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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,¹ including opinion work product,² to

1. Federal Rule of Civil Procedure 26(b)(3), which governs discovery of trial preparation materials, protects only "documents and tangible things." Fed. R. Civ. P. 26(b)(3). Courts have accorded work product protection to a computerized litigation support system, see *In re IBM Peripheral EDP Devices Antitrust Litig.*, M.D.L. No. 163-RM (N.D. Cal. Feb. 10, 1975) (available Apr. 3, 1985, on LEXIS, Genfed library, Dist file), and diagrams of an accident scene obtained or prepared by a party's attorney, see *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 59 (N.D. Ohio 1953); *Brush v. Harkins*, 9 F.R.D. 681, 682 (S.D. Mo. 1950). The work product doctrine does not prohibit a party from discovering the facts that an attorney has learned. See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982); *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131, 136 (S.D. Ga. 1982); *Casson Constr. Co. v. Armco Steel Corp.*, 91 F.R.D. 376, 385 (D. Kan. 1980); 4 J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* ¶ 26.64[1], at 26-348 (2d ed. 18th printing 1984) [hereinafter cited as *Moore's Federal Practice*]; 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2023, at 194 (1970); see also *Illinois v. Borg, Inc.*, 95 F.R.D. 7, 8 (N.D. Ill. 1981) (facts not immune from discovery even if already known to party seeking discovery); *Arco Pipeline Co. v. S/S Trade Star*, 81 F.R.D. 416, 417-18 (E.D. Pa. 1978) (party entitled to discovery of facts in attorney's possession). Similarly, it does not prohibit discovery of the existence or location of documents, *United States v. Lipshy*, 492 F. Supp. 35, 45 n.10 (N.D. Tex. 1979); *LaRocca v. State Farm Mut. Auto Ins. Co.*, 47 F.R.D. 278, 282 (W.D. Pa. 1969), or the identity of persons from whom an attorney has obtained documents, *Cedolia v. C.S. Hill Saw Mills, Inc.*, 41 F.R.D. 524, 527 (D.N.C. 1967) (names and addresses of persons who prepared photographs, drawings and maps of accident scene discoverable).

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.

2. For the purposes of this Note, opinion—or core—work product refers to the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Fed. R. Civ. P. 26(b)(3). This would include an attorney's strategy, intended lines of proof, evaluations of strengths and weaknesses of his case, and cross-examination plans. Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 Va. L. Rev. 333, 333 (1978) [hereinafter cited as *Protection of Opinion Work Product*]; see, e.g., *Hickman v. Taylor*, 329 U.S. 495, 512-13 (1947) (witness interview notes); *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985) (selection and compilation of documents in anticipation of discovery); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 590 (3d Cir. 1984) (attorney's "intellectual process"); *In re Grand Jury Proceedings*, 473 F.2d 840, 841-42 (8th Cir. 1973) (attorney's

an expert³ who will testify at trial on the client's behalf. Rule 26(b)(3) of the Federal Rules of Civil Procedure⁴ (Federal Rules) provides that materials prepared in anticipation of litigation⁵ are subject to discovery by the adverse party, but only upon a showing of substantial need and

personal recollections, notes and memoranda); *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779, 779-80 (S.D.N.Y. 1982) (digest of deposition with marginal notes by attorney); *Smedley v. Travelers Ins. Co.*, 53 F.R.D. 591, 593 (D.N.H. 1971) (inter-office memoranda).

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. Wigmore, *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. Wigmore, *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.

Id. The principles set forth in this Rule collectively form the work product doctrine, first articulated by the Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 512-13 (1947). See Fed. R. Civ. P. 26(b)(3) advisory committee note.

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.⁶ By requiring a significant showing to justify discovery,

136, 151 (D. Del. 1977) (prospect of litigation identifiable because specific claims have arisen).

Documents prepared in the regular course of business are not protected by the work product doctrine. *See* APL Corp. v. Aetna Casualty & Sur. Co., 91 F.R.D. 10, 14-15 (D. Md. 1980) (investigative report prepared by insurance company); *Soeder v. General Dynamics Corp.*, 90 F.R.D. 253, 255 (D. Nev. 1980) (corporation's internal report prepared shortly after aircraft accident); *Thomas Organ Co. v. Jadranska Slobodna Plovidba*, 54 F.R.D. 367, 371-72 (N.D. Ill. 1972) (documents prepared by insurance underwriter's surveyor); Fed. R. Civ. P. 26(b)(3) advisory committee note; 8 C. Wright & A. Miller, *supra* note 1, § 2024, at 199; Cohn, *The Work-Product Doctrine: Protection Not Privilege*, 71 Geo. L.J. 917, 925-29 (1983); *see also* *United States v. Brown*, 478 F.2d 1038, 1040-41 (7th Cir. 1973) (documents prepared by accountant advising taxpayer are discoverable).

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); *Galambus 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.

8. *See Fed. R. Civ. P. 26(b)(3)*. *See supra* note 4.

9. *See United States v. Nobles*, 422 U.S. 225, 239 (1975); *Augenti v. Cappellini*, 84 F.R.D. 73, 80 (M.D. Pa. 1979); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 931 (N.D. Cal. 1976); *Arney v. Geo. A. Hormel & Co.*, 53 F.R.D. 179, 180 (D. Minn. 1971) (mem.); *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 29-30 (N.D. Ga. 1968); *8 C. Wright & A. Miller, supra* note 1, § 2025, at 211-12; *Cohn, supra* note 5, at 929; *Waiver of Immunity, supra* note 2, at 956.

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,¹² Rule 26(b)(4) provides that a party may discover the identity of experts designated as trial witnesses¹³ together with the basis and substance of the expert witness' opinion.¹⁴ Further discovery may be obtained upon motion.¹⁵ The Rule has been interpreted as depriving the expert witness' findings of the immunity granted to attorney work product.¹⁶ 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;¹⁷ by inference, this would also include 26(b)(4) discovery requests.

26(b)(4) "allows considerable discovery of information obtained by experts." 8 C. Wright & A. Miller, *supra* note 1, § 2029, at 241; *see* Dennis v. BASF Wyandotte Corp., 101 F.R.D. 301, 303-04 (E.D. Pa. 1983); *Herbst v. IT&T Corp.*, 65 F.R.D. 528, 530-31 (D. Conn. 1975); *United States v. John R.-Piquette Corp.*, 52 F.R.D. 370, 371 (E.D. Mich. 1971).

12. *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.

13. *See* Fed. R. Civ. P. 26(b)(4)(A)(i).

14. *See id.*

15. *See* Fed. R. Civ. P. 26(b)(4)(A)(ii). Discovery under this Rule is intended to be accomplished through interrogatories before further discovery by other means may be sought. *See* *Norfin, Inc. v. IBM Corp.*, 74 F.R.D. 529, 532 (D. Colo. 1977); *Herbst v. IT&T Corp.*, 65 F.R.D. 528, 530 (D. Conn. 1975); *United States v. John R.-Piquette Corp.*, 52 F.R.D. 370, 372 (E.D. Mich. 1971); Fed. R. Civ. P. 26(b)(4)(A)(i); 4 Moore's Federal Practice, *supra* note 1, ¶ 26.66[3], at 26-411 to -413.

16. *See* *Heitmann v. Concrete Pipe Mach. Co.*, 98 F.R.D. 740, 742 (E.D. Mo. 1983); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39, 41 (N.D. Cal. 1977); *Quadriani v. Sikorsky Aircraft Div.*, 74 F.R.D. 594, 595 n.1 (D. Conn. 1977); Fed. R. Civ. P. 26(b)(4) advisory committee note; 8 C. Wright & A. Miller, *supra* note 1, § 2029, at 243; *Graham, Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. Ill. L.F. 895, 901-02.

17. *See* *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 733-34 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973); *Brown v. Hart, Schaffner & Marx*, 96 F.R.D. 64, 68 (N.D. Ill. 1982); *In re Grand Jury Investigation*, 412 F. Supp. 943, 949 (E.D. Pa. 1976); *United States v. Chatham City Corp.*, 72 F.R.D. 640, 643 n.3 (S.D. Ga. 1976); *United States v. Booth*, 399 F. Supp. 975, 978 n.1 (D.S.C. 1975); *Teribery v. Norfolk & W. Ry.*, 68 F.R.D. 46, 47 (W.D. Pa. 1975); *Smedley v. Travelers Ins. Co.*, 53 F.R.D. 591, 593 (D.N.H. 1971); 4 Moore's Federal Practice, *supra* note 1, ¶ 26.64[3.-2], at 26-383 to -389; *Cohn, supra* note 5, at 932-34; *Protection of Opinion Work Product, supra* note 2, at 337-41. In

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 fraud¹⁸ or is itself at issue.¹⁹ Like the first view, this view would not subject opinion work product to (b)(4) discovery.²⁰ Still other courts employ a balancing test in deciding whether opinion work product is discoverable;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.²² Under this fourth view, disclosure of opinion work product to

Upjohn Co. v. United States, 449 U.S. 383 (1981), the Supreme Court held that a far stronger showing than substantial need and undue hardship was required to compel production of opinion work product, but declined to decide whether opinion work product was absolutely immune from discovery. *See id.* at 401-02.

18. *See, e.g., In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982); *In re Doe*, 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).

19. *See* 4 Moore's Federal Practice, *supra* note 1, ¶ 26.64[3.-2], at 26-385; *Waiver of Immunity*, *supra* note 2, at 960; *see, e.g., Byers v. Burselson*, 100 F.R.D. 436, 438-40 (D.D.C. 1983) (production of opinion work product required to determine whether statute of limitations on attorney malpractice claim had expired); *Handguards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 931-33 (N.D. Cal. 1976) (good faith of defendants in maintaining prior litigation at issue); *Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co.*, 66 F.R.D. 129, 133-36 (E.D. Pa. 1975) (mem.) (activities of counsel in underlying lawsuit basis for defense); *Bird v. Penn Cent. Co.*, 61 F.R.D. 43, 46-47 (E.D. Pa. 1973) (party interposed advice of counsel as reason for not rescinding contract); *see also Protection of Opinion Work Product*, *supra* note 2, at 341-45 ("at issue" exception furthers ultimate goals of judicial system).

20. *See Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 593-95 (3d Cir. 1984). *See supra* note 18.

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.*

The problem with a balancing approach is that it fails to provide guidance to the profession as to what is and is not protected. If such an approach were widely followed, it would inhibit attorneys from recording opinion work product, thus hindering independent trial preparation. *See Waiver of Immunity*, *supra* note 2, at 960-61; *Protection of Opinion Work Product*, *supra* note 2, at 344-45.

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.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.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*.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.²⁶ The Supreme Court, acknowledging a lawyer's need for privacy in order to prepare his client's

tion as opinion work product); *cf.* *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 146 (D. Del. 1982) (showing binder of documents containing documents effected waiver of factual work product immunity under Fed. R. Evid. 612); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616-17 (S.D.N.Y. 1977) (factual work product immunity found to be waived under Fed. R. Evid. 612, but court declined to order discovery because that Rule only recently adopted).

23. *See Boring v. Keller*, 97 F.R.D. 404, 407 (D. Colo. 1983).

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,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.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."²⁹ The *Hickman* Court reasoned that an attorney must be able to plan his strategy and outline his legal theories without undue interference.³⁰

Rule 26(b)(3) was adopted to implement the *Hickman* principle of broad immunity from discovery for opinion work product.³¹ As noted above, the substantial showing required for disclosure of factual work product³² is enhanced for opinion work product: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."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.³⁵ To many courts this protection rises almost to the level of absolute immunity that should not be abrogated

27. See *id.* at 510-11.

28. *Id.* at 511; see *FTC v. Grolier, Inc.*, 103 S. Ct. 2209, 2212-13 (1983); *Upjohn Co. v. United States*, 449 U.S. 383, 399-400 (1981); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 592 (3d Cir. 1984); *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734-35 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

29. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947); *accord In re Doe*, 662 F.2d 1073, 1077 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *In re Grand Jury Proceedings*, 473 F.2d 840, 845 (8th Cir. 1973); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 150 (D. Del. 1977).

30. See *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." *Id.* at 511.

31. See *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 592 (3d Cir. 1984); *Dixon v. Cappellini*, 88 F.R.D. 1, 3 (M.D. Pa. 1980) (mem.); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 150 (D. Del. 1977); *Fed. R. Civ. P. 26(b)(3) advisory committee note*; 4 *Moore's Federal Practice, supra* note 1, ¶ 26.64[3.-2], at 26-382; 8 *C. Wright & A. Miller, supra* note 1, § 2026, at 230-32; *Cohn, supra* note 5, at 932; *Protection of Opinion Work Product, supra* note 2, at 336-37.

32. See *supra* note 6 and accompanying text.

33. See *supra* notes 8-10 and accompanying text.

34. *Fed. R. Civ. P. 26(b)(3)*.

35. See *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 592-93 (3d Cir. 1984); *In re Sealed Case*, 676 F.2d 793, 809-10 (D.C. Cir. 1982); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779, 780 (S.D.N.Y. 1982); see also *Nye v. Sage Prods., Inc.*, 98 F.R.D. 452, 454 (N.D. Ill. 1982) (mem.) (possible prejudice resulting from selective production of privileged documents creates sufficient showing for production of factual work product, but protection still accorded opinion work product).

even when the policies of another rule may conflict.³⁶

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),³⁷ which provides the exclusive mechanism for the discovery of facts known and opinions held by an expert witness.³⁸ 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.³⁹ Thus, the protection provided by Rule 26(b)(3) for factual work product necessarily yields to Rule 26(b)(4)'s broad discovery rule.⁴⁰

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.⁴¹ 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,⁴² 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-

36. See, e.g., *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir. 1984) (production of opinion work product pursuant to Rule 26(b)(4) denied); *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779, 780-81 (S.D.N.Y. 1982) (production of opinion work product pursuant to Fed. R. Evid. 612 denied); *Clower v. Walters*, 51 F.R.D. 288, 289 (S.D. Ala. 1970) (production pursuant to Fed. R. Civ. P. 26(b)(2) denied); *Stix Prods., Inc. v. United Merchants & Mfrs.*, 47 F.R.D. 334, 339 (S.D.N.Y. 1969) (production pursuant to Fed. R. Civ. P. 34 denied); cf. *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947) (production of opinion work product pursuant to Fed. R. Civ. P. 26(b) (now 26(b)(1)) denied).

37. See Fed. R. Civ. P. 26(b)(3). See *supra* note 4.

38. Fed. R. Civ. P. 26(b)(4); *Graham*, *supra* note 16, at 926.

39. See *Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F. Supp. 1013, 1014 (S.D.N.Y. 1983); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39, 41 (N.D. Cal. 1977); *Quadrini v. Sikorsky Aircraft Div.*, 74 F.R.D. 594, 595 n.1 (D. Conn. 1977); see also Fed. R. Civ. P. 26(b)(4) advisory committee note (decisions bringing expert's information within work product doctrine rejected as "ill-considered"). But see *Baise v. Alewel's, Inc.*, 99 F.R.D. 95, 97 (W.D. Mo. 1983) (substantial need and undue hardship standard applied to discovery of factual work product shown to expert).

40. See *Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response, Inc.*, 563 F. Supp. 1013, 1014 (S.D.N.Y. 1983); *In re IBM Peripheral EDP Devices Antitrust Litig.*, 77 F.R.D. 39, 41 (N.D. Cal. 1977); *Quadrini v. Sikorsky Aircraft Div.*, 74 F.R.D. 594, 595 n.1 (D. Conn. 1977); *Graham*, *supra* note 16, at 926.

41. See *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir. 1984).

42. See *id.*

appropriate;⁴³ 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.⁴⁴ 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.⁴⁵

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,⁴⁶ which requires each attorney to prepare his case fully⁴⁷ and without undue interference.⁴⁸ While a trial should be a search for truth rather than a "battle of wits" between counsel,⁴⁹ 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."⁵⁰ 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.

46. See *Protection of Opinion Work Product*, *supra* note 2, at 335; see also *United States v. AT&T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (purpose of work product doctrine is to promote adversary system); *Coastal States Gas Corp. v. United States Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980) (same); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974) (same), *cert. denied*, 420 U.S. 997 (1975); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 142-43 (D. Del. 1982) (same); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 150-51 (D. Del. 1977) (same).

47. See, e.g., *United States v. Nobles*, 422 U.S. 225, 237-38 (1975); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); *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); *Coastal States Gas Corp. v. United States Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 150 (D. Del. 1977); *In re Federal Copper, Inc.*, 19 Bankr. 177, 182 (Bankr. M.D. Tenn. 1982); Fed. R. Civ. P. 26(b)(3) advisory committee note.

48. See *Cohn*, *supra* note 5, at 919-20; *Protection of Opinion Work Product*, *supra* note 2, at 334; see, e.g., *United States v. Nobles*, 422 U.S. 225, 236-38 (1975); *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 592 (3d Cir. 1984) (quoting *Hickman*, 329 U.S. at 510-11); *In re Doe*, 662 F.2d 1073, 1077 (4th Cir. 1981) (same), *cert. denied*, 455 U.S. 1000 (1982); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734-35 (4th Cir. 1974) (same), *cert. denied*, 420 U.S. 997 (1975).

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").

50. *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring); see Fed. R. Civ. P. 26(b)(3) advisory committee note.

his client's case properly.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."⁵² These policies apply with even greater force to opinion work product.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.⁵⁴

The Court in *Hickman* also concluded that an immunity for work product was necessary to maintain the ethical standards of the legal profession.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."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.⁵⁷ Counsel would also be reluctant to take written notes,⁵⁸

51. See *Hickman v. Taylor*, 329 U.S. 495, 512 (1947); Cohn, *supra* note 5, at 943; see, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 397-98 (1981); *United States v. Nobles*, 422 U.S. 225, 237-38 (1975); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 592 (3d Cir. 1984) (quoting *Hickman*, 329 U.S. at 512); *In re Grand Jury Subpoena Dated Nov. 8, 1979*, 622 F.2d 933, 935 (6th Cir. 1980) (per curiam); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 482-83 (4th Cir. 1973).

52. Cohn, *supra* note 5, at 943; see, e.g., *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 592 (3d Cir. 1984); *In re Doe*, 662 F.2d 1073, 1077 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *United States v. AT&T Co.*, 642 F.2d 1285, 1299 (4th Cir. 1980); *Coastal States Gas Corp. v. United States Dep't of Energy*, 617 F.2d 854, 864 (D.C. Cir. 1980).

53. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981); *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734-35 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *In re Grand Jury Proceedings*, 473 F.2d 840, 848 (8th Cir. 1973); Fed. R. Civ. P. 26(b)(3) advisory committee note; *Protection of Opinion Work Product*, *supra* note 2, at 335.

54. See, e.g., *Hickman v. Taylor*, 329 U.S. 495, 516-17 (1947) (Jackson, J., concurring); *In re Murphy*, 560 F.2d 326, 333-34 (8th Cir. 1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 487 F.2d 480, 482-83 (4th Cir. 1973); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 930 (N.D. Cal. 1976); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 33 (D. Md. 1974); Cohn, *supra* note 5, at 919-20; *Protection of Opinion Work Product*, *supra* note 2, at 335. There are situations where an attorney may be required to divulge work product to his adversary. For example, when an attorney uses factual work product to refresh a witness' recollection he may be compelled to disclose the material by Fed. R. Evid. 612. Such an approach, however, should not be applied when discovery of opinion work product is sought. See *infra* notes 108-19 and accompanying text.

55. See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

56. *Id.*; accord *FTC v. Grolier, Inc.*, 103 S. Ct. 2209, 2213 (1983); *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981); *United States v. Nobles*, 422 U.S. 225, 237 (1975); *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 592 (3d Cir. 1984); *In re Doe*, 662 F.2d 1073, 1077-78 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 62 (7th Cir. 1980).

57. The *Hickman* Court reasoned:

thus placing greater dependence on memory.⁵⁹ Furthermore, broad discovery of work product might discourage complete preparation and first-hand investigation.⁶⁰

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 client⁶¹ and does not pertain to information that an attorney acquires from agents or his own investigation.⁶² 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).

58. See *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (if discovery of opinion work product were allowed, "much of what is now put down in writing would remain unwritten"); *FTC v. Grolier, Inc.*, 103 S. Ct. 2209, 2213 (1983) (quoting *Hickman*, 329 U.S. at 511); *United States v. Nobles*, 422 U.S. 225, 237 (1975) (same).

59. *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 736 (4th Cir. 1974) (if attorneys cannot freely record opinion work product, "truth . . . will become lost in the murky recesses of the memory in the minds of men"), *cert. denied*, 420 U.S. 997 (1975).

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 accorded 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.

Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55, 58 (N.D. Ohio 1953).

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 rules⁶⁴ 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 opinion⁶⁸ to impeach or cross-examine that expert.⁶⁹ Access to these

torney-client privilege); *In re* Special Sept. 1978 Grand Jury (II), 640 F.2d 49, 62 (7th Cir. 1980) (same); *Brown v. Hart, Schaffner & Marx*, 96 F.R.D. 64, 68 (N.D. Ill. 1982) (attorney-client privilege does not extend to information secured by attorney from witnesses acting on behalf of client); *American Standard, Inc. v. Bendix Corp.*, 80 F.R.D. 706, 709 (W.D. Mo. 1978) (attorney-client privilege does not protect factual information discovered by attorney); *Jack Winter, Inc. v. Koratron Co.*, 54 F.R.D. 44, 47 (N.D. Cal. 1971) (documents obtained from third persons not privileged); 8 C. Wright & A. Miller, *supra* note 1, § 2017, at 137-38 (attorney-client privilege does not extend to information and statements attorney obtains from third persons).

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*, 446 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.

64. Because the attorney-client privilege applies only to confidential attorney-client communications, see *supra* note 61, voluntary disclosure to a third person destroys the privilege. See, e.g., *In re* Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982); *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 25 (9th Cir. 1981); *United States v. AT&T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *United States v. Bump*, 605 F.2d 548, 550-51 (10th Cir. 1979); *Champion Int'l Corp. v. International Paper Co.*, 486 F. Supp. 1328, 1331-32 (N.D. Ga. 1980); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1161-62 (D.S.C. 1974); *McCormick on Evidence*, *supra* note 3, § 93 at 223; 4 Moore's Federal Practice, *supra* note 1, ¶ 26.60[2], at 26-201; *Waiver of Immunity*, *supra* note 2, at 964.

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

66. See, e.g., *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 725 n.7 (N.D. Ill. 1978); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977); *Ceco Steel Prod. Corp. v. H.K. Porter Co.*, 31 F.R.D. 142, 143 (N.D. Ill. 1962).

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 . . . [E]ffective rebuttal requires advance knowledge of the line of testimony of the other side.") (citations omitted).

68. See *United States v. John R.-Piquette Corp.*, 52 F.R.D. 370, 371 (E.D. Mich. 1971); Fed. R. Civ. P. 26(b)(4); 4 Moore's Federal Practice, *supra* note 1, ¶ 26.66[3], at

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.⁷⁰

Rule 26(b)(4) vests the trial court with broad discretion to order expansive discovery of an expert's findings.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.⁷² Arguably, disallowing discovery of opinion work product provided to an expert frustrates the purposes of Rule 26(b)(4).⁷³ However, an adverse

26-416 to -417; 8 C. Wright & A. Miller, *supra* note 1, § 2029, at 240-41. Neither Rule 26(b)(4) nor the advisory committee notes indicate what, if any, standard of need the party seeking discovery under that Rule must meet. *See* Fed. R. Civ. P. 26(b)(4) & advisory committee notes; Graham, *supra* note 16, at 923. Several early cases denied additional, noninterrogatory discovery, after imposing a high standard of need for the party seeking discovery. *See, e.g.,* Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202, 205 (N.D. Miss. 1972) (requiring unique and exceptional circumstances); United States v. 145.31 Acres of Land, 54 F.R.D. 359, 360 (M.D. Pa. 1972) (compelling need); Wilson v. Resnick, 51 F.R.D. 510, 511-12 (E.D. Pa. 1970) (same), *aff'd mem.*, 485 F.2d 682 (3d Cir. 1973). These decisions improperly disregard both the principle of broad discovery embodied in the Federal Rules, *see, e.g.,* Hickman v. Taylor, 329 U.S. 495, 507 (1947); Dennis v. BASF Wyandotte Corp., 101 F.R.D. 301, 303 (E.D. Pa. 1983); FDIC v. Mercantile Nat'l Bank, 84 F.R.D. 345, 348 (N.D. Ill. 1979), and the advisory committee note, which repudiated decisions holding that the expert's information was protected by the work product doctrine, *see* Fed. R. Civ. P. 26(b)(4) advisory committee note.

Most cases have construed Rule 26(b)(4) liberally and therefore do not require a showing of substantial need and undue hardship. *See, e.g.,* Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response, Inc., 563 F. Supp. 1013, 1015 (S.D.N.Y. 1983); Dennis v. BASF Wyandotte Corp., 101 F.R.D. 301, 303-04 (E.D. Pa. 1983); Carter-Wallace, Inc. v. Hartz Mountain Indus., 553 F. Supp. 45, 52 (S.D.N.Y. 1982); *In re* IBM Peripheral EDP Devices Antitrust Litig., 77 F.R.D. 39, 41-42 (N.D. Cal. 1977); Quadrini v. Sikorsky Aircraft Div., 74 F.R.D. 594, 595 (D. Conn. 1977); Herbst v. IT&T Corp., 65 F.R.D. 528, 530-31 (D. Conn. 1975); 4 Moore's Federal Practice, *supra* note 1, ¶ 26.66[3], at 26-416.

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.

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

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, *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").

72. *See, e.g.,* Dennis v. BASF Wyandotte Corp., 101 F.R.D. 301, 303-04 (E.D. Pa. 1983); Beverage Mktg. Corp. v. Ogilvy & Mather Direct Response, Inc., 563 F. Supp. 1013, 1015 (S.D.N.Y. 1983); Grinnell Corp. v. Hackett, 70 F.R.D. 326, 333 (D.R.I. 1976); Herbst v. IT&T Corp., 65 F.R.D. 528, 530-31 (D. Conn. 1975); Fed. R. Civ. P. 26(b)(4) advisory committee note. *See infra* note 87 and accompanying text.

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.⁷⁴ 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.⁷⁵ 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.⁷⁶ 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.⁷⁷ Some courts have recognized exceptions for crime or fraud⁷⁸ or when the opinion work product itself is at issue.⁷⁹ These exceptions to opinion work product immunity are concerned with maintaining the integrity of the judicial

74. See *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 598 (3d Cir. 1984) (Becker, J., dissenting).

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.

76. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984).

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.

system;⁸⁰ In each case discovery is necessary for the purpose of proving a claim or presenting a defense.⁸¹ 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,⁸² 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.⁸³

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.⁸⁴ 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.

81. See, e.g., *In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982) (opinion work product not protected if attorney's work performed in furtherance of crime, fraud or "other misconduct inconsistent with the basic premises of the adversary system"); *In re Doe*, 662 F.2d 1073, 1079 (4th Cir. 1981) (work product immunity "not designed as a fringe benefit for protecting lawyers who would, for their personal advantage, abuse it"), cert. denied, 455 U.S. 1000 (1982); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 931-33 (N.D. Cal. 1976) (discovery of opinion work product necessary when party is asserting reliance on attorney's advice); *Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co.*, 66 F.R.D. 129, 136 (E.D. Pa. 1975) (mem.) (discovery of opinion work product essential when activities of counsel in underlying action formed basis for defense in current action); *Bird v. Penn Cent. Co.*, 61 F.R.D. 43, 46-47 (E.D. Pa. 1973) (discovery of opinion work product required when essential to other party's case). See supra note 18.

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.

83. See Fed. R. Civ. P. 26(b)(4) advisory committee note; see, e.g., *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 456-57 (2d Cir. 1975) (expert testimony "crucial" to resolve products liability dispute); *Dennis v. BASF Wyandotte Corp.*, 101 F.R.D. 301, 303 (E.D. Pa. 1983) (expert testimony needed to resolve wrongful death action arising from alleged manufacturing defect); *Carter-Wallace, Inc. v. Hartz Mountain Indus.*, 553 F. Supp. 45, 52 (S.D.N.Y. 1982) (testimony of damages expert crucial); *Quadrini v. Sikorsky Aircraft Div.*, 74 F.R.D. 594, 594 (D. Conn. 1977) (parties in highly technical lawsuit relying extensively on expert testimony); *United States v. NYSCO Laboratories, Inc.*, 26 F.R.D. 159, 162 (E.D.N.Y. 1960) (expert scientific testimony crucial in action to enjoin introduction of drug into interstate commerce); *E.I. Dupont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416, 421 (D. Del. 1959) (adequacy of procedures used by experts crucial in patent infringement case).

84. See supra notes 11-15 and accompanying text.

tected by the attorney-client privilege.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.⁸⁶ Still other courts developed and applied an "unfairness" doctrine to justify denying discovery of expert witnesses.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.⁸⁸

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*].

86. See *Discovery of Experts, supra* note 85, at 794-95; see, e.g., *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257, 260-61 (D. Neb. 1959); *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55, 58 (N.D. Ohio 1953); *Colden v. R.J. Schofield Motors*, 14 F.R.D. 521, 522 (N.D. Ohio 1952). This approach was expressly rejected by the drafters of the rule. See Fed. R. Civ. P. 26(b)(4) advisory committee note.

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.

87. See Fed. R. Civ. P. 26(b)(4) advisory committee note; *Graham, supra* note 16, at 902-03; see, e.g., *United States v. 2,001.10 Acres of Land*, 48 F.R.D. 305, 308 (N.D. Ga. 1969) (not unfair to deny discovery of expert's reports until party seeking discovery has prepared own reports); *United States v. 5 Cases*, 9 F.R.D. 81, 83 (D. Conn. 1949) (discovery of expert's report denied, party seeking discovery could conduct own tests), *aff'd*, 179 F.2d 519 (2d Cir.), *cert. denied*, 339 U.S. 963 (1950); *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594, 596 (W.D. Pa. 1947) (court should not allow one party to prove its case through use of an expert paid for by the other party); *Boynton v. R.J. Reynolds Tobacco Co.*, 36 F. Supp. 593, 595 (D. Mass. 1941) (mere offer of compensation by opposing party to expert not sufficient to compel discovery of expert witness). Other courts denied discovery of an expert's findings because it would be unfair to the expert. See *Walsh v. Reynolds Metal Co.*, 15 F.R.D. 376, 378-79 (D.N.J. 1954) (fair to deny discovery of expert witness' report because he had property right in it); *United States v. Certain Parcels of Land*, 15 F.R.D. 224, 234-35 (S.D. Cal. 1953) (same).

88. See, e.g., *United Air Lines v. United States*, 26 F.R.D. 213, 217-18 (D. Del. 1960); *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376, 378-79 (D.N.J. 1954); *Colonial Airlines v. Janas*, 13 F.R.D. 199, 200 (S.D.N.Y. 1952); *Moran v. Pittsburgh-Des Moines Steel Co.*, 6

Rule 26(b)(4) was adopted to end this confusion.⁸⁹ 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.⁹⁰ It expressly rejected the holding that an expert witness' findings were protected by the work product doctrine.⁹¹ Rule 26(b)(4) in effect codified the unfairness doctrine.⁹² Under this Rule, all nonprivileged and relevant materials that an expert witness used in preparing his findings may be discovered,⁹³ 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.⁹⁴

II. THEORIES OF WAIVER INAPPOSITE

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

F.R.D. 594, 596 (W.D. Pa. 1947); *Boynton v. R.J. Reynolds Tobacco Co.*, 36 F. Supp. 593, 595 (D. Mass. 1941).

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) 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. 305, 308 (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).

89. See *Dennis v. BASF Wyandotte Corp.*, 101 F.R.D. 301, 303 (E.D. Pa. 1983); *Grinnell Corp. v. Hackett*, 70 F.R.D. 326, 332 (D.R.I. 1976); 8 C. Wright & A. Miller, *supra* note 1, § 2029, at 249-50; *Graham*, *supra* note 16, at 898-99.

90. See Fed. R. Civ. P. 26(b)(4) advisory committee note.

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.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 612.⁹⁶ These approaches fail to appreciate the overriding importance of maintaining the integrity of opinion work product in our adversary system.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 immunity⁹⁸ tend to confuse the work product doctrine with the attorney-client privilege.⁹⁹ The work product immunity is broader than and encompasses the attorney-client privilege.¹⁰⁰ Because the work product doctrine and the attorney-client privilege serve different purposes,¹⁰¹ the waiver rules of one should not apply to the other.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.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.¹⁰⁴ It would be waived only when disclosure to a

95. See *supra* note 68 and accompanying text.

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. *Boring*, 97 F.R.D. at 407. See *infra* notes 111-19 and accompanying text.

97. See *supra* notes 46-53 and *infra* notes 114-19 and accompanying text.

98. See, e.g., *Schenectady Chems., Inc. v. General Elec. Co.*, 19 Fed. R. Serv. 2d (Callaghan) 1132, 1133 (N.D.N.Y. 1975); *D'Ippolito v. Cities Serv. Co.*, 39 F.R.D. 610, 610 (S.D.N.Y. 1965); *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461, 464-65 (E.D. Mich. 1954); *Wild v. Payson*, 7 F.R.D. 495, 500-01 (S.D.N.Y. 1946).

99. See 8 C. Wright & A. Miller, *supra* note 1, § 2024, at 209-10.

100. See *United States v. Nobles*, 422 U.S. 225, 238 n.11 (1975); *Hickman v. Taylor*, 329 U.S. 495, 508 (1947); *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982); *In re Special Sept. 1978 Grand Jury (II)*, 640 F.2d 49, 62 (7th Cir. 1980); *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 *supra* notes 56-60 and accompanying text.

101. See *supra* notes 61-66 and accompanying text.

102. See *infra* notes 103-07 and accompanying text.

103. See, e.g., *United States v. AT&T Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980); *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979); *American Standard Inc. v. Bendix Corp.*, 71 F.R.D. 443, 446-47 (W.D. Mo. 1976); 4 Moore's Federal Practice, *supra* note 1, ¶ 26.64[4], at 26-390 to -392; *Waiver of Immunity*, *supra* note 2, at 965.

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.¹⁰⁵ 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.*¹⁰⁶

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.¹⁰⁷ 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 anti-trust 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).

105. *See* United States v. AT&T Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980); GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 51-52 (S.D.N.Y. 1979); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 446 (W.D. Mo. 1976); Stix Prods., Inc. v. United Merchants & Mfrs., Inc., 47 F.R.D. 334, 338 (S.D.N.Y. 1969); 8 C. Wright & A. Miller, *supra* note 1, § 2024, at 210; Cooper, *Work Product of the Rulesmakers*, 53 Minn. L. Rev. 1269, 1299-300 n.100 (1969); *Waiver of Immunity, supra* note 2, at 966.

106. United States v. AT&T Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) (emphasis in original).

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.¹⁰⁸ It could be contended that because Rule 26(b)(4) does not provide any guidance to courts in determining whether to grant further discovery,¹⁰⁹ the principles of Rule 612 should be applied by analogy.¹¹⁰ 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.*,¹¹¹ the district court held that work product immunity is waived when factual work product is used to refresh an expert witness' recollection.¹¹² That court feared that parties would conceal discoverable materials under the guise of trial preparation.¹¹³ The automatic waiver rule espoused by *Berkey*,¹¹⁴ 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.¹¹⁵ 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.

110. See *Boring v. Keller*, 97 F.R.D. 404, 407 (D. Colo. 1983).

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.

114. The *Berkey* rule has been applied in several subsequent cases. See *S & A Painting Co. v. O.W.B. Corp.*, 103 F.R.D. 407, 409 (W.D. Pa. 1984); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 145 (D. Del. 1982); *Peck & Peck, Inc. v. Jack La Lane Fifth Ave. Health Spa, Inc.*, No. 76-4020 (S.D.N.Y. Jan. 12, 1978) (available Apr. 2, 1985, on LEXIS, Genfed library, Dist file). A similar result was reached in *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972), which was decided before the memory refreshment doctrine was codified as Federal Rule of Evidence 612. See *id.* at 13.

115. 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 612[04], 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*, ¶ 612[04], 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

standard, Rule will be narrowly construed to only compel discovery of portions of documents actually used to refresh recollection.

116. *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 n.3 (3d Cir. 1984). *But see id.* (Becker, J., dissenting) (majority's holding in conflict with Federal Rule of Evidence 612).

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.

118. *See Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, 92 F.R.D. 779, 780-81 (S.D.N.Y. 1982) (after in camera review, court held that documents in question should not be produced); 3 J. Weinstein & M. Berger, *supra* note 115, ¶ 612[04], at 612-40 (judge should examine documents in camera and refrain from producing opinion work product).

119. *See Fed. R. Civ. P. 26(b)(3) advisory committee note*; 3 J. Weinstein & M. Berger, *supra* note 111, ¶ 612[04], at 612-41 to -42.

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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