimes called 'discretion' of each particular judge").


\textsuperscript{73} See supra notes 68-69 and accompanying text.
party having broad access to the facts and data used by the expert in reaching his conclusion would have little need of or justification for seeking production of opinion work product.

It could also be argued that it is relevant to the fact finder's assessment of the expert's credibility whether the expert's opinion originated with the attorney or with the expert himself. If the expert's findings are debatable or flawed, however, an attorney who has the factual basis for these findings at his disposal should be sufficiently equipped to identify the flaw and cross-examine the expert accordingly. Conversely, if the expert's conclusions are valid, the need for opinion work product to rebut or impeach the expert does not justify intrusion into an attorney's opinion work product. Even if the attorney originated the idea, the expert, by testifying to it at trial, in effect subscribes to or ratifies it, thereby giving the idea the same weight as if the expert had formulated it himself. Moreover, under Federal Rule of Evidence 705, the attorney cross-examining the expert can inquire into the origins of the expert's opinion. Therefore, the fact that the expert's findings or theories originated in whole or in part with the attorney will be revealed on cross-examination, thus obviating the need to discover documents constituting opinion work product.

In sum, the need to obtain disclosure of opinion work product for the purpose of cross-examining the expert does not outweigh the competing need to protect that material from intrusive discovery. Thus, granting opinion work product immunity from discovery under Rule 26(b)(4) strikes an effective balance between the need to preserve the integrity of the adversary system and the policy of liberal discovery upon which the Federal Rules are premised.

If opinion work product is discoverable at all, its disclosure should be limited to narrow and well defined circumstances. Some courts have recognized exceptions for crime or fraud or when the opinion work product itself is at issue. These exceptions to opinion work product immunity are concerned with maintaining the integrity of the judicial

75. See id. (Becker, J., dissenting). Fed. R. Evid. 705 provides:
The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.
Id. Arguably, examination into the the facts underlying the expert's opinion may also include inquiries into the origin of that opinion. Because of Rule 26(b)(4) the cross-examining attorney will have sufficient access to factual material forming the expert's opinion to be able to make an inquiry into any role an attorney may have played in formulating the expert's opinion.
77. See supra notes 18-20 and accompanying text.
78. See supra note 18 and accompanying text.
79. See supra note 19 and accompanying text.
In each case discovery is necessary for the purpose of proving a claim or presenting a defense. Discovery in those situations in no way subverts the policies favoring absolute immunity for opinion work product shown to expert witnesses when these narrow concerns are not at issue; therefore, neither doctrine should operate to impair the other. Absolute immunity for opinion work product shown to expert witnesses as a general rule is therefore not inconsistent with the common law exceptions that have developed around it.

Finally, failure to protect opinion work product that is shown to an expert may discourage attorneys from using experts in presenting their clients' cases. This may have significant adverse effects on the presentation of the client's case, particularly in actions when expert testimony goes to the heart of the issue.

2. Policy of Broad Discovery: Rule 26(b)(4)

Rule 26(b)(4) affords adverse counsel liberal discovery privileges to obtain material shown to experts in anticipation of trial. Prior to the adoption of Rule 26(b)(4), a variety of theories were advanced for denying discovery of an expert witness' findings and the underlying factual basis for them. Some courts had held that an expert's findings were pro-

80. See In re Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982); In re Doe, 662 F.2d 1073, 1079 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); In re Murphy, 560 F.2d 326, 335 (8th Cir. 1977); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 931-33 (N.D. Cal. 1976); Protection of Opinion Work Product, supra note 2, at 343-45.


82. It could also be argued that in the situation where an attorney participates in a crime or fraud, the interest of maintaining the integrity of the judicial system outweighs the need for protecting the attorney's work product.


84. See supra notes 11-15 and accompanying text.
tected by the attorney-client privilege.\textsuperscript{85} Other courts, reasoning that the expert was an agent of the attorney, held that the expert witness' findings were protected by Hickman's work product immunity doctrine.\textsuperscript{86} Still other courts developed and applied an "unfairness" doctrine to justify denying discovery of expert witnesses.\textsuperscript{87} Courts relying on this doctrine denied discovery when they were convinced that it would be unfair to allow one party to benefit from the expertise of an expert retained by the other party, particularly when the party seeking discovery can procure its own expert testimony.\textsuperscript{88}

\textsuperscript{85} See, e.g., Schuyler v. United Air Lines, 10 F.R.D. 111, 113 (M.D. Pa. 1950) (expert report obtained after commencement of litigation privileged whether obtained by attorney or client); Cold Metal Process Co. v. Aluminum Co. of Am., 7 F.R.D. 684, 686-87 (D. Mass. 1947) (expert is agent of party so findings are protected by attorney-client privilege); Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21, 23 (W.D. Pa. 1940) (expert not required to divulge any communications between himself and attorney or client). This view is difficult to sustain in light of the Court's conclusion in Hickman that "the protective cloak of this [attorney-client] privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation." Hickman v. Taylor, 329 U.S. 495, 508 (1947); see 4 Moore's Federal Practice, supra note 1, § 26.66[1], at 26-405; Note, Discovery of Experts: A Historical Problem and a Proposed FRCP Solution, 53 Minn. L. Rev. 785, 795-97 (1969) [hereinafter cited as Discovery of Experts].


One problem with this view is that the expert's findings, unlike those of other agents, constitute evidence. See Friedenthal, Discovery and Use of an Adverse Party's Expert Information, 14 Stan. L. Rev. 455, 479 (1962); Graham, supra note 16, at 901; Discovery of Experts, supra note 85, at 795-96. Additionally, a major policy consideration underlying the work product doctrine is to avoid situations in which the attorney in effect becomes a witness. See supra note 57 and accompanying text. Concealing the expert witness findings under the cloak of the work product doctrine does not serve this function because the expert is a proper witness. See Long, Discovery and Experts Under the Federal Rules of Civil Procedure, 39 Wash. L. Rev. 665, 691 (1964); Discovery of Experts, supra note 85, at 796.


Rule 26(b)(4) was adopted to end this confusion. In drafting the Rule, the Advisory Committee acknowledged that a lawyer requires advance preparation in order to cross-examine an expert witness effectively for the purpose of rebutting his findings. It expressly rejected the holding that an expert witness' findings were protected by the work product doctrine. Rule 26(b)(4) in effect codified the unfairness doctrine. Under this Rule, all nonprivileged and relevant materials that an expert witness used in preparing his findings may be discovered, thus facilitating the effective cross-examination and impeachment of that expert. Accordingly, because extensive factual materials are already available to the opposing party, there would be no need to order production of opinion work product shown to an expert witness.

II. Theories of Waiver Inapproriate

Rule 26(b)(4) does not provide the courts with any standards to use in


Decisions prior to the adoption of Rule 26(b)(4) also relied on a variety of other theories in denying discovery. Under one view, the expert witness' information was regarded as the property of the expert or the litigant employing him. See Graham, supra note 16, at 902; see, e.g., Walsh v. Reynolds Metals Co. 15 F.R.D. 376, 378 (D.N.J. 1954) (expert had property interest in his own expert conclusions); United States v. Certain Parcels of Land, 15 F.R.D. 224, 235 (S.D. Cal. 1953) (appraiser had property right in report).

Another view maintained that it is unfair for one party to have the benefit of the expert's knowledge without paying for it. See United States v. 23.76 Acres of Land, 32 F.R.D. 593, 597 (D. Md. 1963); Fed. R. Civ. P. 26(b)(4)(C) advisory committee note. Rule 26(b)(4)(C) provides:

Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

Fed. R. Civ. P. 26(b)(4)(C). Discovery may not be automatically obtained, however, merely by offering to pay the expert's fees. See Fed. R. Civ. P. 26(b)(4)(C) advisory committee note; cf. Boynton v. R.J. Reynolds Tobacco Co., 36 F. Supp. 593, 595 (D. Mass. 1941) (pre-rule case; court denied discovery even though adversary offered to pay expert witness' fee). Some courts, however, had held that there were situations in which granting discovery of expert witnesses was not unfair. See, e.g., United States v. 2,001.10 Acres of Land, 48 F.R.D. 303, 307 (N.D. Ga. 1969) (not unfair to exchange reports once each party had prepared their own); United States v. 23.76 Acres of Land, 32 F.R.D. 593, 597 (D. Md. 1963) (not unfair to grant discovery of expert witness because opposing party will pay).


91. See id.

92. See id.

93. See supra notes 11-16 and accompanying text.

94. See supra notes 68-73 and accompanying text.
determining whether further discovery of an expert witness should be ordered.\textsuperscript{95} Courts attempting to resolve discovery disputes involving opinion work product shown to an expert might be tempted to analogize to waiver theories applicable to the attorney-client privilege or Federal Rule of Evidence 612.\textsuperscript{96} These approaches fail to appreciate the overriding importance of maintaining the integrity of opinion work product in our adversary system.\textsuperscript{97}

A. Mere Disclosure of Opinion Work Product To A Third Party Does Not Waive The Immunity

Cases that have held that mere disclosure of work product to third persons constitutes a waiver of work product immunity\textsuperscript{98} tend to confuse the work product doctrine with the attorney-client privilege.\textsuperscript{99} The work product immunity is broader than and encompasses the attorney-client privilege.\textsuperscript{100} Because the work product doctrine and the attorney-client privilege serve different purposes,\textsuperscript{101} the waiver rules of one should not apply to the other.\textsuperscript{102} It would thus be inappropriate to rely on attorney-client waiver principles to strip opinion work product shown to experts of its immunity.

Courts that recognize the different policies underlying the work product doctrine have adopted a "common interest" test to respond to discovery requests.\textsuperscript{103} This test dictates that work product immunity is not waived when the work product is shown to someone with a common interest in the litigation.\textsuperscript{104} It would be waived only when disclosure to a

\textsuperscript{95} See \textit{supra} note 68 and accompanying text.

\textsuperscript{96} In Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983), the court relied on Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 617 (S.D.N.Y. 1977) (disclosure of work product to expert witness effects waiver of work product immunity under Federal Rule of Evidence 612) to hold that disclosure of opinion work product to an expert witness waives the immunity. \textit{Boring}, 97 F.R.D. at 407. See \textit{infra} notes 111-19 and accompanying text.

\textsuperscript{97} See \textit{supra} notes 46-53 and \textit{infra} notes 114-19 and accompanying text.


\textsuperscript{99} See 8 C. Wright & A. Miller, \textit{supra} note 1, \S 2024, at 209-10.

\textsuperscript{100} See United States v. Nobles, 422 U.S. 225, 238 n.11 (1975); Hickman v. Taylor, 329 U.S. 495, 508 (1947); \textit{In re Sealed Case}, 676 F.2d 793, 809 (D.C. Cir. 1982); \textit{In re Special Sept. 1978 Grand Jury (II)}, 640 F.2d 49, 62 (7th Cir. 1980); \textit{In re Grand Jury Proceedings}, 604 F.2d 798, 801 n.4 (3d Cir. 1979); see also United States v. AT&T Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) (disclosure made in course of trial preparation does not waive work product immunity). See \textit{supra} notes 56-60 and accompanying text.

\textsuperscript{101} See \textit{supra} notes 61-66 and accompanying text.

\textsuperscript{102} See \textit{infra} notes 103-07 and accompanying text.


\textsuperscript{104} See, e.g., United States v. AT&T Co., 642 F.2d 1285, 1300 (D.C. Cir. 1980); GAF
third person substantially increases the likelihood that the work product will fall into the adversary's hands. As one court observed:

The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation. A disclosure made in the pursuit of trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege. We conclude, then, that while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.

It follows, therefore, that opinion work product—traditionally entitled to even greater protections than factual work product—should be similarly immune from third-party waiver principles. Showing opinion work product to an expert is often indispensable to the effective preparation and prosecution of a client's case. Moreover, disclosure to an expert, like disclosure to a co-defendant or co-plaintiff, does not increase the likelihood that the work product will be revealed to the adversary. Therefore, the common interest doctrine should similarly apply to opinion work product shown to experts. Indeed, applying the strict waiver rules of the attorney-client privilege to attorney work product would compromise an attorney's ability to prepare the best case possible for his client, and would adopt an unduly rigid approach to dangers that are more speculative than real.

Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 52 (S.D.N.Y. 1979); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 447 (W.D. Mo. 1976); see also Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1984) (disclosure of opinion work product to expert does not constitute a waiver of the immunity). There is some disagreement among the courts, however, in deciding who is a party with a common interest. Compare D'Ippolito v. Cities Serv. Co., 39 F.R.D. 610, 610 (S.D.N.Y. 1965) (Justice Department and plaintiff held not parties with common interest because government not party to plaintiff's antitrust suit) with United States v. AT&T Co., 642 F.2d 1285, 1299-300 (D.C. Cir. 1980) (Justice Department held to be party with common interest under similar facts).


107. In Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984), both the district and circuit courts held that showing opinion work product to an expert witness did not constitute a waiver of the opinion work product immunity. See id. at 593. This reasoning is correct because the expert witness shares a common interest with the litigant and the attorney in the effective presentation of the litigant's case. Showing opinion work product to the expert in no way enhances the likelihood of immunized materials falling into the hands of the adversary. See supra note 105 and accompanying text.
B. Waiver Under Federal Rule of Evidence 612 is Inapposite

Federal Rule of Evidence 612 provides that an adversary may, by order of the court, obtain the written materials used by a witness to refresh his recollection. It could be contended that because Rule 26(b)(4) does not provide any guidance to courts in determining whether to grant further discovery, the principles of Rule 612 should be applied by analogy. Whatever value this analogy holds for discovery of factual work product, it is not persuasive when opinion work product is sought.

In Berkey Photo, Inc. v. Eastman Kodak Co., the district court held that work product immunity is waived when factual work product is used to refresh an expert witness' recollection. That court feared that parties would conceal discoverable materials under the guise of trial preparation. The automatic waiver rule espoused by Berkey, however, ignores the principles of Rule 26(b)(3) and has the effect of compelling discovery without a showing of any need at all, let alone substantial need and undue hardship. Although there is an obvious unfairness in

108. Fed. R. Evid. 612 provides:
Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh his memory for the purpose of testifying, either—
(1) while testifying, or
(2) before testifying, if the court in its discretion determines it is necessary in the interest of justice,
an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

Id.

109. See supra notes 95-97 and accompanying text.
111. 74 F.R.D. 613 (S.D.N.Y. 1977).
112. See id. at 617. The court, however, did not order production of the material at issue because the Federal Rules of Evidence had been adopted too recently to have allowed counsel to anticipate that they were waiving their work product immunity. See id.
113. See id. at 616-17.
115. 3 J. Weinstein & M. Berger, Weinstein's Evidence \[1981\], at 612-41 to -42 (1981); see Memory Refreshment Doctrine, supra note 6, at 401-02. Weinstein and Berger observe:

[A]utomatic disclosure whenever a witness prepares himself for a deposition by referring to pertinent materials may lead to the the very practice which troubled the Hickman court . . . . The opponent should be required to make some showing of need in order to obtain materials which a witness reviewed before a deposition instead of achieving wholesale disclosure.

3 J. Weinstein & M. Berger, supra, \[1984\], at 612-41 to -42; See also S & A Painting Co. v. O.W.B. Corp., 103 F.R.D. 407, 409 (W.D. Pa. 1984) (since disclosure of attorney work product under Fed. R. Evid. 612 circumvents substantial need/undue hardship
allowing a party to use ordinary trial preparation materials to refresh a witness' recollection and then to refuse to allow his adversary to view the documents to check for their accuracy, it would be even more unfair to use the pretext of Rule 612 to strip opinion work product of the protections assured by *Hickman* and Rule 26(b)(3). As one court observed, "[T]he purposes of Rule 612 are generally fully served without disclosure of core work product."116 As a rule, therefore, an attorney's mental impressions should be free from discovery under 612 and its attendant waiver doctrine "[u]nless the judge finds that the adverse party would be hampered in testing the accuracy of the witness' testimony."117 In any case, to preserve the sanctity of these documents, such a determination should be made by an in camera review of the materials in question, with the court weighing the importance of the confidentiality of opinion work product against the substantiality of the adverse party's need.118 In any event, if disclosure is warranted, opinion work product should be redacted.119

CONCLUSION

A rule prohibiting disclosure of opinion work product sought under Rule 26(b)(4) better effectuates the policies underlying the work product doctrine. The facts that the expert used in reaching his findings are readily discoverable. The limited impeachment value opinion work product may have is outweighed by the attorney's need to prepare his client's case in private. Since *Hickman v. Taylor*, documents comprising an attorney's core or opinion work product have been accorded a virtually sacrosanct status. This status is required if the soundness of our adversary system is to be maintained. Moreover, since *Hickman*, "the Supreme Court has never permitted intrusion into work product revealing the attorney's thought processes."120 Accordingly, providing opinion work

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117. Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co., 92 F.R.D. 779, 780 (S.D.N.Y. 1982) (quoting 3 J. Weinstein & M. Berger, *supra* note 115, ¶ 612[04], at 612-40). In Sporck v. Peil, 759 F.2d 312 (3d Cir. 1984), the court declined to resolve whether opinion work product provided a witness must be produced under Fed. R. Evid. 612. *Id.* at 318 n.7. The court held that Rule 612 was inapplicable because the party seeking disclosure failed to show the documents had an impact on the witness' testimony. *Id.* at 318-19.


120. *Id.* at 612-40.
product absolute protection from discovery under Rule 26(b)(4) most effectively achieves this goal while not impairing the policy of liberal discovery embodied in the Federal Rules.

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