Fall 1987

The Work Product Doctrine Revisited

Carolyn Jo McFatridge

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/tlr

Part of the Law Commons

Recommended Citation

Available at: http://digitalcommons.law.utulsa.edu/tlr/vol23/iss1/4

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.
THE WORK PRODUCT DOCTRINE REVISITED

I. INTRODUCTION

An attorney preparing for litigation seeks to learn all that he can from his opponent with respect to the case. At the same time, however, he jealously guards his own knowledge. Our adversary system encourages each litigant to prepare his own case for trial, but it also encourages each party to acquire all the relevant facts of the case in order to be well prepared for trial.1

The discovery provisions of the Federal Rules of Civil Procedure enable the parties to discover the facts and to compel their disclosure so that all relevant information is available to the parties before trial.2 When discovery begins to move from the production of facts into the realm of the attorney's perception of the facts and his trial tactics, however, the liberal discovery provisions must be curbed.3 In response to the "fishing expeditions" conducted by some zealous litigants, the Supreme Court in 1947 ordered the protection of an opposing counsel's trial preparation materials.4 The Court labeled this preparation for trial the "work product" of the attorney and prohibited disclosure absent a showing of necessity.5

The work product doctrine is now codified in Fed. R. Civ. P. 26(b)(3).6 The courts have interpreted the rule as protecting "fact" work

2. Id. at 501. Discovery has three main purposes: (1) to preserve relevant information that might not be available at trial, (2) to define the issues that are actually in controversy between the parties, and (3) to obtain information that will lead to admissible evidence on the disputed issues. Freidenthal, Kane, and Miller, Civil Procedure § 7.1 (1985).
3. Hickman, 329 U.S. at 510. The Court stated that an unjustified attempt to obtain the personal reflections of an attorney in the course of representation is outside the discovery arena and contravenes public policy. Further, "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." Id.
4. Id. at 512-13.
5. Id. at 509.
6. Fed. R. Civ. P. 26(b) in pertinent part reads:

(b) Scope of Discovery and Limits
(3) [A] party may obtain discovery of documents and tangible things otherwise discoverable . . . and prepared in anticipation of litigation or for trial by or for another party . . . 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.
product\textsuperscript{7} and "opinion" work product\textsuperscript{8}; each type is subject to a different standard for disclosure. While the courts consistently apply the "substantial need" and "undue hardship" standard to the disclosure of fact work product, there is some inconsistency in the courts' analyses of the disclosure of opinion work product. The exceptions to this statutory immunity include fraud\textsuperscript{9} and waiver,\textsuperscript{10} as well as the conflicts with FED. R. CIV. P. 26(b)(4)\textsuperscript{11} and FED. R. EVID. 612.\textsuperscript{12} In addition, many courts tend to confuse their analyses of the work product doctrine with the policies and purposes of the attorney-client privilege.\textsuperscript{13} The confusion and inconsistency resulting from the courts' application of the work product doctrine is perhaps the result of unnecessary limitations on the statutory protection.\textsuperscript{14}

The nature of the work product doctrine is that of a two-edged sword. Because of the potential disadvantages as well as advantages of the application of the rule, each attorney involved in litigation should be familiar with the standards for invoking it as well as evading it.

II. THE DEVELOPMENT OF THE WORK PRODUCT DOCTRINE

A. Hickman v. Taylor

The work product doctrine has its genesis in the United States Supreme Court case Hickman v. Taylor.\textsuperscript{15} The question presented in Hickman was whether the discovery rules allowed a party to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation.\textsuperscript{16} The plaintiff had filed interrogatories requesting copies of any written statements and detailed reports of any oral statements taken of persons involved in the accident.\textsuperscript{17} The Supreme Court agreed with the district court that, because the statements were obtained from third persons instead of the client, the information which the plaintiff sought was not protected by the attorney-client privilege.\textsuperscript{18} In the Court's opinion, however, none of the discovery rules could allow

\begin{itemize}
\item 7. See infra notes 35-64 and accompanying text.
\item 8. See infra notes 65-80 and accompanying text.
\item 9. See infra notes 81-90 and accompanying text.
\item 10. See infra notes 91-95 and accompanying text.
\item 11. See infra notes 96-107 and accompanying text.
\item 12. See infra notes 108-124 and accompanying text.
\item 13. See infra notes 125-132 and accompanying text.
\item 14. See infra notes 133-139 and accompanying text.
\item 15. 329 U.S. 495 (1947).
\item 16. Id. at 505.
\item 17. Id. at 498-99.
\item 18. Id. at 508.
\end{itemize}
production as pursued.\textsuperscript{19}

The plaintiff in Hickman requested statements of witnesses who were known and available to him. He had already obtained answers to interrogatories and had access to the public testimony of the witnesses. Based on these factors, the Court concluded that the plaintiff was actually attempting to obtain the written statements in the files and the mental impressions of the attorney without the proper showing of necessity.\textsuperscript{20} The Court stated that an unjustified attempt to obtain the private memoranda or personal recollections prepared or formed by an attorney in the course of his legal duties falls outside the discovery arena. Noting that such a request violates public policy, the Court stressed that even under the most liberal of discovery theories an unwarranted inquiry into the files and mental impressions of an attorney cannot be justified.\textsuperscript{21}

The Hickman Court recognized that a lawyer works not only to advance justice but also to protect the interests of his clients.\textsuperscript{22} In order to perform his duties properly, the lawyer must be free to prepare his legal theories and to plan his strategy without unnecessary interference from opposing counsel. The Court termed this preparatory effort "work product of the lawyer" and stated:

\begin{quote}
Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An 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. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.\textsuperscript{23}
\end{quote}

The Court went on to explain, however, that this exemption from discovery is not without limit. Information found in an attorney's files that is relevant and non-privileged is discoverable.\textsuperscript{24} In addition, the party seeking discovery may invade the opposing party's preparatory materials by a showing of necessity or by claiming that denial of the production would unduly prejudice the preparation of his case or cause him hardship or injustice.\textsuperscript{25}

\begin{itemize}
\item \textsuperscript{19} Id. at 509.
\item \textsuperscript{20} Id. at 508-09.
\item \textsuperscript{21} Id. at 510.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} Id. at 511.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id at 512.
\end{itemize}
The drafters of the federal discovery rules codified the Hickman work product doctrine in 1970. FED. R. CIV. P. 26(b)(3) allows discovery of attorney product, but, as Hickman indicated, the burden is on the party seeking discovery to justify production of the materials. Rule 26 allows discovery of documents and tangible things otherwise discoverable which were prepared in anticipation of litigation or trial by or for that party’s representative. The burden is on the party seeking discovery to show that (1) he or she has “substantial need” of the materials in preparing his or her case and (2) he or she is unable without “undue hardship” to obtain the substantial equivalent of these documents in any other way. This portion of the rule also requires the court to prevent the disclosure of an attorney’s “mental impressions, conclusions, opinions, or legal theories . . . concerning the litigation.”

The appellate court which reviews a lower court’s grant or denial of production will overturn the decision only if the lower court has abused its discretion. The primary factors which the district court should consider in evaluating a party’s request for materials are the importance of the materials sought and, if discovery is denied, the difficulty which the party seeking discovery will face in attempting to obtain substantially

26. Although codified in the civil discovery code, the work product doctrine also applies to criminal trials and grand jury proceedings. In re Doe, 662 F.2d 1073, 1078 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).

27. 329 U.S. at 512.


Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Id.

29. Some courts prefer to approach the doctrine from the standpoint of immunity and consider the substantial need and undue hardship requirements as exceptions to the rule. See, e.g., Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 43 (D. Md. 1974).

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

equivalent information from other sources. Elements which go to the hardship aspect of this test include the unavailability or faulty memory of a witness and, in the extraordinary case, the expense of discovery. With respect to the importance of the materials, some courts have found substantial need for discovery by finding that the documents themselves relate to the party's claim and therefore must be produced.

1. Documents and Tangible Things

In order for material to come within the protection of the work product doctrine, it must be (1) a document or other tangible thing, (2) prepared in anticipation of litigation, (3) by or for another party or by or for the other party's representative. Work product protection, as the language in Rule 26 indicates, extends only to the documents themselves and not to the facts which they embody. For example, a deponent cannot refuse to answer questions based on the work product doctrine when the questions are directed toward the discovery of facts learned by the deponent.

Work product which consists of purely factual information gathered by the attorney in the course of his or her preparation for trial is "fact" or "ordinary" work product. Facts which are the foundation of the litigation are valuable to all parties in the preparation of their cases. The courts will therefore encourage the parties to discover these facts because informed litigants are better able to present the facts and applicable law to the court. The courts are not, however, eager to allow an adverse party to roam aimlessly through an attorney's files just to make sure he has not missed anything. For this reason, the party seeking discovery


33. In re International Systems and Controls Corp. Sec. Litigation, 693 F.2d 1235, 1240-41 (5th Cir. 1982) (while the cost of one or a few depositions is not enough to justify discovery of work product, if the cost of duplicating the information costs the party an inordinate amount, here $1.5 million, cost may be a factor in the undue hardship analysis).


37. Feldman, 87 F.R.D at 89.

38. In re Doe, 662 F.2d 1073, 1076 n.2 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982) ([F]act work product includes "those documents prepared by the attorney which do not contain the mental impressions, conclusions or opinions of the attorney.").


40. Id at 513. "Petitioner's counsel frankly admits that he wants the oral statements only to help prepare himself to examine witnesses and to make sure that he has overlooked nothing. That is
must show to the court that he or she is in substantial need of the information and that he or she is unable without undue hardship to obtain the information's substantial equivalent. 41

If a party can obtain the information he seeks by deposition or other investigative procedures, the court will deny discovery. 42 The party seeking discovery must do more than merely make broad, unsubstantiated assertions of unavailability; he must convince the court, as the plaintiff did in Hamilton v. Canal Barge Co., 43 that other discovery methods, such as depositions 44 and interviews, 45 are unavailable.

In Hamilton the defendant's insurance adjuster took the statements of five eyewitnesses on the day of the accident at issue. The plaintiffs requested production of those statements because they were a fresh, contemporaneous account of the accident and, because of the lapse of time, deposition testimony would be less accurate. 46 Although most of the witnesses in Hamilton were available for deposition, the length of time that had elapsed since the accident made it reasonable to conclude that the witness' perceptions of the facts could have changed. The court agreed with the plaintiffs that the statements which were taken within hours of the accident contained information unavailable through a deposition. The court concluded that not only were the plaintiffs unable to obtain the statements without undue hardship but also that plaintiffs were completely unable to obtain their substantial equivalent, and the court ordered the statements produced. 47 The Hamilton court was quick to note, however, that mere lapse of time is not enough to require production of a statement that was not taken within a few days of the accident. 48

insufficient under the circumstances to permit him an exception to the policy underlying the privacy of [the attorney's] professional activities." Id.

41. See Kennedy v. Senyo, 52 F.R.D. 34 (W.D. Pa. 1971) (defendant's insurer compelled to produce documents which were only means of substantiating claim of misrepresentation or concealment).

42. In re International Systems and Controls Corp. Sec. Litigation, 693 F.2d 1235, 1240 (5th Cir. 1982); Baise v. Alewel's, Inc., 99 F.R.D. 95, 96 (W.D. Mo. 1983).


44. Miles v. Bell Helicopter Co., 385 F. Supp. 1029 (N.D. Ga. 1974) (plaintiff's motion to compel production of documents granted; reports in question were not prepared by defendant in anticipation of litigation).


46. Id. at 977. The defendants did not produce one statement because the witness was out of the country; his deposition was unavailable without undue hardship.

47. Id. at 978. In finding that there was substantial need of the statements, the court noted that the injured party was no longer alive to give his own account of the accident. Id. at 976.

48. Id. If a statement were taken a week or more after the incident, the party seeking discovery should require the attorney to show that the witness is presently unavailable for deposition without undue hardship. If the witness is available, counsel should depose him and then show the court specific ways the deposition failed to reveal information counsel expects to be in the prior statement.
Documents which are protected by the work product doctrine must be prepared in anticipation of litigation. Materials which are generated in the ordinary course of business, such as an insurance company's factual investigations of claims, are not work product and, presuming they are relevant, are discoverable. Where, however, the party seeking to avoid discovery asserts that preparation for litigation is its regular course of business, hardly any document would be discoverable without a showing of substantial need and undue hardship. In that case, in order to avoid disclosure, the probability of litigation "must be substantial and the commencement of litigation must be imminent." Nevertheless, the general test is whether the document was prepared or obtained because of the prospect of litigation, or whether the primary purpose for creating the document was to aid in possible future litigation.

An issue which follows from the "prepared in anticipation of litigation" requirement is whether the work product protection obtains after the litigation is terminated. In In re Murphy, the Eighth Circuit advocated perpetuating work product protection beyond the initial litigation, reasoning that if the protection were limited to the case for which discovery was sought, the doctrine would lose some of its value. The work product doctrine as defined by the Supreme Court in Hickman protected the work of the attorney who represented the litigant. The court may then conduct an in camera inspection of the statement and the marked deposition to see whether or not the statement does contain additional or different information. Id. at 1033.

The court may then conduct an in camera inspection of the statement and the marked deposition to see whether or not the statement does contain additional or different information. Id. at 1033.

Id. at 1033.
The policy underlying the doctrine, however, is best served by extending the protection to agents of the attorney, so that when the attorney relies on the work of an investigator or other agent in the preparation for trial, that material is protected as well. The material must have been requested by or prepared for the attorney; otherwise, it will be presumed to have been made in the ordinary course of business. Moreover, it must be clear who authored the document. If the author is not specified, the court may be reluctant to find that it was prepared by an attorney or his agent.

Because the attorney's work primarily benefits the client, work product protection may not apply when the client seeks access to documents created by the attorney during the course of the representation. The Tenth Circuit has indicated that in a dispute between attorney and client regarding work product protection, the client may be able to compel the attorney to give up his files to the client or to another attorney. This approach correctly interprets the policies and purposes of the work product doctrine because it protects the primary beneficiary of the doctrine's protection.

2. Mental Impressions, Conclusions, Opinions, or Legal Theories

Rule 26(b)(3) requires that a court, when ordering discovery of fact work product, prohibit the disclosure of an attorney's mental impressions, conclusions, opinions, or legal theories of the attorney. These
intellectual processes are a result of the attorney’s evaluation of and reactions to the facts discovered in preparation for trial. The courts have classified this work as opinion work product. Although Rule 26(b)(3) clearly prohibits discovery of opinion work product, the courts have not taken a consistent approach in their analyses. Some courts advocate an absolute immunity with respect to opinion work product, while others hold that certain circumstances justify compelled disclosure.

The court in Duplan Corp. v. Moulinage et Retorderie de Chavanoz set forth the doctrine as an absolute immunity. In Duplan, the plaintiff charged the defendant with Sherman Act violations and sought a declaratory judgment on the grounds that the defendant’s patents were invalid and unenforceable. The plaintiffs requested work product material which related to the defendant’s knowledge of the state of the art of the patent process. The question presented to the court was whether opinion work product is protected once the litigation for which the materials were prepared terminates. The court found that the command of Rule 26(b)(3) to protect against disclosure of an attorney’s thought processes applies to the qualified immunity spelled out in the first part of the rule. According to the Duplan court, no showing of relevance, substantial need, or undue hardship can justify compelled disclosure of opinion work product. The court reasoned that if an attorney’s thoughts and theories can become discoverable in later litigation because they are relevant, our adversary system will suffer. According to the court, the attorney who works under the threat of discovery will not perform properly, and the client will not receive the thorough, professional opinion he deserves.

68. See In re Doe, 662 F.2d at 1078. The distinction between fact work product and opinion work product is not a bright line. Varying degrees of mental impressions may require varying degrees of a showing of substantial need and undue hardship to compel disclosure. However, as the work product doctrine becomes more a matter of creative thought and less a mere recognition of fact, the work product becomes increasingly less susceptible to discovery. Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1199-1200 (D.S.C. 1974).
70. Id. at 732.
71. Id. at 731.
72. Id. at 734.
73. Id.
74. Id. at 735.
75. Id. at 736.
The court in Handgards, Inc. v. Johnson & Johnson\(^{76}\) took a contrary position to the Fourth Circuit's holding in Duplan. In this antitrust action, the plaintiff contended that the defendants filed a series of patent infringement suits against it in bad faith in order to restrain trade and monopolize the industry.\(^{77}\) The court found that Rule 26(b)(3) grants only a qualified immunity to opinion work product and that an exception to this immunity exists when the advice of counsel is an issue in the case.\(^{78}\) The Handgards court distinguished Duplan because there the advice of counsel was not at issue. The court stated that the "sacrosanct protection" espoused by the court in Duplan\(^{79}\) must give way when the information is directly at issue and the need for production is compelling.\(^{80}\)

III. RESTRAINTS ON THE WORK PRODUCT DOCTRINE

A. Fraud

The work product doctrine does not protect materials which are produced in the furtherance of a crime or fraud.\(^{81}\) In order to trigger this exception, the party seeking discovery must make a prima facie showing that the criminal or fraudulent violation is serious enough to overcome the work product protection and that there is some relationship between the violation and the documents containing the work product.\(^{82}\) The primary element which a party must prove to invoke this exception is that the documents which contain the attorney's work product have a close relationship to the client's fraudulent or criminal scheme.\(^{83}\) In addition,
the party must show (1) that the client was planning or participating in a criminal or fraudulent scheme when he consulted the attorney and the consultation was for the purpose of furthering the scheme, 84 or (2) that the crime or fraud originated with or evolved from the attorney’s advice and interactions with the client. 85

In In re Doe, 86 the Fourth Circuit compelled disclosure of opinion work product which was related to a fraud on the court. 87 The appellate court found that the government had demonstrated a prima facie case of conspiracy, obstruction of justice, and subornation of perjury by attorney Doe while representing his client. 88 The presence of fraud, however, was not the sole basis for the court’s holding. In addition, the government demonstrated that it would be unable to prosecute Doe without the evidence contained in the work product materials. 89 Because access to Doe’s files was the only way to verify or contradict the client’s allegations of criminal activity by Doe, the court found a compelling need for the release of Doe’s opinion work product. 90

B. Waiver

Because an attorney’s work is primarily for the client’s advantage, adverse parties should not be permitted to obtain the use of that work through discovery. 91 Either the attorney or the client can forfeit his ability to invoke the doctrine, but those actions which give rise to the waiver must be consistent with a conscious disregard of the work product protection. 92 When the attorney or client releases documents to a person with an interest common to that of the attorney or client, the disclosure typically is not inconsistent with an intent to invoke work product

84. In re Murphy, 560 F.2d at 338.
86. 662 F.2d 1073 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).
87. Id. at 1080-81.
88. Id. at 1080.
89. Id. at 1081.
90. Id.
91. Id. In an investigation of attorney John Doe’s representation of a client, the grand jury subpoenaed Doe’s records in the possession of his law firm. In addition, the grand jury reviewed certain records which Doe had inadvertently given to the client after completion of the client’s criminal litigation. Id. at 1076.
92. Id. at 1081. See In re Sealed Case, 676 F.2d 793, 817-25 (D.C. Cir. 1982); cf. Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222 (4th Cir. 1976) (“[B]road concepts of subject matter waiver analogous to those applicable to claims of attorney-client privilege are inappropriate when applied to Rule 26(b)(3).”).

(II), 640 F.2d 49, 63 (7th Cir. 1980) (invasion of attorney’s opinion work product “not justified by the misfortune of representing a fraudulent client”).
protection and does not waive it.\textsuperscript{93} However, when the attorney or client voluntarily releases otherwise protected documents to someone with adverse interests, he may be deemed to have waived work product protection.\textsuperscript{94} In addition, disclosure of otherwise protected material without limit on its future use may serve as a waiver of work product protection.\textsuperscript{95}

C. \textit{Fed. R. Civ. P. 26(b)(4)}

Although the work product doctrine protects the opinions of attorneys and their agents, the doctrine’s protection does not extend to the opinions of experts.\textsuperscript{96} \textit{Fed. R. Civ. P. 26(b)(4)} allows the discovery of facts known and opinions held by experts which are otherwise discoverable and have been developed in anticipation of trial. While Rule 26(b)(4) is typically viewed as an exception to the work product doctrine,\textsuperscript{97} a certain degree of tension arises when the documents on which an expert has relied contain opinion work product of the attorney.

The Third Circuit addressed this conflict in \textit{Bogosian v. Gulf Oil Corp.}\textsuperscript{98} Expert witnesses, in preparing for trial depositions, reviewed certain memoranda prepared by plaintiffs’ counsel. The district court compelled production of these memoranda under the direction of Rule 26(b)(4). The plaintiffs objected to the district court’s order, however, because the memoranda which were ordered produced consisted solely of mental impressions, thought processes, opinions, and legal theories of counsel.\textsuperscript{99} The district court recognized that, while opinion work prod-


\textsuperscript{94} In \textit{re Doe}, 662 F.2d at 1081. Only those disclosures which are inconsistent with the adversary system will waive work product protection. Chubb Integrated Sys. Ltd. v. National Bank of Washington, 103 F.R.D. 52, 63 (D.D.C. 1984).

\textsuperscript{95} In \textit{re Doe}, 662 F.2d at 1081. The court found that Doe’s release to the client of the material was apparently unconditional and that Doe failed to attempt to limit the future use of the documents. The court concluded, therefore, that “Doe substantially and freely increased the possibility of disclosure to, and use by, anyone the client desired. . . . Hence, he effectively forfeited any protection provided by the work product rule. . . .” \textit{Id.} at 1082.

\textsuperscript{96} \textit{Fed. R. Civ. P. 26(b)(4).} Discovery of facts known and opinions held by expert witnesses otherwise discoverable under Rule 26(b)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained through interrogatories, or other means by order of the court. \textit{Id.}


\textsuperscript{98} 738 F.2d 587 (3d Cir. 1984).

\textsuperscript{99} \textit{Id.} at 588-89.
uct deserves the court's protection, the opposing party is entitled to the substance of the facts and opinions to which the expert will testify as well as a summary of the grounds for each opinion.\textsuperscript{100} In balancing these two conflicting policies, the district court concluded that the work product doctrine must give way.\textsuperscript{101}

The appellate court agreed with the district court's finding that showing the material to the witnesses did not waive the attorney work product protection.\textsuperscript{102} The appellate court did not agree, however, that discovery of an attorney's opinion work product which was relied on by an expert witness necessarily follows from the right to discover the expert's basis for his opinion.\textsuperscript{103} The court avoided any tension between the two policies by reading the provisions of Rule 26(b)(4) as only limiting the discovery of fact work product. The court stated that Rule 26(b)(4) in no way limits the mandate against disclosure of opinion work product.\textsuperscript{104} Moreover, the court continued, counsel can effectively cross-examine an expert witness on the issue of the basis of the expert's opinion without referring to the attorney's role in the formulation of the theory.\textsuperscript{105} According to the court, the marginal value of revealing the attorney's role cannot outweigh the strong policy against disclosure of work product.\textsuperscript{106} In a footnote, the court stated that this same reasoning applies to documents governed by FED. R. EVID. 612 so that disclosure still would not be required.\textsuperscript{107}

\textsuperscript{100} Id. at 590.

\textsuperscript{101} Id.

\textsuperscript{102} Id. at 593; Baise v. Alewel's, Inc., 99 F.R.D. 95, 97 (W.D. Mo. 1983) ("attorney's work product does not lose its special status merely because it is transmitted to an expert").


\textsuperscript{104} Bogosian, 738 F.2d at 594. The dissent advocated a case-by-case assessment through an in camera inspection by the judge to determine whether the documents' impeachment value outweighed the chilling effect on the development of attorney work product. Id. at 598 (Becker, J., dissenting).

\textsuperscript{105} Id. at 598; see Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977) (although work product materials shown to witnesses were protected by doctrine, in the future such materials, if withheld from opposing parties, will be withheld from witnesses).

\textsuperscript{106} Bogosian, 738 F.2d at 595. The dissent disagreed that such a finding would be of only a "marginal value." Instead, the dissent argued that a fact finder would likely change its assessment of the expert's opinion if it were revealed that the opinion evolved as a result of the attorney's suggestion. Id. at 598 (Becker, J., dissenting).

\textsuperscript{107} Id. at 595.
D. FED. R. EVID. 612

Federal Rule of Evidence 612,\textsuperscript{108} although applicable to depositions, is not a rule of discovery. Its function is evidentiary in nature, allowing the adverse party to test the memory and credibility of the witness.\textsuperscript{109} Rule 612 requires that, before a party may obtain documents used by a witness prior to testifying, "(1) the witness must use the writing to refresh his memory; (2) the witness must use the writing for the purpose of testifying; and (3) the court must determine that production is necessary in the interests of justice."\textsuperscript{110} These requirements limit those documents which must be produced to ones which are relevant and which influenced the witness' testimony.\textsuperscript{111} It follows that if a party does not first establish that the witness used the document to refresh his memory before testifying, the document is not required to be produced.\textsuperscript{112}

The tension between FED. R. EVID. 612 and the work product doctrine surfaced in \textit{Sporck v. Peil}.\textsuperscript{113} In \textit{Sporck}, the defendant produced thousands of documents upon plaintiff's request, none of which contained attorney work product. Prior to defendant Sporck's deposition, counsel selected a number of those documents for Sporck's review. At the beginning of the deposition, Sporck acknowledged that he had reviewed documents in preparation for the deposition, but defense counsel refused to identify those documents, arguing that the selection process itself was protected by the work product doctrine.\textsuperscript{114} Counsel conceded that the individual documents were not work product but insisted that the selection of those documents represented counsel's mental impressions with respect to how the documents related to the issues and de-

\textsuperscript{108} FED. R. EVID. 612 provides in part:

Except as otherwise provided in criminal proceedings . . . 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 interests 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.


\textsuperscript{111} \textit{Id.} at 317-18.

\textsuperscript{112} \textit{Id.} at 317. For a discussion of the applicability of FED. R. EVID. 612 with respect to the use of work product documents to refresh the memory of a witness, see \textit{In re Comair Air Disaster Litigation}, 100 F.R.D. 350, 354 (E.D. Ky. 1983) ("Work product materials ordered produced because "it would be unfair and unduly prejudicial to permit the deponent Lawrence to review the accident report, give a deposition with it fresh in his mind, yet keep it unavailable to opposing counsel.").

\textsuperscript{113} 759 F.2d 312 (3d Cir. 1985).

\textsuperscript{114} \textit{Id.} at 313-14.
fenses in the litigation. The Third Circuit agreed that the selection process must be protected as work product, but it did not find that Fed. R. Evid. 612 applied to void this protection. By not inquiring at the outset of the deposition whether Sporck had reviewed any documents, counsel failed to establish either that the deponent had relied on the documents or that the documents in any way influenced his testimony.

While the Sporck court declined to comment on the dictum in the Bogosian footnote, the court did discuss the applicability of Rule 612 under proper circumstances. The court found that, when properly applied, Rule 612 does not conflict with work product in terms of the selection process of the attorney. The identification of documents under Rule 612, according to Sporck, should result only from deposing counsel's own selection of relevant areas of questioning. It appears from the majority's reasoning that the attorney work product doctrine will not defeat a request for identification of documents under Rule 612 under any circumstances.

The dissent in Sporck found it difficult to believe that an attorney could infer from the selection of a particular document the opposing counsel's reason for the selection. The dissent stated that there are so many reasons for showing a document to a witness that the only inference which can be drawn is that someone thought the document might be useful to the deponent. According to the dissent, the majority's ruling impermissibly expanded the doctrine at the expense of legitimate discovery.

IV. Analysis of the Doctrine

A. The Attorney-Client Privilege

The work product doctrine improves the quality of legal representation by encouraging the attorney to creatively analyze the facts and to record those mental impressions for future use. This protection is statutory and is aimed primarily at preparation for trial. Although the facts

115. Id. at 315.
116. Id. at 317.
117. Id. at 318.
118. Id. at 318 n.7.
119. Id.
120. Id. at 318-19.
121. Id. at 319 (Seitz, J., dissenting).
122. Id.
123. Id.
124. Id.
which the attorney discovers during his preparation are discoverable, the protection of the doctrine may encompass any document prepared by or for any attorney in anticipation of litigation. In addition, either the client or the attorney may waive this protection.

The attorney-client privilege also improves the quality of legal representation, but this doctrine's policies and purposes are distinct from those of the work product doctrine. The protection of the attorney-client privilege is not as broad as the immunity of the work product doctrine. The purpose of the attorney-client privilege is to encourage full and open communication between an attorney and the client; therefore, only confidential communications between the attorney and the client are protected. The primary element of the attorney-client privilege is that the attorney must be acting as an attorney. If the attorney is acting in any other capacity, such as a business advisor, the protection does not apply. Another element of the attorney-client privilege is that there must be a communication. Just as under the work product doctrine, the privilege does not protect underlying facts. However, legal services must be performed. In order to invoke this privilege, the attorney and client must intend the communication to be confidential, and a disclosure to anyone else waives the privilege. Moreover, only the client holds the attorney-client privilege.

Although the two doctrines are separate and distinct, attorneys and judges alike tend to apply both to achieve protection of documents and information. The analyses of the two doctrines, however, should remain separate. For example, when a client consults an attorney for the purpose of representation in an impending suit, the attorney will generate several types of documents. A document which retains the attorney's impressions of the client's interpretation of the facts is protected by the work product doctrine. On the other hand, a document which is directed

---

126. *Id.* Because the ability to protect work product extends to both the client and the attorney, either one can waive it. The waiver by either goes only to the one waiving the protection. *In re Doc*, 662 F.2d 1073, 1079 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982).
129. *Id.* at 186.
130. *Id.*
to the client and renders legal advice with respect to the litigation is protected by the attorney-client privilege.

B. The Breadth of the Doctrine

The facts of Hickman v. Taylor, from which the work product doctrine arose, indicate that the statements which plaintiff requested were taken by the defendant in anticipation of litigation. The Court’s discussion necessarily incorporates the fact that the documents were prepared with an eye toward litigation, but the Court’s holding does not turn on this fact. On the contrary, the Court’s primary concern in Hickman is the protection of the attorney’s privacy in the course of his legal duties. The Court emphasized that while representing a client, the attorney must feel free to develop opinions and impressions regarding the matter without threat of invasion by opposing counsel. Absent such an assurance, according to the Court, the attorney will become inefficient.

In light of the policy espoused in Hickman, it is possible that the drafters of Rule 26(b)(3) went too far in requiring that work product documents must be prepared in anticipation of litigation. It appears clear that the hazards which the Court in Hickman sought to avoid can just as well be encountered by requiring discovery of materials prepared in the ordinary course of business. For example, in Western National Bank v. Employers Insurance of Wausau, the court found that the attorneys’ files were prepared in the ordinary course of business and ordered them produced. Western National Bank alleged bad faith on the party of Wausau for the failure to pay a claim. Based on this allegation, the court concluded that the plaintiff could prove its claim only by obtaining information contained in the attorneys’ files. Although the court relied on the “in anticipation of litigation” requirement of the Rule, it is clear that the court could have easily ordered the documents produced by finding that the materials were fact work product and that the plaintiff demonstrated substantial need for them and could not obtain their substantial equivalents.

134. Id. at 514.
135. See id. at 510-13.
136. Id. at 511.
138. Id. at 57.
139. Id.
In light of the policy underlying the work product doctrine, all files of an attorney should be protected from disclosure according to the standards set out in Rule 26(b)(3). Facts contained in them which are relevant and otherwise discoverable should be produced, while the documents themselves should only be produced on a showing of undue hardship and substantial need. In addition, opinions and mental impressions contained therein should be afforded the same qualified immunity, subject only to the accepted exceptions of fraud and waiver.

V. Conclusion

Although the work product doctrine as codified in Fed. R. Civ. P. 26(b)(3) is perhaps more restrictive than the underlying policy suggests, it is an effective tool for protecting an attorney’s mental impressions from discovery. The courts afford opinion work product the highest degree of immunity, subject only to the fraud and waiver exceptions and to particular provisions dealing with experts and documents which influence a witness’ testimony. The standard applied to fact work product is based on the party’s need for the materials and the party’s ability to obtain the substantial equivalent of the material from other sources. Because this discovery provision can work to a party’s advantage or disadvantage, it is imperative that litigators understand the methods for invoking the doctrine as well as avoiding it.

Carolyn Jo McFatridge