

DISCOVERABILITY OF OPINION WORK PRODUCT MATERIALS PROVIDED TO TESTIFYING EXPERTS

CHRISTA L. KLOPFENSTEIN*

INTRODUCTION

The strong policy against disclosure of an attorney's thought processes was first articulated by the United States Supreme Court in *Hickman v. Taylor*.¹ The *Hickman* rule came to be known as the "work product rule," and was later codified in Federal Rule of Civil Procedure 26(b)(3) ("Rule 26(b)(3)").² The Rule establishes a qualified privilege for materials prepared by counsel in anticipation of litigation³ and offers special protection to "opinion work product," which encompasses documents containing an attorney's mental impressions, ideas, and opinions.⁴ At the same time, the federal rules provide for liberal discovery practices, particularly with regard to the opinions and testimony of expert witnesses.⁵ These two policies collide when an attorney shares work product materials with a testifying expert prior to trial, leaving courts and parties to guess at whether those materials are discoverable by the opposing party. As expert witnesses are used ever more frequently in modern litigation, the need for a decisive answer to this question becomes increasingly critical.

In general, Rule 26(b)(4) governs discovery of materials provided to experts. It protects materials provided to non-testifying experts and allows for discovery of materials related to testifying experts.⁶ Although factual information provided to testifying experts by counsel has consistently been held discoverable,⁷ courts have disagreed on the discoverability of opinion work product materials provided to experts.⁸ Despite the 1993 Amendments to the federal rules that purported to

* J.D. Candidate, 1999, Indiana University School of Law—Indianapolis; B.S., 1991, Purdue University, West Lafayette, Indiana.

1. 329 U.S. 495 (1947).
2. FED. R. CIV. P. 26(b)(3).
- 3.

[D]ocuments 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 [are discoverable] only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Id.

4. *Id.*
5. See generally FED. R. CIV. P. 26.
6. FED. R. CIV. P. 26(b)(4).
7. See, e.g., *B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 62-63 (S.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995).
8. Compare *Bogossian v. Gulf Oil Corp.*, 738 F.2d 587, 593-95 (3d Cir. 1984) (holding that opinion work product is absolutely privileged even though an expert relied on it in forming his

solve the issue through the addition of Rule 26(a)(2),⁹ which imposes initial disclosure requirements on testifying experts, courts continue to disagree. A split of authority currently exists among the federal districts, and no federal appellate court has spoken on the issue since the enactment of the 1993 Amendments to the Rules.¹⁰

Proponents for protection of opinion work product materials shared with expert witnesses stress the need for privacy and the free exchange of ideas in developing litigation strategy. Conversely, proponents for disclosure of such materials emphasize the opposing party's need to effectively cross-examine the expert regarding materials that may have improperly influenced that expert's testimony. The overriding question remains: Should experts be able to participate as advocates, or should they merely be disinterested third parties whose purpose is to educate the jury on matters beyond the common understanding?¹¹ The uncertainty in the law forces litigators to gamble: Give the expert the work product materials, reap the benefits, and hope that the court will not order disclosure, or keep the work product materials, forego the benefits, but be certain that valuable work product is protected.¹² Neither parties nor attorneys should be forced to engage in such a potentially disastrous game of chance.

This Note argues that a clear, uniform rule is needed, and that parties and courts should no longer be forced to guess at the mandates of Rule 26. Part I of this Note provides background information on the origins and evolution of the

opinion), *with Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387 (N.D. Cal. 1991) (holding that all materials disclosed to an expert are discoverable notwithstanding that they constitute opinion work product).

9. FED. R. CIV. P. 26(a)(2)(B) (adding initial disclosure requirements for testifying experts).

10. *Compare Haworth, Inc.*, 162 F.R.D. at 292-94 (holding that protection of opinion work product under Rule 26(b)(3) prevails over production of documents considered by experts under Rule 26(a)(2)(B)), *with Karn v. Rand*, 168 F.R.D. 633, 638 (N.D. Ind. 1996) (holding that Rule 26(a)(2) is a bright-line rule that all documents provided to experts are discoverable).

Note that a related issue on which the federal districts are also split is the discoverability of work product materials reviewed by witnesses prior to or while testifying or being deposed pursuant to Federal Rule of Evidence 612. When work product materials are used to refresh an expert's memory prior to giving sworn testimony, they may be discoverable on this basis alone, notwithstanding the issues discussed in this note. *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 615 (S.D.N.Y. 1977). For a discussion of Federal Rule of Evidence 612 as applied to work product materials reviewed by experts, see Martha J. Aaron, *Resolving the Conflict Between Federal Rule of Evidence 612 and the Work Product Doctrine: A Proposed Solution*, 38 U. KAN. L. REV. 1039 (1990); Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 801-02 (1994).

11. *See Mickus, supra* note 10, at 778-79; George Vernon, *Protecting Your Expert from Discovery*, FOR THE DEFENSE, June 1989, at 16-17.

12. *See Mickus, supra* note 10, at 774-75; Michael E. Plunkett, Comment, *Discoverability of Attorney Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed Anything?*, 69 TEMP. L. REV. 451, 452 (1996).

work product rule, and explains the problem of discoverability of work product materials provided to testifying experts in light of its historical context. Part II examines the impact of the 1993 Amendments to Rule 26 on expert discovery and explains the subsequent development of the issue. Part III explains that both the text of the rule and sound policy dictate that work product materials provided to testifying experts should not be discoverable under Rule 26.¹³ Finally, this Note concludes that Rule 26 should be amended to clarify that Rule 26(b)(3) work product protection “trumps” Rule 26(a)(2) and Rule 26(b)(4) expert disclosure rules.

I. HISTORICAL CONTEXT AND BACKGROUND

A. The Work Product Rule

The work product doctrine was first announced by the U.S. Supreme Court

13. Although the remainder of this Note exclusively addresses opinion work product as it relates to experts who have been specially retained to provide testimony at trial, the proposed amendment certainly applies to all categories of experts. In general, experts (and applicable discovery rules) can be classified as follows:

1. Experts retained or specially employed in anticipation of litigation and who are expected to testify—discovery is governed by Federal Rule of Civil Procedure 26(a)(2)(A) (initial disclosure of identity), 26(a)(2)(B) (initial disclosure must be accompanied by written report), and 26(b)(4)(A) (depositions permitted; facts and opinions are wholly discoverable).
2. Experts retained or specially employed in anticipation of litigation but who are not expected to testify—discovery is governed by Federal Rule of Civil Procedure 26(b)(4)(B) (facts and opinions discoverable only upon a showing of exceptional circumstances).
3. In-house experts who regularly give expert testimony and who are expected to testify in present litigation—discovery is governed by Federal Rule of Civil Procedure 26(a)(2)(A) (initial disclosure of identity), 26(a)(2)(B) (initial disclosure must be accompanied by written report), and 26(b)(4)(A) (depositions permitted; facts and opinions are wholly discoverable).
4. In-house experts used in normal course of business but who are not expected to testify—facts and opinions are not discoverable.
5. Experts informally consulted regarding present litigation but not retained or specially employed in anticipation of litigation and not expected to testify—facts and opinions are not discoverable.
6. Other experts used in normal course of business but retained or consulted for purposes of present litigation—facts and opinions are not discoverable.

See generally Gregory P. Joseph, *Emerging Issues Under the 1993 Amendments to the Federal Civil Rules*, Q247 ALI-ABA 65, 86-93 (1996). This Note focuses on experts retained or specially employed in anticipation of litigation and who are expected to testify (category 1 above) because it is this category of experts for which the strongest arguments in favor of disclosure can be made. As noted above, the Rules almost completely protect from discovery information regarding non-testifying experts. *See* FED. R. CIV. P. 26.

in 1947 in the landmark case of *Hickman v. Taylor*,¹⁴ in which the Court recognized a “general policy against invading the privacy of an attorney’s course of preparation.”¹⁵ The Court found this policy to be “so essential to an orderly working of our system of legal procedure”¹⁶ that “[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.”¹⁷

In *Hickman*, the defendant owned a tugboat that sank, killing five of the nine crew members. The plaintiff represented the estate of one of the drowned crew members. After a public hearing in which the four survivors were examined, the defendant’s attorney interviewed them privately and took their statements with an eye toward litigation. The plaintiff sought production of defendant’s attorney’s notes taken during the interviews and also of the witnesses’ statements. In refusing to order disclosure, the Court stated, “[i]n performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.”¹⁸ The Court reasoned that because “[p]roper 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,”¹⁹ it would be “a rare situation . . . [that would justify] production of these matters.”²⁰

If an attorney’s theories and mental impressions were made available to the opposing party upon demand, the Court believed that “much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own.”²¹ The result would be that “[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial.”²² Not only would this have a demoralizing effect on the legal profession, but it also would bring about the even more devastating consequence that “the interests of the clients and the cause of justice would be poorly served.”²³

The work product doctrine announced in *Hickman* was codified in 1970 in Rule 26(b)(3), which provides general protection for documents and tangible

14. 329 U.S. 495 (1947).

15. *Id.* at 512.

16. *Id.*

17. *Id.* at 510.

18. *Id.*

19. *Id.* at 511.

20. *Id.* at 513.

21. *Id.* at 511.

22. *Id.*

23. *Id.* See also *Upjohn Co. v. United States*, 449 U.S. 383, 398-402 (1981) (reiterating a desire to afford particular protection to attorneys’ opinion work product). Writing for a unanimous Court, Justice Rehnquist emphasized the “special protection [afforded] to work product revealing the attorney’s mental processes.” *Id.* at 400.

things prepared in anticipation of litigation.²⁴ One important difference between Rule 26(b)(3) and the *Hickman* rule, however, is that *Hickman* did not restrict the work product rule to documents and tangible things. It extended protection to all inquiries and requests seeking “counsel’s mental impressions, conclusions, or opinions.”²⁵ At least one court has held that when work product information sought to be discovered from an expert is something other than a document or tangible thing, courts should apply the more expansive rule of *Hickman v. Taylor*²⁶ rather than Rule 26(b)(3).²⁷

Under Rule 26(b)(3), protection is afforded not only to documents and tangible things prepared by attorneys, but also to those prepared by parties, consultants, sureties, indemnitors, insurers, and agents.²⁸ The rule “divides work product into two parts, one of which is ‘absolutely’ immune from discovery and the other only qualifiedly immune.”²⁹

The qualified immunity protects ordinary or “fact work product” materials, which are documents and tangible things prepared in anticipation of litigation but which do not contain the attorney’s mental impressions.³⁰ The first sentence of Rule 26(b)(3) provides that these materials are not discoverable unless the other party demonstrates a substantial need for them, in which case discovery will be permitted.³¹ The party resisting disclosure has the burden of establishing the documents’ eligibility for protection.³² Once a prima facie showing of privilege has been made, the party seeking discovery of such documents may only obtain them upon demonstration of “both a substantial need for the materials and that

24. See *supra* note 2.

25. *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85, 87 (S.D. W. Va. 1995) (citing *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)).

26. 329 U.S. 495 (1947).

27. *Maynard*, 160 F.R.D. at 87 (“[W]hen, as in this case, opposing counsel’s mental impressions, conclusions or opinions are sought in the context of a deposition, rather than as memorialized on paper, it is to the *Hickman* decision rather than Rule 26, that the Court must look in resolving the dispute.”).

28. FED. R. CIV. P. 26(b)(3). Although the principles expressed within this Note are equally applicable to all categories of protected persons, this Note addresses only attorneys’ work product materials.

29. *National Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

30. See *Joseph*, *supra* note 13, at 88.

31. Specifically, Rule 26(b)(3) provides:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule [(i.e., relevant and not privileged)] and prepared in anticipation of litigation or for trial . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

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

32. See *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1120 (7th Cir. 1983).

it would suffer undue hardship in procuring the requested information some other way.”³³

The (nearly) absolute immunity is contained in the second sentence of Rule 26(b)(3),³⁴ which offers even greater protection against disclosure of opinion work product, also known as core work product.³⁵ Opinion work product is comprised of materials prepared in anticipation of litigation, which include “the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”³⁶ Opinion work product is not discoverable even upon a showing of substantial need by the party seeking discovery.³⁷ Accordingly, when a court orders discovery of the ordinary work product materials upon the required showing, it must protect opinion work product contained therein from discovery.³⁸

In determining whether a document has been prepared in anticipation of litigation such as to invoke work product protection, “the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”³⁹ Litigation need not be imminent to satisfy the “because of the prospect of litigation” standard; however, “the primary motivating purpose behind the creation of a document or investigative report

33. *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976 (7th Cir. 1996) (footnotes omitted).

34. The second sentence of Rule 26(b)(3) provides: “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.” FED. R. CIV. P. 26(b)(3).

35. *See Joseph, supra* note 13, at 88.

36. *Logan*, 96 F.3d at 976 n.4 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981)).

37. *See id.* at 976.

In short, to resolve whether Rule 26(b)(3) grants immunity from discovery, the district court must determine, from an examination of the documents or their circumstances, whether they were prepared in anticipation of litigation or for trial. If so and if the documents embody opinions and theories about the litigation, discovery is refused without further inquiry. If opinions and theories about the litigation are only part of a document otherwise discoverable, the court may require production of a redacted copy. With regard to other documents falling within the scope of Rule 26(b)(3), the court must determine whether the requesting party has a substantial need for them, taking into account their relevance and importance and the availability of the facts from other sources.

National Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 985 (4th Cir. 1992).

38. *See* FED. R. CIV. P. 26(b)(3).

39. *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (quoting 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 (West 1973)).

must be to aid in possible future litigation.”⁴⁰ A party seeking to assert the privilege has the burden of proving “at the very least [that] some articulable claim, likely to lead to litigation, [has] arisen.”⁴¹ Although courts will consider the fact that a claim was actually filed as a factor in making the determination, “[t]he mere fact that litigation does eventually ensue does not, by itself, cloak materials prepared by an attorney with the protection of the work product privilege.”⁴²

Once it has been determined that documents have been prepared in anticipation of litigation, courts have generally held that fact work product materials provided to a testifying expert are discoverable, regardless of whether the expert relied on them in forming his opinions.⁴³ “Rule 26(a)(2) specifically requires disclosure of factual information considered but not relied upon, as well as the information that was considered and relied upon.”⁴⁴ Although it has been argued that an attorney’s selection of facts reflects opinion work product,⁴⁵ “[i]t would strain credulity to maintain that the Rule somehow exempts factual

40. *Binks Mfg. Co. v. National Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir. 1983) (quoting *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982)).

41. *Id.* (quoting *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980)).

42. *Id.* at 1118. A survey of the case law indicates that courts have held the following events sufficient to trigger the application of the work product privilege: (1) investigation by a federal agency, *Martin v. Monfort, Inc.*, 150 F.R.D. 172, 173 (D. Colo. 1993); (2) receipt of a letter from an attorney saying that they planned to file suit within two weeks if settlement was not reached, *Henderson v. Zurn Industries, Inc.*, 131 F.R.D. 560, 571 (S.D. Ind. 1990); (3) consultation with an attorney during an insurance claims investigation, *Taroli v. General Electric Co.*, 114 F.R.D. 97, 99 (N.D. Ind. 1987); (4) denial of an insurance claim, *Logan v. Commercial Union Insurance Co.*, 96 F.3d 971, 977 (7th Cir. 1996); (5) mailing of notice of denial of an insurance claim, *Harper v. Auto-Owners Insurance Co.*, 138 F.R.D. 655, 665 (S.D. Ind. 1991); (6) crash of a commercial airliner, *In re Air Crash Disaster at Detroit Metropolitan Airport*, 130 F.R.D. 641, 644 (E.D. Mich. 1989); and (7) testimony in front of a grand jury, *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 491 (7th Cir. 1970), *aff’d per curiam by an equally divided Court*, 400 U.S. 348 (1971).

Courts have held that the following events do not automatically trigger application of the work product doctrine: (1) the fact that litigation ultimately ensues, *Logan*, 96 F.3d at 976; (2) receipt of letters generally threatening litigation, *Binks*, 709 F.2d at 1120; (3) learning that a party has consulted an attorney, *Taroli*, 114 F.R.D. at 98; (4) investigation of a claim by either party, *Harper*, 138 F.R.D. at 660; (5) negotiations over a claim, *id.*; (6) determination by a fire department that the cause of an insured’s fire was arson, *id.* at 667; and (7) routine investigation events that could lead to litigation, *In re Air Crash Near Roselawn, Indiana*, No. 95C4593, MDL 1070, 1997 WL 97096 (N.D. Ill. Feb. 25, 1997).

43. *See B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 62-63 (S.D.N.Y. 1997); *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-99 (W.D. Mich. 1995); *In re Air Crash Disaster at Stapleton Int’l Airport, Denver, Colo.*, 720 F. Supp. 1442, 1444 (D. Colo. 1988).

44. *Haworth, Inc.*, 162 F.R.D. at 296 (citing FED. R. CIV. P. 26(a)(2)).

45. *See id.* at 295 n.5 (citing *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985)).

information that counsel gave the expert."⁴⁶ Even though an attorney may have an interest in his sifting of the facts,⁴⁷ the interest is "considerably outweighed . . . by the need of the adversary to know the basis of the expert's opinion."⁴⁸ The law is less clear on the discoverability of opinion work product materials provided to a testifying expert.

B. State of the Law Prior to the 1993 Amendments to the Federal Rules of Civil Procedure

The uncertainty regarding whether the work product doctrine protects opinion work product materials provided to a testifying expert arises from unclear language in Rule 26. Before the 1993 Amendments to Rule 26, which added initial disclosure requirements with regard to testifying experts,⁴⁹ courts considering whether work product materials provided to experts should be disclosed had to determine the relationship between Rules 26(b)(3) (the work product rule) and 26(b)(4) (the expert discovery rule).

The primary confusion surrounded the phrase, "[s]ubject to the provisions of subdivision (b)(4) of this rule," at the beginning of the work product rule.⁵⁰ The question was whether that phrase was meant to apply only to the first sentence of that paragraph (the general work product rule providing that materials prepared in anticipation of trial are discoverable only upon a showing of need),⁵¹ or if it was also meant to apply to the second sentence (the opinion work product rule providing that an attorney's mental impressions are not discoverable notwithstanding a showing of substantial need).⁵² If the drafters intended the phrase to apply only to the first sentence, then the opinion work product rule in the second sentence is not subject to subdivision (b)(4) (the expert discovery rule), and opinion work product given to experts is not discoverable pursuant to subdivision (b)(3).⁵³ Conversely, if the phrase applied to both sentences, then the expert discovery rule prevails over both, and opinion work product given to experts is discoverable.⁵⁴ The Third Circuit, the only federal appellate court to have considered the issue to date, chose the former interpretation;⁵⁵ however, that decision has recently been criticized.⁵⁶

46. *B.C.F. Oil Ref., Inc.*, 171 F.R.D. at 63.

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

48. *B.C.F. Oil Ref., Inc.*, 171 F.R.D. at 63.

49. FED. R. CIV. P. 26(a)(2).

50. FED. R. CIV. P. 26(b)(3).

51. *Id.*

52. *Id.*

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

54. *See Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387-88 (N.D. Cal. 1991).

55. *Bogosian*, 738 F.2d at 594; *see also Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 292 (W.D. Mich. 1995).

56. *See Karn v. Rand*, 168 F.R.D. 633, 636 (N.D. Ind. 1996); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61 (D.N.M. 1996); *United States v. City of Torrance*, 163

The pre-1993 cases addressing discovery of work product materials provided to experts can largely be categorized as either protection-oriented or discovery-oriented.⁵⁷ In 1984 the Third Circuit announced the leading and most strongly protection-oriented approach in *Bogosian v. Gulf Oil Corp.*⁵⁸ In ruling that work product materials provided to testifying experts are not discoverable, the court held that “subdivision (b)(4) [is] not exempt from (b)(3) protection against disclosure of attorney mental impressions.”⁵⁹ The court stated that the “thrust of Rule 26(b)(4) is to permit discovery of facts known or opinions held by the expert.”⁶⁰ The defendants argued that they could not effectively cross-examine the expert without knowing the extent to which the lawyer had shaped the expert’s testimony. The court disagreed, believing that the defendants could effectively cross-examine the expert on the basis of his opinion without revealing the extent of the lawyer’s influence.⁶¹ “[T]he marginal value in the revelation on cross-examination that the expert’s view may have originated with an attorney’s opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney’s work product.”⁶²

Relying heavily on *Hickman*,⁶³ the court further reasoned that if attorneys did not feel confident that their theories would be protected from disclosure, “the freedom of thought essential to carefully reasoned trial preparation would be inhibited.”⁶⁴ Although some of the other pre-1993 protection-oriented approaches were more moderate, the *Bogosian* approach was widely followed.⁶⁵

F.R.D. 590, 593-94 (C.D. Cal. 1995); *United States Energy Corp. v. Nukem, Inc.*, 163 F.R.D. 344, 348 (D. Colo. 1995); *Rail Intermodal Specialists, Inc. v. General Elec. Capital Corp.*, 154 F.R.D. 218, 220-21 (N.D. Iowa 1994).

57. See Mickus, *supra* note 10, at 776; Plunkett, *supra* note 12, at 455-67.

58. 738 F.2d 587 (3d Cir. 1984). *Bogosian* was an antitrust class action by lessee oil dealers against major oil companies in which plaintiffs sought a writ of mandamus to direct the district court judge to vacate orders compelling production of documents reviewed by plaintiffs’ expert and prepared by plaintiffs’ counsel. The documents wholly consisted of counsel’s mental impressions, thought processes, opinions, and legal theories. *Id.* at 588.

59. *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 292 (W.D. Mich. 1995) (citing *Bogosian*, 738 F.2d at 594).

60. *Bogosian*, 738 F.2d at 595.

61. *Id.*

62. *Id.*

63. *Hickman v. Taylor*, 329 U.S. 495 (1947).

64. *Bogosian*, 738 F.2d at 593.

65. See *Toledo Edison Co. v. GA Techs., Inc.*, 847 F.2d 335, 340 (6th Cir. 1988) (holding that “the rule flatly states that the court is not to permit discovery of ‘mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation.’”); *Natta v. Zletz*, 418 F.2d 633, 638 (7th Cir. 1969) (holding that letters from an attorney to a testifying expert were not discoverable absent a showing of exceptional circumstances under *Hickman*); *In re Aircraft Accident Near Prineville, Or.*, 7 Fed. R. Serv. 3d 260 (D. Or. 1987) (holding that letters to experts from counsel were protected under the work product privilege).

The leading and most extreme discovery-oriented approach prior to the 1993 Amendments was articulated in *Intermedics, Inc. v. Ventritex, Inc.*,⁶⁶ a decision announced by the Northern District of California seven years after the Third Circuit decided *Bogosian*. In granting a motion to compel discovery of counsel's work product provided to a testifying witness, the court held that

absent an extraordinary showing of unfairness that goes well beyond the interests generally protected by the work product doctrine, written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product.⁶⁷

In so holding, the court expressly rejected the Third Circuit's analysis and holding in *Bogosian*,⁶⁸ and instead relied in part on two earlier Colorado cases.⁶⁹ The court disagreed with the view expressed in *Bogosian* that the purpose of Rule 26(b)(4) is to permit discovery only of the facts known or opinions held by the expert.⁷⁰ Instead, the court stated, "[i]t is clear that the interests that are intended to be advanced by paragraph (4) of Federal Rule of Civil Procedure 26(b) include nothing less than the integrity and reliability of the truth-finding process."⁷¹ Given these interests and the Advisory Committee Notes to the 1970 Amendments to Rule 26,⁷² the court believed that "[t]he drafters' goal in writing

66. 139 F.R.D. 384 (N.D. Cal. 1991). *Intermedics* was a patent infringement and misappropriation of trade secrets action in which defendants moved to compel both answers to questions posed at plaintiff's expert's deposition regarding information told to him by plaintiff's counsel and production of documents prepared by plaintiff's counsel and given to the expert. *Id.* at 385.

67. *Id.* at 387.

68. *Id.* ("While we do so with trepidation, and in full recognition that this is an area in which there is considerable room within which thoughtful judges can reach different conclusions, we respectfully disagree with the analysis and holding of the *Bogosian* majority.")

69. See *In re Air Crash Disaster at Stapleton Int'l Airport, Denver, Colo.*, 720 F. Supp. 1442 (D. Colo. 1988); *Boring v. Keller*, 97 F.R.D. 404 (D. Colo. 1983). Both cases held that "[t]he work product privilege 'is no exception to discovery under circumstances where documents which contain [an attorney's] mental impressions are examined and reviewed by expert witnesses before their expert opinions are formed.'" *In re Crash Disaster*, 720 F. Supp. at 1444 (quoting *Boring*, 97 F.R.D. at 406-07). *Accord* *William Penn Life Assurance Co. of Am. v. Brown Transfer & Storage Co.*, 141 F.R.D. 142, 143 (W.D. Mo. 1990) ("Without discovery of such material the adversary is deprived of the opportunity to adequately explore the extent to which counsel's observations affected the expert's opinion, and to impeach the expert on that basis.") (citing *Boring*, 97 F.R.D. at 408).

70. See *supra* note 60 and accompanying text.

71. *Intermedics*, 139 F.R.D. at 394.

72. *Id.* at 388. The Advisory Committee Notes "reject as ill-considered the decisions which have sought to bring expert information within the work product doctrine." *Id.* (quoting the 1970 Amendments Advisory Committee Notes, FED. R. CIV. P. 26 (amended 1993)).

the second sentence of [paragraph (b)(3)] was simply to make sure that special protection attached to the opinion work product, not to suggest that the first sentence's proviso [that the rule was subject to 26(b)(4)] was applicable only to non-opinion work product."⁷³ The court suggested that the conclusion in *Bogosian* that only the first sentence of 26(b)(3) was meant to be subject to subdivision (b)(4) was unclear and without foundation.⁷⁴

The court also disagreed with the view expressed in *Bogosian* that cross-examination of expert witnesses could be effective without delving into the extent to which counsel's thoughts and opinions were shared with the expert.⁷⁵ The court reasoned that because the factual information considered by the expert was already discoverable regardless of its source, only two kinds of things would be protected by the *Bogosian* rule: (1) counsel's organization of the information shared with the expert, and (2) counsel's thoughts and impressions of that information.⁷⁶ The latter category would include counsel's "editorial comments about [the data's] relative significance, suggestions about how to interpret the data, or how to package it for presentation by the expert while testifying, or about what inferences should be drawn from it, what meanings should be ascribed to it, or what generalizations it supports."⁷⁷ The court felt that if these types of communications were to be protected, the independence of the experts' opinions, and thus "the integrity and reliability of the truth finding process" would be threatened.⁷⁸ Because experts present opinions and reasoning as their own, the court believed that "[k]nowing that some or all of the reasoning and opinion that is being presented by an expert is not her own, but is a lawyer's, might well have an appreciable effect on the probative value the trier of fact ascribes to the expert testimony."⁷⁹

Other pre-1993 cases took a more moderate discovery-oriented approach. One court held that work product materials relied on by the expert were discoverable under a waiver theory, but that work product materials merely reviewed by the expert were not.⁸⁰ This approach was criticized by the court in *Intermedics* on fairness grounds: "[A] finding of waiver requires a showing that a person voluntarily has given up a known right. . . . [But] the courts have developed nothing approaching a clear consensus about what consequences, if any, attach to sharing such documents with a testifying expert."⁸¹ Another court was willing to order disclosure of opinion work product materials provided to a

73. *Id.* at 389.

74. *Id.* at 388.

75. *Id.* at 393-94; *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 (3d Cir. 1984).

76. *Intermedics*, 139 F.R.D. at 393.

77. *Id.*

78. *Id.* at 394.

79. *Id.* at 395.

80. *Trimec, Inc. v. Zale Corp.*, No. 86-C3885, 1992 WL 245602, at *2 (N.D. Ill. Sept. 23, 1992); see also Mickus, *supra* note 10, at 776.

81. *Intermedics*, 139 F.R.D. at 391.

testifying expert, but only upon a Rule 26(b)(3) showing of substantial need.⁸² Yet another court, in *Occulto v. Adamar of New Jersey Inc.*,⁸³ adopted a balancing approach “in which the most important factors were the degree to which the expert’s opinion derived from the alleged work product and whether the alleged work product was primarily factual or ‘laced with the attorney’s intimate observations.’”⁸⁴

The 1993 Amendments have furthered the uncertainty in the relationship between Rules 26(b)(3) and 26(b)(4).⁸⁵ The phrase, “[s]ubject to the provisions of subdivision (b)(4) of this rule,”⁸⁶ at the beginning of subdivision (b)(3) has survived, and neither the text of amended Rule 26 nor the Advisory Committee Notes answer the question of exactly what in the rule is subject to subdivision (b)(4). Although the 1993 Amendments made such sweeping changes to expert discovery that at least one court has suggested that the reasoning of pre-1993 cases no longer applies,⁸⁷ many courts and commentators believe that the pre-1993 approaches remain viable solutions to the lingering expert discovery problems.⁸⁸

C. The 1993 Amendments

The 1993 Amendments to the Federal Rules of Civil Procedure became effective on December 1 of that year, with many of the most significant changes occurring within Rule 26. These changes added initial disclosure requirements with regard to testifying experts, expanded expert disclosure obligations from material known by experts to material considered by experts, and added a provision allowing a party to depose the opposing party’s expert(s).⁸⁹ At least one court has commented that the “reasoning of those cases interpreting the Rule prior to 1993 on this subject is probably obsolete.”⁹⁰

The amendments brought the addition of Rule 26(a)(2), entitled “Disclosure of Expert Testimony.”⁹¹ As a result, parties can no longer wait until they receive formal discovery requests to disclose information regarding expert witnesses who are expected to testify, and instead are required to make disclosures automatically.⁹² Included in those mandatory disclosures are the identity of any

82. See *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 284-85 (D. Kan. 1989).

83. 125 F.R.D. 611 (D.N.J. 1989).

84. *B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 65 (S.D.N.Y. 1997) (quoting *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 615-16 (D.N.J. 1989)).

85. See *infra* notes 100-43 and accompanying text.

86. FED. R. CIV. P. 26(b)(3).

87. See *B.C.F. Oil Ref., Inc.*, 171 F.R.D. at 65.

88. See generally Mickus, *supra* note 10, at 778.

89. See FED. R. CIV. P. 26.

90. *B.C.F. Oil Ref., Inc.*, 171 F.R.D. at 65.

91. FED. R. CIV. P. 26(a)(2).

92. Unless otherwise agreed or directed by the court, the parties must make these disclosures at least 90 days prior to the date that the case is to be ready for trial. See FED. R. CIV. P.

persons “specially employed to provide expert testimony in the case” and a report prepared and signed by that person containing

a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.⁹³

An evasive or incomplete disclosure is treated as a failure to disclose, with the consequences possibly including preclusion of the undisclosed testimony or exhibits or other sanctions pursuant to Rule 37(c)(1).⁹⁴

In addition to adding the mandatory disclosures, the 1993 Amendments broadened the scope of discoverable information from material “known by experts”⁹⁵ to material “considered by” experts.⁹⁶ “‘Consider’ is defined as ‘[t]o think about seriously,’ ‘[t]o regard,’ ‘[t]o take into account,’ and/or ‘[t]o bear in mind,’”⁹⁷ which is clearly a broader concept than materials merely relied upon.⁹⁸ The effect is that materials that the expert reviewed but on which he did not rely in forming his opinion are no longer protected from discovery.⁹⁹

The 1993 Amendments also introduced a provision allowing for a new

26(a)(2)(C). If the testimony is solely intended for rebuttal purposes, the disclosures must be made within 30 days after the disclosure by the other party which this testimony is intended to rebut. *See id.*

93. FED. R. CIV. P. 26(a)(2)(B). *See also* Joseph, *supra* note 13, at 98.

94. *See* Joseph, *supra* note 13, at 98-99. Under Rule 37(c)(1), a party failing to make a disclosure or to supplement disclosure responses under Rule 26 may not “present as substantive evidence or on summary judgment (or other) motion any evidence not so disclosed, unless there is ‘substantial justification’ for the failure to disclose or unless the ‘failure is harmless.’” *Id.* at 99. However, this automatic preclusion may be subject to principles of fundamental fairness. *See id.* For cases applying Rule 37 sanctions to nondisclosure under Rule 26(a)(2), *see id.* at 99 nn.4-6.

95. FED. R. CIV. P. 26(b)(4) (amended 1993).

96. FED. R. CIV. P. 26(a)(2)(B).

97. George E. Lieberman, ESQ., *Experts and the Discovery/Disclosure of Protected Communication*, 43-FEB. R.I. BUS. J. 7, 10 (1995) (quoting WEBSTER’S II NEW RIVERSIDE UNIVERSITY DICTIONARY 301 (Riverside Pub. Co. 1988)).

98. *See* Karn v. Rand, 168 F.R.D. 633, 635 (N.D. Ind. 1996).

99. *See* Baxter Diagnostics, Inc. v. AVL Scientific Corp., No. CV91-4178-RG, 1993 WL 360674 (C.D. Cal. Aug. 6, 1993). The court stated:

The word “considered,” as used herein, is intended to encompass: (a) all documents and oral communications relied upon by the experts in formulating their opinions; and (b) all documents and oral communications reviewed by the experts in connection with the formulation of their opinions, but ultimately rejected or not relied upon.

method of discovery regarding expert witnesses—the deposition.¹⁰⁰ Prior to the 1993 Amendments, Rule 26 allowed a party to obtain information from expert witnesses only through the use of interrogatories unless the court ordered additional discovery.¹⁰¹ Amended Rule 26(b)(4) allows parties to take depositions of opposing parties' testifying experts after receiving the experts' reports pursuant to Rule 26(a)(2)(B).¹⁰²

Although these changes may seem clear on their face, courts have disagreed on their effect upon the status of opinion work product materials shared with testifying experts. Unfortunately, the Advisory Committee Notes to the 1993 Amendments for Rule 26 have not helped. The Advisory Committee Notes state that

[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.¹⁰³

Although this language has been interpreted by many courts to create a “bright-line” rule that all materials provided to experts are discoverable,¹⁰⁴ others have continued to follow *Bogosian*'s holding that this comment only addresses fact work product and that opinion work product materials given to testifying experts are not discoverable.¹⁰⁵

II. DEVELOPMENT OF THE ISSUE SINCE THE 1993 AMENDMENTS

The law regarding disclosure of work product materials provided to testifying experts is not well-settled, and “there is considerable room within which thoughtful judges can reach different conclusions.”¹⁰⁶ Although it is generally accepted that fact-oriented work product materials, those not containing attorneys' mental impressions, are discoverable,¹⁰⁷ federal district courts have continued to report inconsistent decisions regarding the discoverability of opinion work product materials. No federal appellate court has considered the issue since the 1993 Amendments.

Post-1993 cases may still be accurately described as either discovery-oriented

100. See FED. R. CIV. P. 26(b)(4).

101. FED. R. CIV. P. 26(b)(4) (amended 1993).

102. FED. R. CIV. P. 26(b)(4)(A). Note, however, that a party deposing another party's expert must “pay the expert a reasonable fee for the time spent in responding to discovery.” FED. R. CIV. P. 26(b)(4)(C).

103. FED. R. CIV. P. 26, 1993 Amendments Advisory Committee Notes.

104. See *Karn v. Rand*, 168 F.R.D. 633, 638 (N.D. Ind. 1996).

105. See *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 294-96 (W.D. Mich. 1995).

106. *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 387 (N.D. Cal. 1991).

107. See *Joseph*, *supra* note 13, at 88 (“[T]he cases leave little doubt that compilations of factual materials provided to experts (i.e., ordinary work product) may be discovered.”).

or protection-oriented.¹⁰⁸ Many discovery-oriented opinions have essentially relied on the policies and reasoning set forth in *Intermedics* despite the 1993 Amendments.¹⁰⁹ One court even expressed an opinion that the *Intermedics* reasoning makes even more sense in light of the 1993 Amendments.¹¹⁰ However, the leading opinion of *Karn v. Rand*¹¹¹ has stated that although *Intermedics* “provides thoughtful and instructive reasoning, the analysis it espouses has become unnecessary in light of the new Rule.”¹¹²

The court in *Karn* reviewed the pre-1993 discrepancy between the *Bogosian* line of cases and the *Intermedics* line of cases, and determined that “[a]gainst this historical backdrop, it becomes plainly evident that the text of the new Rule, supported by its accompanying commentary, was designed to mandate full disclosure of those materials reviewed by an expert witness, regardless of whether they constitute opinion work product.”¹¹³ The court found that the drafters of the 1993 Amendments considered the confusion surrounding the discoverability of opinion work product materials under Rules 26(b)(3) and 26(b)(4), and attempted to clearly resolve it by providing that expert disclosure under 26(a)(2) “trump” any claims of privilege.¹¹⁴ *Karn* declared that the 1993 Amendments “unambiguously provide a ‘bright-line’ rule” mandating disclosure of opinion work product materials provided to experts.¹¹⁵

Aside from the “bright-line” rule purportedly created by the 1993 Amendments, *Karn* explained that such a rule also makes sense on several policy grounds: “[E]ffective cross examination of expert witnesses will be enhanced; the policies underlying the work product doctrine will not be violated; and, finally, litigation certainty will be achieved—counsel will know exactly what documents will be subject to disclosure and can react accordingly.”¹¹⁶ The court

108. See Plunkett, *supra* note 12, at 470-75.

109. See, e.g., *Barna v. United States*, No. 95C6552, 1997 WL 417847, at *2 (N.D. Ill. July 28, 1997) (holding that “any information considered by a testifying expert in forming his opinion on an issue, even if that information contains attorney opinion work product, is discoverable”); *Furniture World, Inc. v. D.A.V. Thrift Stores, Inc.*, 168 F.R.D. 61, 62 (D.N.M. 1996) (“The reasoning in *Intermedics* is made even more compelling in light of the revisions contained in Rule 26(a)(2).”); *United States v. City of Torrance*, 163 F.R.D. 590, 593 (C.D. Cal. 1995) (holding that “[t]he approach which is most consistent with the purpose of the Federal Rules of Civil Procedure is to require disclosure”); *United States Energy Corp. v. Nukem, Inc.*, 163 F.R.D. 344, 348 (D. Colo. 1995) (holding that when work product documents have been turned over to an expert, “the protection has been waived because immunized materials should not remain undiscoverable after they have been used to influence and shape testimony”) (citing *Boring v. Keller*, 97 F.R.D. 404 (D. Colo. 1983)).

110. See *Furniture World, Inc.*, 168 F.R.D. at 62.

111. 168 F.R.D. 633 (N.D. Ind. 1996).

112. *Id.* at 639.

113. *Id.* at 637.

114. *Id.* at 639.

115. *Id.* at 638.

116. *Id.* at 639.

believed that the purpose of the work product doctrine as declared by *Hickman* is to provide counsel with latitude to develop new legal theories without knowing beforehand if they will be favorable to the client's case.¹¹⁷ Because providing work product materials to experts does not normally result in the development of new legal theories, the court reasoned that mandating disclosure of those materials does not violate the *Hickman* rule.¹¹⁸

The Southern District of New York recently followed *Karn* in *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*¹¹⁹ In *B.C.F.* the court approvingly cited *Karn*'s three policy reasons for creating a "bright-line" rule in favor of disclosure,¹²⁰ and made the additional observation that "this reading of Rule 26(b) is consistent with the intent of the drafters of the 1993 Amendment."¹²¹ The court reasoned that a primary purpose of the amendments was to resolve the conflict between work product protection and expert discovery and "to mandate disclosure despite privilege."¹²²

Other courts ordering discovery of opinion work product materials provided to testifying experts tend to focus more heavily on the argument that disclosure of opinion work product material provided to an expert is necessary for effective cross-examination of the expert. The court in *Barna v. United States*¹²³ went beyond *Intermedics*, explaining that disclosure is essential to the truth-finding process: "Without this form of discovery, expert testimony may become another way in which counsel places his view of the case or the evidence in front of the jury. . . ."¹²⁴ The court urged that allowing presentation of counsel's views in this way effectively deprives opposing counsel of grounds for cross-examination because, when espoused by an expert, counsel's views are "presented to the jury with an air of authority and a stamp of scientific validity."¹²⁵ The court in *Musselman v. Phillips*¹²⁶ followed *Barna*'s reasoning and added that without disclosure of opinion work product provided to experts, parties would be unable to reveal weaknesses in expert testimony that might affect its admissibility.¹²⁷ This would prevent trial courts from effectively performing their "gatekeeping" function with regard to expert testimony¹²⁸ as contemplated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹²⁹

117. *Id.* at 640.

118. *Id.*

119. 171 F.R.D. 57 (S.D.N.Y. 1997).

120. *Id.* at 66.

121. *Id.*

122. *Id.* (quoting 8 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2016.2, at 252 (2d ed. 1994)).

123. No. 95C6552, 1997 WL 417847 (N.D. Ill. July 23, 1997).

124. *Id.* at *2.

125. *Id.*

126. 176 F.R.D. 194 (D. Md. 1997).

127. *Id.* at 200-01.

128. *See id.*

129. 509 U.S. 579, 595 (1993) (contemplating that trial judges would rely on scientific

Although the reasoning of these cases may have appeal, many post-1993 cases have adopted a protection-oriented approach and determined that Rule 26 only requires disclosure of fact work product materials provided to experts, while opinion work product materials remain protected. These cases tend to point to the strong protection for an attorney's theories and mental impressions described in *Hickman*.¹³⁰

At least one court has held that Rule 26 is not applicable in cases in which the information sought to be discovered from the expert is something other than a document or tangible thing.¹³¹ In *Maynard v. Whirlpool Corp.*,¹³² the plaintiffs made a motion to compel the defendant's expert to respond to deposition questions inquiring about prior statements made by the defendant's counsel regarding a former expert with whom counsel was presumably dissatisfied. The court determined that Rule 26(b)(3) did not apply because the information sought was not a document or other tangible thing, and thus turned to *Hickman* for the rule of law.¹³³ After reviewing the *Hickman* decision, the court held that "an attorney's opinion work product is nearly, if not absolutely, privileged."¹³⁴

The leading post-1993 protection-oriented case construing amended Rule 26 is *Haworth, Inc. v. Herman Miller, Inc.*¹³⁵ *Haworth* was a patent infringement action in which the plaintiff appealed a magistrate's order granting the defendant's motion to compel the plaintiff's expert to testify about all communications that he had with the plaintiff's attorneys. The plaintiff argued that the materials were protected opinion work product. In reversing the magistrate's order, the court held that Rule 26 and the Advisory Committee

weaknesses revealed during effective cross-examination of expert witnesses to determine the admissibility of the evidence); *Musselman*, 176 F.R.D. 194 at 199-200.

130. See, e.g., *Kennedy v. Baptist Mem'l Hosp.-Booneville, Inc.*, No. 1:96CV339-S-D, 1998 WL 208999, at *3 (N.D. Miss. Apr. 23, 1998) (quoting *Musselman*, 176 F.R.D. at 200) (Attorney work product disclosed to a testifying expert will be discoverable "[o]nly when an event occurs which puts the opponent on notice that counsel may have 'interjected him or herself into the process by which a testifying expert forms the opinions to be testified to at trial'"); *Ambrose v. Southworth Prods. Corp.*, No. CIV.A.95-0048-H, 1997 WL 470359, at *1 (W.D. Va. June 24, 1997) (noting that "[i]f and when further discovery of experts is ordered by the court, following the procedure outlined in Rule 26(b), the parties should note that such disclosure may still be limited by the needs of the defendant to prepare for trial"); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 642 (E.D.N.Y. 1997) (holding that "the data or other information considered by [an expert] witness in forming [his] opinions' required to be disclosed in the expert's report mandated under Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney work product considered by an expert"); *All West Pet Supply Co. v. Hill's Pet Prod. Div.*, 152 F.R.D. 634, 638-39 (D. Kan. 1993).

131. See *Maynard v. Whirlpool Corp.*, 160 F.R.D. 85, 87 (S.D. W. Va. 1995).

132. *Id.*

133. *Id.*

134. *Id.* at 88 (citing *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734 (4th Cir. 1974)).

135. 162 F.R.D. 289 (W.D. Mich. 1995).

Notes require “only that all factual information considered by the expert must be disclosed.”¹³⁶ The court believed that the 1993 Amendments merely eliminate the need for the opposing party to make a motion to compel production of such materials and for the judge to order redaction of opinion work product contained therein.¹³⁷

The court reasoned, “[f]or the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute. No such language appears here.”¹³⁸ Consequently, the court held that “the protection accorded an attorney’s mental impressions and opinions by the Supreme Court in *Hickman v. Taylor*,¹³⁹ and substantially codified in 1970 in Rule 26(b)(3), was intended to apply to discovery from experts.”¹⁴⁰

In response to arguments that disclosure of opinion work product materials provided to experts is necessary for effective cross examination, the court in *Haworth* noted that “[t]he risk of an attorney influencing an expert witness does not go unchecked in the adversarial system, for the reasonableness of an expert opinion can be judged against the knowledge of the expert’s field and is always subject to the scrutiny of other experts.”¹⁴¹ The court pointed out that the Supreme Court in *Hickman* stated that it would be “‘a rare situation’ which would justify disclosure of attorney opinion work product.”¹⁴² In light of this mandate, the court in *Haworth* determined that “a more effective cross-examination and impeachment of the opposing party’s expert witness . . . is not the type of circumstance the Supreme Court contemplated would overcome the strong policy against disclosing an attorney’s opinion work product.”¹⁴³

As evidenced by the above cases, the federal districts are not moving toward agreement on the issue of discoverability of opinion work product materials provided to expert witnesses. The issue is being confronted with increasing frequency, and parties are in need of a clear, uniform rule.

III. ARGUMENT

A uniform standard is needed given the uncertainty faced by parties to litigation and the widely divergent approaches adopted by the federal districts with regard to opinion work product materials furnished to expert witnesses. Does amended Rule 26 require that an attorney withhold valuable work product materials from a testifying expert if she wishes them to remain unreachable by the opposing party? Does a party have to hire multiple experts, some of whom

136. *Id.* at 295 (citing *All West Pet Supply Co. v. Hill’s Pet Prod. Div.*, 152 F.R.D. 634, 639 n.9 (D. Kan. 1993)).

137. *Id.* (citations omitted).

138. *Id.* (citing *Hickman v. Taylor*, 329 U.S. 495, 514 (1947)).

139. 329 U.S. 495 (1947).

140. *Haworth, Inc.*, 162 F.R.D. at 294.

141. *Id.* at 295-96.

142. *Id.* at 295 (quoting *Hickman*, 329 U.S. at 513).

143. *Id.*

will testify and some of whom will not, if it wishes to engage in confidential discussions with an expert about the attorney's theories or litigation strategy? The answer to both of these questions should be a resounding no. Amended Rule 26 does not require that opinion work product materials shared with testifying experts be disclosed to the opposing party. Rule 26 should be amended to clarify that the work product rule "trumps" the provisions addressing expert discovery.

A. *The Drafters' Intent*

Given the extent of the controversy regarding discoverability of work product materials provided to testifying experts prior to the 1993 Amendments to Rule 26, the drafters would have explicitly created a "bright-line" rule mandating disclosure of opinion work product if they had intended such a result. As demonstrated by the wealth of post-1993 case law on the topic,¹⁴⁴ such a "bright-line" rule does not exist. Contrary to the declarations of the *Karn v. Rand*¹⁴⁵ line of cases, the text of Rule 26 does not create a clear rule mandating discovery.

One commentator has argued that it is illogical to construe the new rules as protecting opinion work product given to experts because that would mean that the 1993 Amendments did "not affect what information another party is entitled to obtain, but only how the party is entitled to obtain it."¹⁴⁶ The claim is that the title and text of Rule 26(a)(2) contradict that conclusion.¹⁴⁷ However, this argument is inaccurate and simply ignores one of the major changes to Rule 26. Even if opinion work product given to testifying experts is protected under the new Rule, amended Rule 26 expands the category of information that a party is entitled to obtain from material "known by" experts to material "considered by" experts. This is significant because previously, parties were able to conceal "relevant but adverse information through the mental gymnastic of deciding that [the expert] did not rely on it."¹⁴⁸ Because the experts' reliance is no longer the relevant criterion in determining whether information reviewed by them is discoverable, the 1993 Amendments have significantly expanded both the types of information that a party may obtain from the opposing party and the ways in which it may be obtained.

As further evidence that a clear rule mandating discovery does not exist, one need only look to the text of Rule 26(b). The same wording in this section that created confusion prior to the 1993 Amendments still exists in the current rule, and no other portion of the text of Rule 26 solves the problem. Rule 26(b)(3) still

144. See *supra* notes 106-43 and accompanying text.

145. 168 F.R.D. 633 (N.D. Ind. 1996).

146. Plunkett, *supra* note 12, at 476; see also *Barna v. United States*, No. 95C6552, 1997 WL 417847, at *2 (N.D. Ill. July 28, 1997) (finding that an interpretation that the Advisory Committee Notes only requires the disclosure of fact work product materials "renders the 1993 amendments to Rule 26(a)(2) superfluous").

147. See Plunkett, *supra* note 12, at 476.

148. Joseph, *supra* note 13, at 103-04.

begins: "Subject to the provisions of subdivision (b)(4) of this rule,"¹⁴⁹ without stating whether the entire paragraph or only the first sentence is subject to (b)(4).

The most logical construction of this wording is the one adopted by the court in *Haworth*,¹⁵⁰ in which the court stated that "the drafters intended the terms 'subject to' to mean that subdivision (b)(3) applies unless there is a standard to the contrary in subdivision (b)(4)."¹⁵¹ Upon determining that subsection (b)(4) does not contain a standard for core work product different from the one contained in subsection (b)(3), the court "conclude[d] that the protection accorded an attorney's mental impressions and opinions by the Supreme Court in *Hickman v. Taylor*,¹⁵² . . . and substantially codified in 1970 in Rule 26(b)(3), was intended to apply to discovery from experts."¹⁵³

Any other reading of Rule 26(b) raises possible conflicts with the Rules Enabling Act (the "Act").¹⁵⁴ Under the Act, any rule that modifies or abolishes an evidentiary privilege is invalid.¹⁵⁵ Although the applicable provision of the Act has never been construed in a published opinion, it may invalidate any federal rule that mandates waiver of the work product privilege.¹⁵⁶ If the strong protection afforded core work product is found to be an evidentiary privilege within the meaning of the Act, and if a federal rule mandating disclosure of core work product materials when they are shared with an expert is found to modify that privilege, then that federal rule would be invalid.¹⁵⁷ Therefore, any interpretation other than that adopted by the court in *Haworth* might render the applicable portion of Rule 26(b) invalid.

In addition to the fact that the text of Rule 26 does not create a clear rule mandating discovery, the wording of Rule 26(a)(2) does not express the drafters' intent that work product materials be disclosed.¹⁵⁸ One commentator has argued that "[i]f Congress had intended the information considered by an expert witness similarly to retain any privilege or protection, it could have specifically provided those protections despite Rule 26(a)'s disclosure requirements."¹⁵⁹ In support, the commentator cites another portion of the rule in which there is a specific provision protecting data from disclosure: "Rule 26(a)(1)(C) requires the disclosure of documents or other materials used in making damage calculations, but specifically protects from disclosure materials that are privileged or

149. FED. R. CIV. P. 26(b)(3).

150. *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995).

151. *Id.* at 293.

152. 329 U.S. 495 (1947).

153. *Haworth, Inc.*, 162 F.R.D. at 294.

154. 28 U.S.C. § 2074(b) (1994).

155. The Rules Enabling Act provides that "[a]ny such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." *Id.*

156. See Joseph, *supra* note 13, at 106.

157. See *id.* at 106 & n.18.

158. See Plunkett, *supra* note 12, at 477.

159. *Id.*

protected.”¹⁶⁰ Consequently, the drafters’ choice not to explicitly protect opinion work product materials provided to experts “suggests further that disclosure under Rule 26(a)(2) requires disclosure of attorney work product given to an expert.”¹⁶¹ However, applying this same logic, if Congress had intended to mandate disclosure despite privilege, it could have specifically provided for that result, which it clearly did not. In light of *Hickman* and the strong protection afforded an attorney’s work product, it is difficult to imagine that the new rules were intended to supersede Supreme Court jurisprudence by inference or speculation.¹⁶²

The wording of Rule 26(a)(2)(B) itself suggests that mental impressions were not intended to fall within the Rule’s disclosure requirements. Rule 26(a)(2)(B) requires the disclosure of “data or other information considered by the [expert] in forming the opinions”¹⁶³ Mental impressions do not logically fit within this description. “‘Data’ and ‘information’ connote subjects that are factual in nature, not ephemera like ‘mental impressions, conclusions, opinions or legal theories’ of the sort protected by Rule 26(b)(3).”¹⁶⁴ As such, the text of Rule 26(a)(2)(B) does not require that the expert report disclose counsel’s opinion work product materials.

Nor do the Advisory Committee Notes to Rule 26(a) indicate that the amended rule was meant to mandate discovery of core work product materials provided to experts.¹⁶⁵ The Advisory Committee’s comments regarding disclosure simply state that attorneys should no longer be able to argue that materials containing fact work product are protected from discovery.

Also, it has been argued that a “reading of the Rule and the Comment as requiring only the disclosure of facts renders the Comment meaningless, because the work product doctrine protects only an attorney’s recording of facts, not the facts themselves.”¹⁶⁶ However, amended Rule 26(a) protects only materials containing an attorney’s mental impressions. Any materials containing fact work product, as well as the facts themselves, are discoverable under the new rule. Even though opinion work product is still protected, the comment is not meaningless because it clarifies that the materials containing the discoverable facts are also now discoverable.

Subsection (b)(3), as written, protects documents and tangible things (which are a method of transmittal) prepared in anticipation of litigation, while

160. *Id.*

161. *Id.*

162. *See* *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995).

163. FED. R. CIV. P. 26(a)(2)(B).

164. Joseph, *supra* note 13, at 104 (citing *Haworth, Inc.*, 162 F.R.D. at 289).

165. The Advisory Committee Notes to the 1993 Amendments for FED. R. CIV. P. 26 state: Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

166. Plunkett, *supra* note 12, at 479.

subsection (a)(2)(B) permits discovery of data and other information considered by the expert without specifying what methods of transmittal/forms of communication are contemplated.¹⁶⁷ The question then becomes, is just the data discoverable, or are the communications transmitting the data also discoverable?¹⁶⁸ The comment's function is to answer this question by clarifying that the materials given to the expert that communicate the factual information, not just the factual information itself, are discoverable. Although the comment certainly is not worthless under this interpretation, its significance ends at clarifying that the facts *and* the factual materials are discoverable. It does not indicate that the rule is intended to override the work product privilege in cases where opinion work product materials are shared with experts.

Amended Rule 26 and its comments do not create a clear rule mandating discovery of opinion work product materials provided to testifying experts. Against the historical backdrop of the judicial debate on the issue, the drafters of the rule would have created a clear rule mandating disclosure of such core work product had they intended to override the strong protection afforded such materials by the U.S. Supreme Court.

B. The Supreme Court's Protectionist Approach

The Supreme Court clearly announced its desire to protect attorney work product in *Hickman v. Taylor*¹⁶⁹ and has not expressed a contrary desire since. Given that the text of Rule 26 does not create a clear rule regarding discovery of opinion work product materials provided to testifying experts, any ambiguity on the face of the rule should be resolved in favor of existing Supreme Court jurisprudence. The Court clearly announced in *Hickman* that an attorney's opinion work product is deserving of nearly absolute protection.¹⁷⁰ Twenty-six years later, the Supreme Court reiterated that rule in *Upjohn Co. v. United States*.¹⁷¹ In writing for a unanimous Court, Justice Rehnquist emphasized that "Rule 26 accords special protection to work product revealing the attorney's

167. FED. R. CIV. P. 26.

168. See Joseph, *supra* note 13, at 103.

It is revealing that the Advisory committee Note is phrased in terms of "materials," even though subdivision (a)(2)(B) is not expressly limited to "documents and tangible things," as is subdivision (b)(3), but speaks only generally, in terms of "data or other information" (a phrase that describes the type of subject matter transmitted, regardless of the method of transmittal). The Advisory Committee's reference to "materials"—together with its reference to what "litigants should no longer be able to argue"—suggests that the drafters' intent was to resolve the prior squabbling over the discoverability of the factual matter furnished by counsel to a testifying expert to permit the expert to form an opinion.

Id.

169. 329 U.S. 495 (1947).

170. See *supra* notes 14-23 and accompanying text.

171. 449 U.S. 383, 400 (1981).

mental processes.”¹⁷² The Supreme Court has not spoken on the issue since *Upjohn*. As noted by the court in *Haworth*, in the absence of a Supreme Court opinion to the contrary, “[f]or the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute. No such language appears [in Rule 26].”¹⁷³

C. *Experts as Part of the Litigation Team*

Expert witnesses and counsel need to engage in uninhibited exchanges. Allowing the opposing party to discover opinion work product communicated within those exchanges would, in effect, allow the parties to use the discovery rules to uncover the opposing party’s litigation strategies. Unlike other types of trial witnesses, experts are part of a party’s litigation team who, like the attorney, are employed expressly for the purpose of analyzing the strengths and weaknesses of a party’s case. “Communications between counsel and expert are often essential to the understanding and proper functioning of both, and are therefore crucial to the prosecution or defense of a case.”¹⁷⁴ These types of strategic communications include analysis of “(i) the strengths and weaknesses of claims and defenses, whether asserted or unasserted; (ii) esoterica in the expert’s field, often but not necessarily relating either to [the] expert’s own, or to another expert’s, actual or prospective opinion in the case; and (iii) damages issues.”¹⁷⁵ Given this mutual need to freely exchange ideas, expert witnesses should be treated similarly to other members of a party’s litigation team, such as individual plaintiffs or defendants, who may testify at trial without having to disclose their litigation strategy or information that their attorney may have disclosed to them.

Experts are not impartial witnesses. Like attorneys, they are paid to advocate a point of view. In order to fulfill this purpose, they may have a legitimate need to share in uninhibited exchanges with other members of the litigation team without fear of having to disclose strategy to the other party. The mere fact that an attorney chooses to use an expert at trial indicates that the expert’s opinion is favorable to her client’s case.¹⁷⁶ Viewed in this light, allowing the opposing party to automatically discover all of the materials provided to the expert, including those containing the attorney’s mental impressions and theories, would amount to a windfall to the opposing party. Certainly, the Federal Rules of Civil Procedure were not intended to either deprive counsel of the benefits of freely communicating with an expert witness, or to act as a vehicle through which a party is able to freely discover the opposing counsel’s strategy.

172. *Id.*

173. *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289, 295 (W.D. Mich. 1995) (citation omitted).

174. Joseph, *supra* note 13, at 101.

175. *Id.*

176. See Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 390 (1990); Mickus, *supra* note 10, at 784.

D. Cross-examination

Contrary to the views expressed in many of the post-1993 discovery-oriented opinions,¹⁷⁷ disclosure of opinion work product materials provided to testifying experts is not required for effective cross-examination because the experts' opinions must ultimately have their basis in fact, not in attorneys' mental impressions.¹⁷⁸ Because such facts are discoverable, the opposing party has access to the information on which the experts' opinions are based, resulting in effective cross-examination. The opposing party also may counter expert testimony with experts of its own giving opinions based on the same facts. An expert whose opinions are shown not to have a strong basis in fact will not have credibility with the jury. Lack of factual foundation for an opinion is likely to have a more profound impeaching effect with the jury than the simple knowledge that the attorney shared her opinions with the expert.

Proponents of discovery argue that "[t]he cross-examiner cannot effectively pin an expert down on the extent to which counsel's presentation of the factual background or overt suggestions have shaded the expert's testimony unless the cross-examiner has some idea of what was presented or suggested to the expert."¹⁷⁹ However, this argument is inaccurate. If an expert's opinion is sound given the facts of the case which are equally available to both parties, opinion work product presented to the expert is essentially immaterial. A factually sound opinion is no less sound simply because the attorney agrees. If the expert's opinion is not sound, then he may be impeached on the facts of the case rather than on opinion work product that he may have seen.

E. Integrity of the Truth-finding Process

Many courts that have adopted a discovery-oriented approach have based their holdings, at least in part, on the principle announced in *Intermedics, Inc. v. Ventritex, Inc.*¹⁸⁰ that disclosure of opinion work product materials provided to experts is required to protect the integrity of the truth-finding process. This is not the case. Experts are not occurrence witnesses who merely describe factual information underlying the dispute. Protecting work product materials disclosed to experts will not affect the ability of the trier of fact to gain an accurate

177. See *supra* notes 109-29 and accompanying text.

178. See, e.g., *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 283 (D. Kan. 1989); *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 108 F.R.D. 283, 285-86 (M.D.N.C. 1985); Bryan Lewis, Note, *Discovery Under the Federal Rules of Civil Procedure of Attorney Opinion Work Product Provided to an Expert Witness*, 53 *FORDHAM L. REV.* 1159, 1172-73 (1985); Katherine A. Staton, Note, *Discovery of Attorney Work Product Reviewed by an Expert Witness*, 85 *COLUM. L. REV.* 812, 827-28 (1985).

179. Mickus, *supra* note 10, at 790-91; see also Jack H. Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 *STAN. L. REV.* 455, 485 (1962).

180. 139 F.R.D. 384, 394 (N.D. Cal. 1991). See also *supra* notes 66-79 and accompanying text.

understanding of the events giving rise to the lawsuit or to judge the credibility of the evidence presented.

The truth-finding process will be better served by a rule that allows counsel to most effectively and efficiently develop litigation strategies and prepare their case for trial without fear of essentially handing that strategy over to the other party.¹⁸¹ In fact, protecting work product materials furnished to testifying experts furthers the search for truth by “[p]reserving the privacy of preparation that is essential to the attorney’s adversary role”¹⁸² and by creating incentives to encourage counsel to creatively explore all possible theories of a case. It is important to recognize that

counsel does not know when she begins to prepare a new legal theory of the case, or to develop its factual basis, whether the process will produce insights more helpful to the other side than to her own. If counsel does not know, prior to undertaking the development of a new legal theory or factual investigation, whether the end result will prove helpful or harmful to her client’s case, then the possibility that the opposing party could discover the lawyer’s work would constitute a substantial disincentive for proceeding with the development of the new theory or factual investigation.

. . . Removing this disincentive to creative legal thought therefore stimulates the truth-finding process by unleashing each lawyer’s analytic abilities in the preparation of her client’s case, so that the finder of fact is presented with a choice between two well-developed positions, each portrayed in the best possible light.¹⁸³

Providing absolute protection to counsel’s core work product provides the necessary incentives to encourage counsel to most creatively and effectively plan the client’s litigation strategy, and actually furthers the integrity of the truth-finding process rather than hindering it.

Additionally, protecting core work product materials shared with experts “has the added benefits of (1) not favoring wealthy parties who can afford to hire both testifying and non-testifying experts and (2) not encouraging counsel and experts to engage in coy or strained conversations cloaked as ‘hypothetical’ to avoid discovery.”¹⁸⁴ Both of these benefits aid in the truth-finding process by not disadvantaging parties who are not well-financed and by permitting counsel and experts to engage in frank, straightforward discussions regarding the litigation.

Also, limiting discovery of opinion work product materials provided to experts does not affect the opposing party’s ability to determine the facts of a case or to prepare its best case for trial. Protecting opinion work product materials provided to testifying experts does not allow parties to circumvent the

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

182. *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir. 1985).

183. *Mickus*, *supra* note 10, at 781-82.

184. *Joseph*, *supra* note 13, at 90 (citing *Haworth, Inc. v. Herman Miller, Inc.*, 162 F.R.D. 289 (W. D. Mich. 1995)).

mandates of Rule 26(a)(2) and thus avoid revealing the basis for the expert's opinion. It has been argued that "allowing the work product protection to continue in materials used to prepare an expert to give testimony would yield the perverse incentive of encouraging counsel to use only work product materials to prepare an expert to give testimony, in order to avoid disclosure to the opposing party."¹⁸⁵ However, such a result is unlikely. Because fact work product materials are discoverable, the factual basis for the expert's opinion would be discoverable in all circumstances; and because the expert's opinion must ultimately be rooted in fact, parties must provide experts with factual materials so that they may first develop an informed opinion, and then intelligently and convincingly testify to the basis for that opinion at trial.

Proponents of discovery also suggest that the employment nature of the attorney/expert relationship encourages experts to alter their opinions to satisfy the attorneys who have hired them. Because the nature of the attorney/expert relationship is similar to an employer/employee relationship, and because many experts today are professional witnesses whose income depends on the production of favorable testimony, it is argued that there is pressure on experts "to conceal doubt, to overstate nuance, to downplay weak aspects of the case that one has been hired to bolster,' and to otherwise bring his opinion in line with the lawyer's view of what the expert's opinion ought to be. . . ."¹⁸⁶ But this is not a valid argument for disclosure of core work product materials. There is a risk that any and all types of testimony will be influenced by one of the parties. However, that risk cannot be eliminated and certainly does not justify disclosure of core work product. The job of the trier of fact is to judge the credibility of witnesses, and they are able to do so without compromising an attorney's right to protect his work.

In fact, the ongoing employment nature of the expert-attorney relationship is precisely the thing that encourages attorneys and experts *not* to taint the expert's testimony. Expert witnesses have less incentive than other types of witnesses to shape their testimony in response to influence of counsel because their continued income depends upon their credibility. Professional experts who express inconsistent opinions from one trial to the next are no longer desirable experts for future litigation. Attorneys also share in this interest to preserve the integrity of expert testimony because they often build an ongoing relationship with experts. If the attorney unduly influences the expert's testimony and the expert testifies to opinions that are not firmly rooted in fact, then the expert becomes less credible and consequently is a less desirable witness in the future.

CONCLUSION

For all of these reasons, a protection-oriented approach would better serve the interests of justice than a rule allowing for disclosure of core work product.

185. Mickus, *supra* note 10, at 787 (footnote omitted).

186. *Id.* at 789 (quoting John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (1985)).

The truth-finding process would be better advanced by a rule that would allow the attorney and the expert to engage in free, creative discussions without requiring that they then turn over the fruits of those discussions to the opposing party. A protection-oriented rule would allow attorneys to freely develop their best case for trial without fear of disclosing litigation strategy.

The confusion surrounding the mandates of Rule 26 forces parties to gamble with their most precious and creative ideas and strategies. The risks are potentially devastating. Because work product materials provided to testifying experts should not be discoverable under Federal Rule of Civil Procedure 26, the rule should be amended to clarify that 26(b)(3) work product protection extends to opinion work product materials provided to testifying experts.

