Nebraska Law Review

Volume 64 | Issue 2 Article 4

1985

Opinion Work Product—Solving the Dilemma of Compelled Disclosure

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I. INTRODUCTION

Among the jurisprudential concepts that effect the conduct and sanctity of the legal profession, none is more revered than the attorney-client privilege.[1] While the privilege is given a pre-eminent place in the pantheon of principles that protect and foster the vitality of the adversary system, the work product doctrine[2] often has a more perva-

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1. UpJohn v. United States, 449 U.S. 383, 389 (1981); Trammel v. United States, 445 U.S. 40, 51 (1980); Fisher v. United States, 425 U.S. 391, 403 (1976).

2. Work product consists of the tangible and intangible material that reflects an attorney's efforts at investigating and preparing a case, including one's pattern of investigation, assembling of information, determination of the relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions. The privilege creates a zone of privacy in which an attorney can investigate, prepare, and analyze a case. *In re* Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980).

sive impact on the manner in which a client's case proceeds through the litigation process. While the attorney-client privilege protects only confidential communications between client and attorney, the work product doctrine protects a wide variety of information and materials that have been gathered or prepared by an attorney on a client's behalf for or in anticipation of litigation.[3]

Stemming as it does from a concern for the privacy in which an attorney can best explore and prepare a client's case,[4] the protections accorded work product spread a broad protective shield around the efforts and activities of counsel.[5] When an attorney is free to pursue a client's interests without substantial intrusion from the opposing party, both the client and the legal system benefit from the thoroughness with which the attorney prepares the client's case.[6] The more an attorney restricts his or her efforts, for fear that the opposing party will be entitled to the fruits of those efforts through the discovery process,[7] the more the client's case and the adversary system are denied the factual and legal information necessary for a fair and thorough determination of the issues on their merits.[8]

Since it is the attorney's efforts which are, first and foremost, the subject of the protections accorded work product,[9] it should come as no surprise that the legal profession both vigorously asserts and jealously guards this important adversarial concept. It should also come as no surprise that the use and misuse of the work product doctrine has bred confusion and misconceptions as to its scope and function in the contex of day-to-day litigation.[10]

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3. *In re* Sealed Case, 676 F.2d 793, 808-09 (D.C. Cir. 1982).
4. *In re* Grand Jury Subpoena Dated Nov. 8, 1979, 622 F.2d 933, 935 (6th Cir. 1980).
5. *In re* Doe, 662 F.2d 1073, 1079 (4th Cir. 1981).
6. Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).
7. As Justice Jackson observed in his concurring opinion in *Hickman*: "Discovery was hardly intended to enable a learned profession to perform its function either without wits or on wits borrowed from the adversary." *Id.* at 516 (Jackson, J., concurring).
8. *Id.* at 510-11.
9. *In re* Doe, 662 F.2d 1073, 1079 (4th Cir. 1981).
10. More often than not, the work product doctrine is discussed in language that results in imbuing it with the type of olympian stature that misleads rather than instructs those who seek to apply it in the context of day-to-day litigation:

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his client. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.

Hickman v. Taylor, 329 U.S. 495, 510 (1947).

However, absent the protections of the work product doctrine: "[I]nefficiency, 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." *Id.* at 511.

From its inception, the work product doctrine has been viewed as applying, somewhat differently, to two distinct categories of information.[11] The first, usually referred to as "ordinary" or "fact" work product, encompasses materials of a purely factual nature prepared by or for an attorney in anticipation of litigation or trial.[12] These materials have always been subject to discovery upon a showing of substantial need and unavailability from other sources.[13] The second category of information is usually referred to as "opinion" work product and encompasses materials containing the impressions, opinions, conclusions, and theories of counsel.[14] The discoverability of this category of work product has been and continues to be an area of controversy, confusion, and sharply divided opinion. Some courts have held that opinion work product is never discoverable.[15] Other courts have held that it is discoverable, but disagree on the showing necessary to obtain disclosure.[16] It is the opinion work product category and the issue of its discoverability that form the primary focus of this Article.

After a brief examination of the fundamental concepts and considerations that underlie the work product doctrine, the Article will assess the discoverability of opinion work product as it exists today in the federal courts. Then, a single discovery standard and analytical framework for applying that standard will be proposed in an effort to bring unity to an area of disparate viewpoints and results. Since the discovery standard and analytical framework proposed herein attempt to unify and accommodate the various polices and concerns expressed by the courts that have examined the discoverability issue, it represents a careful balancing of the competing interests that lie at the very heart of the adversary system, i.e. the zone of privacy accorded an attorney in the preparation of a client's case (work product) versus the

11. *Id.* at 511-13.
12. *In re* Doe, 662 F.2d 1073, 1076 n.2 (4th Cir. 1981); United States v. Bonnell, 483 F. Supp. 1070, 1078 (D. Minn. 1979).
13. Hickman v. Taylor, 329 U.S. 495, 511-12 (1947); FED. R. CIV. P. 26(b)(3).
14. *In re* Doe, 662 F.2d 1073, 1076 n.2 (4th Cir. 1981); United States v. Bonnell, 483 F. Supp. 1070, 1078 (D. Minn. 1979).
15. Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *In re* Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973).
16. "In our view, opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977).

> It is therefore apparent that the basic thrust of *Hickman* and its progeny is that documents containing the work product of attorneys which contain the attorneys' thoughts, impressions, views, strategy, conclusions, and other similar information produced by the attorney in anticipation of litigation are to be protected when feasible, but not at the expense of hiding the non-privileged facts from adversaries or the court.

Xerox Corp. v. International Business Mach. Corp., 64 F.R.D. 367, 381 (S.D.N.Y. 1974).

full disclosure of issues and facts before trial as promoted by the deposition-discovery rules of the Federal Rules of Civil Procedure.[17] It is only through the furtherance of both interests, which at times though may be contradictory, that the vitality and fairness of the adversary system can be maintained.

II. A SHORT HISTORY OF THE WORK PRODUCT DOCTRINE

The discoverability of an attorney's work product was first addressed by the Supreme Court in *Hickman v. Taylor*.[18] In *Hickman*, the Court was faced with a clash of competing interests when a party sought to employ the liberalized discovery procedures contained in the Federal Rules of Civil Procedure to compel disclosure of information personally compiled by the opposing party's counsel in preparation for possible litigation.[19]

The Court began its analysis by declaring that "the pre-trial deposition-discovery mechanism established by Rules 26 to 37 is one of the most significant innovations of the Federal Rules of Civil Procedure"[20] and that these rules were to be accorded broad and liberal treatment.[21] Since mutual knowledge of all relevant facts gathered by both parties was essential to the proper conduct of litigation,[22] the discovery mechanisms contained in the Federal Rules assured that civil trials in the federal courts no longer needed to be carried out in the dark.[23] As the Court noted: "The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial."[24]

Turning to the issue of the discovery of materials personally prepared by counsel, the Court acknowledged that an attorney, engaged in the representation of a client, in order to discharge his or her duties to the client in a responsible and effective manner, must be allowed a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.[25] Proper preparation of a client's case de-

17. Hickman v. Taylor, 329 U.S. 495, 500-01, 510-11 (1947).
18. *Id.* at 495. (a suit under the Jones Act for the death of a crew member who drowned when the tugboat upon which he was employed sank in the Delaware River).
19. Plaintiff sought discovery of information personally obtained by defendant's counsel when he interviewed various witnesses, including the surviving crew members of the tug, soon after the accident. The plaintiff not only sought any statements, notes or memoranda concerning counsel's interviews with the witnesses, but also counsel's recollections of the interviews where no statements, notes, or memoranda existed. *Id.*
20. *Id.* at 500.
21. *Id.* at 507.
22. *Id.*
23. *Id.* at 501.
24. *Id.*
25. *Id.* at 510-11.

manded that an attorney investigate and compile factual information, sift what he or she considered to be relevant from that which appeared to be irrelevant, prepare his or her legal theories, and plan strategy without undue and needless interference from the opposing party.[26] Were unfettered scrutiny of an attorney's files to be allowed, counsel would be reluctant to fully inquire into the merits of their case and thereafter reduce to writing both the information obtained and counsel's own opinions and conclusions regarding the facts and the law. The obvious fear was that such materials and information would be available to opposing counsel simply for the asking.[27] The *Hickman* court believed that such a discovery practice would ill-serve the interests of clients and the cause of justice.[28]

Balancing the liberalized discovery of the Federal Rules with the need for according attorneys a certain degree of privacy in the preparation of their cases, the Court imposed certain restrictions on the discoverability of all tangible and intangible material prepared by an attorney for or in anticipation of litigation that reflected the attorney's investigative efforts, case preparation, planning, strategies, and legal theories.[29] These materials have come to be known as attorney work product, and it is the restrictions on the discoverability of these materials that have come to be known as the work product doctrine.[30]

The *Hickman* court recognized two distinct catergories of work product and imposed upon each a different degree of discovery protection. To the extent that work product contained relevant nonprivileged factual material, the Court merely shifted the standard presumption in favor of discovery and required the requesting party to show "adequate reasons" or some "necessity or justification" for disclosure of the work product at issue.[31] Such factual work product, often taking the form of witness statements, photographs, or data compilations, has come to be known as "ordinary" work product.[32] To the extent that work product reveals the opinions, judgments, and thought processes of an attorney, the *Hickman* court accorded it a sub-

26. *Id.* at 511.
27. *Id.*
28. *Id.*
29. *Id.* at 511-13.
30. While some courts and practitioners prefer the term work product privilege, (*see, e.g., In re* Murphy, 560 F.2d 326, 331-35 (8th Cir. 1977)), others prefer to draw a clear distinction between work product and the privilege accorded attorney-client communications: "[W]hile the attorney-client privilege has previously been discussed as being relatively absolute, the so-called 'work product' privilege is not a privilege, but is a qualified immunity from discovery." International Tel. & Tel. Corp. v. United Tel. Co. of Fla., 60 F.R.D. 177, 186 (M.D. Fla. 1973). To avoid any confusion, the term work product doctrine will be used throughout this Article.
31. Hickman v Taylor, 329 U.S. 495, 510-12 (1947); *In re* Murphy, 560 F.2d 326, 334 (8th Cir. 1977).
32. United States v. Bonnell, 483 F. Supp. 1070, 1078 (D. Minn. 1979).

stantially higher degree of protection from disclosure by requiring a party seeking discovery of such materials to show "extraordinary justification."[33] This second category of work product, often taking the form of an attorney's notes, memoranda, personal data summaries, and planning documents, has come to be known as "opinion" work product.[34]

The work product doctrine is in some measure related to the attorney-client privilege because work product represents efforts expended by an attorney during the course of the attorney-client relationship. However, the two concepts are separate and distinct from each other and reflect very different policy considerations.[35] The purpose of the attorney-client privilege is to encourange the complete disclosure of information by a client to his or her attorney.[36] The privilege belongs to the client, and is intended to impose a cloak of privacy around confidential communications made in the course of the attorney-client relationship.[37] The work product doctrine, on the other hand, is aimed at protecting the effectiveness of an attorney's case preparation by insulating from discovery those materials prepared or obtained by an attorney for or in anticipation of litigation. The doctrine assures an attorney that, in the absence of special circumstances, his or her files shall remain free from the intrusions of opposing counsel.[38] Furthermore, the protections of the work product doctrine belong to both the client and the attorney and can be asserted by either independently.[39]

Finally, the work product doctrine is a substantially broader concept than that of the attorney-client privilege. Although only confidential communications between the attorney and client are protected by the attorney-client privilege, the work product doctrine encom-

33. Hickman v. Taylor, 329 U.S. 495, 512-14 (1947); *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977).

34. *In re* Doe, 662 F.2d 1073, 1076 n.2 (4th Cir. 1981); United States v. Bonnell, 483 F. Supp. 1070, 1078 (D. Minn. 1979).

35. Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976).

36. *Id.* at 929-30. *See also* cases cited *supra* note 1.

37. Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 930 (N.D. Cal. 1976).

38. *Id. See also In re* Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982).

39. *In re* Doe, 662 F.2d 1073, 1079 (4th Cir. 1981); *In re* Special Sept. 1978 Grand Jury, 640 F.2d 49, 62 (7th Cir. 1980).

One court has stated:

> A lawyer may assert the work product privilege, indeed, it has been said that he alone may invoke it. We are not inclined to accept quite that narrow an application, however. It is not realistic to hold that it is only the attorney who has an interest in his work product or that the principal purpose of the privilege—to foster and protect proper preparation of a case—is not also of deep concern to the client, the person paying for that work. To the extent a client's interest may be affected, he, too, may assert the work product privilege.

In re Grand Jury Proceedings, 604 F.2d 798, 801 (3d Cir. 1979) (citations and footnote omitted).

passes any objects, materials, or information obtained for or prepared in anticipation of litigation or trial.[40] Thus, the quantity and type of information potentially protected by the work product doctrine far exceeds that of the attorney-client privilege.

Although the fundamental concept of work product was initially recognized and applied in the context of civil litigation, the principles underlying the doctrine—promoting thorough and complete preparation and presentation of each side of a dispute—are clearly applicable in a wide variety of legal contexts. It is not surprising, therefore, that in the decades since *Hickman* was decided, the work product doctrine has been found applicable to criminal prosecutions,[41] grand jury proceedings,[42] and the enforcement of administrative subpoenas.[43]

Until 1970, the work product doctrine remained a creature of case law, depending on *Hickman* and its progeny for guidance. In 1970, however, the doctrine received its first federal codification when Rule 26(b)(3) was added to the Federal Rules of Civil Procedure.[44]

Initially, it should be noted that Rule 26(b)(3) establishes a reasonably clear standard for the discoverability of ordinary or factual work product; that is, work product that does not contain the mental impressions, conclusions, or opinions of counsel. Improving on the somewhat murky language of the Court in *Hickman*, the drafters of the Rule made ordinary work product discoverable only upon a showing of substantial need *and* the inability to secure, without undue hardship, the substantial equivalent of the sought-after information by alternate means. This test for discoverability[45] has provided the courts with an easily applicable standard by which to assess the burden that must be met by a party seeking discovery of ordinary work product. In this respect, the Rule clearly aided both the courts and counsel in

40. *In re* Sealed Case, 676 F.2d 793, 808-09 (D.C. Cir. 1982).

41. United States v. Nobles, 422 U.S. 225, 238 (1975).

42. *In re* Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973).

43. UpJohn v. United States, 449 U.S. 383, 397 (1981).

44. FED. R. CIV. P. 26(b)(3) reads in pertinent part:

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

45. The test for discoverability, in FED. R. CIV. P. 26(b)(3), involves two distinct elements: substantial need, *and* inability to secure the substantial equivalent of the information through alternate means without undue hardship.

clarifying the circumstances under which ordinary work product must be disclosed in response to a valid request for discovery.

The Rule also resolved the nagging question of whether work product protection attached only to materials prepared by an attorney or whether it also protected materials prepared by others. Rule 26(b)(3) now clearly extends work product protection to materials prepared in anticipation of litigation or trial by not only an attorney, but also by others functioning for or on behalf of a party, such as a consultant, insurer, agent, surety, and/or indemnitor.[46]

As much as Rule 26(b)(3) attempts to solve problems, it also is suspiciously vague in areas of considerable significance. For example, when we turn to the issue of the discoverability of opinion work product, the Rule is of little help. Besides indicating that in ordering disclosure of ordinary work product a court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party, the drafters of the Rule failed to address, in any meaningful way, the specific issue of the direct discoverability of opinion work product.[47] Furthermore, the Rule, on its face, applies only to "documents and tangible things." Information obtained in anticipation of litigation or trial that does not exist in tangible form at the time discovery is sought simply does not come within the ambit of the Rule.[48] Therefore, when conversations, interviews, observations, and/or tests are not reduced to writing or other means of recordation, Rule 26(b)(3) is simply not applicable.

When an item of work product does not come within Rule 26(b)(3) or for which the Rule offers little useful guidance, counsel and the courts must revert to a consideration of the principles enunciated in *Hickman* and the cases thereafter that have applied and expanded the work product doctrine.[49] In dealing with opinion work product in particular, the issue of its discoverability is one in which the caselaw, in attempting to grapple with the issue of disclosure, is only moderately more enlightening that the language contained in Rule 26(b)(3).

III. OPINION WORK PRODUCT

Any examination of that part of the work product doctrine that involves an attorney's impressions, conclusions, opinions, and legal theories, must keep clearly in mind the fundamental reasons for the existence of the doctrine in the first place:

> The primary purpose of the work product privilege is to assure that an attor-

46. *See* the express language of FED. R. CIV. P. 26(b)(3), *supra* note 44.

47. *Compare* the language of FED. R. CIV. P. 26(b)(3) *with* the advisory committee notes on this same subsection of the Rule, 48 F.R.D. at 487, 502 (1970).

48. 4 J. MOORE, J. LUCAS & G. GROTHER JR., MOORE'S FEDERAL PRACTICE § 26.64[1], at 26-348 (2d ed. 1984).

49. *Id.*

> ney is not inhibited in his representation of his client by the fear that his files will be open to scrutiny upon demand of an opposing party. Counsel should be allowed to amass data and commit his opinions and thought processes to writing free of the concern that, at some later date, an opposing party may be entitled to secure any relevant work product documents merely on request and use them against the client.[50]

When courts have sought to resolve the issue of the potential discoverability of opinion work product, they have interpreted the work product doctrine's "primary purpose" in very different ways. This has given rise to a variety of approaches to the discoverability issue. However, before we examine this range of approaches, two preliminary issues must first be addressed.

A. Discovering Factual Information

The first issue, which seems to bother lawyers more than it should, relates to whether or not the work product doctrine precludes the discovery of relevant facts gathered by the lawyer during his or her efforts on the client's behalf. For example, during the interview of witness A, the lawyer learns of the existence of witness B. Can the lawyer then, in response to an interrogatory requesting the names and addresses of all known witnesses, decline to reveal the existence of witness B based upon the protections of the work product doctrine? The answer to this question was clearly provided by the Supreme Court in *Hickman*. The Court pointed out that where relevant and non-privileged *facts* were contained in an attorney's file, and where discovery was essential to preparation of the opposing party's case, such facts were clearly discoverable or the "liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning."[51]

More recently, the Supreme Court addressed this same problem in the context of the attorney-client privilege. The Court noted that the privilege protected against disclosure of communications between a client and his attorney, but did not protect against disclosure of the underlying facts known by those who communicate with an attorney.[52] Similarly, while witness A's written statement may be protected from discovery as ordinary work product and an interview

50. *In re* Murphy 560 F.2d, 326, 334 (8th Cir. 1977).

51. Hickman v. Taylor, 329 U.S. 495, 511-12 (1947).

52. '[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.'

UpJohn v. United States, 449 U.S. 383, 395-96 (1981) (quoting Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

summary prepared by the lawyer protected from discovery as opinion work product, the basic facts provided by witness A, as long as they are relevant and not protected from disclosure by another evidentiary privilege, are discoverable by the opposing party. Where a document may be insulated from a Request for Production, the facts contained therein must be disclosed in response to a properly worded interrogatory or deposition question.[53]

Attorneys often refuse to disclose during discovery those facts that they have acquired through their investigative efforts and assert, as the basis for their refusal, the protections of the work product doctrine.[54] Where such facts are concerned, as opposed to the documents containing them or the impressions and conclusions drawn from them, they must be disclosed to the opposing party in response to a proper request for discovery.[55] Otherwise, discovery would be a meaningless tool and we would be back to the era before the advent of the Federal Rules of Civil Procedure when "mutual knowledge of all the relevant facts gathered by both parties"[56] was far from the guiding principle of the federal litigation process.

B. What Types of Information Constitute Opinion Work Product?

The second preliminary issue that must be addressed before we can move on to an examination of the problem of the discoverability of opinion work product is the question of what types of information and materials have been found to constitute opinion work product. It is one thing to say that opinion work product is the mental impressions, conclusions, opinions, and legal theories of counsel.[57] It is quite another to say whether a particular memorandum, report, letter or piece of information is or contains opinion work product. To understand the

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53. The courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.

8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2023, at 194 (1970).

54. The court in Kent Corp. v. NLRB, 530 F.2d 612, 624 (5th Cir.), *cert. denied*, 429 U.S. 920 (1976), observed that while data summaries were protected from disclosure by the work product doctrine, a verbatim witness statement, or other objective data contained in a memorandum prepared for litigation, was not protected from disclosure.

55. Hickman v. Taylor, 329 U.S. 495, 511-12 (1947). *See also* FED. R. CIV. P. 26(b)(3) advisory committee notes, 48 F.R.D. 485, 502 (1970) (commenting on the relationship between Rule 26(b)(3) and the amended rules on interrogatories and requests for admission).

56. Hickman v. Taylor, 329 U.S. 495, 507 (1947).

57. This language is the terminology used in FED. R. CIV. P. 26(b)(3).

wide range of information and materials that the courts have categorized as opinion work product, one needs to briefly review a sampling of cases in which potential opinion work product was at issue.

There can be no question that an opinion letter to a client,[58] a memorandum outlining an attorney's evaluation of and strategies for a particular case,[59] and instructions to subordinates regarding investigative approaches[60] all constitute opinion work product. Such information and materials have as their primary function the recording and communication of the attorney's impressions, opinions, conclusions, and theories regarding the legal and factual aspects of the case. But once we move away from such relatively clear examples of opinion work product, we discover that almost anything can be placed in the opinion work product category.

How, we might ask, can a purely factual memorandum prepared by an attorney, summarizing an interview with a witness, be classified as opinion work product? All the memorandum contains is the attorney's recollection of what the witness told him. If it contains any impressions, opinions or conclusions, they surely are those of the witness and not the attorney. Therefore, at most, such a memorandum should be classified as ordinary work product, not opinion work product. But such a memorandum has long been held to be opinion work product on the theory that even though it is a factual summary, it indirectly reflects the attorney's mental impressions and analytical approach to the factual and legal issues involved in the case.[61] What the attorney choses to record, the manner and order of that recordation, and the emphasis placed on one set of facts over another reveals something of the attorney's mental processes and his or her consideration and weighing of the facts. Such information clearly constitutes potential opinion work product and the courts have so held.[62]

Once we recognize that even purely factual materials can indirectly reveal an attorney's opinions and conclusions regarding a particular case, it is entirely logical to find that a wide range of attorney generated information can be classified as opinion work product. In *Besly-Welles Corp. v. Balax, Inc.*,[63] the defendants asked the plaintiffs, by way of several interrogatories, to disclose what efforts had been undertaken to locate witnesses having information regarding a particular aspect of the case. The interrogatories, however, did not request the names and addresses of witnesses having knowledge of the rele-

58. Sylgab Steel & Wire Corp. v. Imco-Gateway Corp., 62 F.R.D. 454, 456 (N.D. Ill. 1974).
59. *In re* Natta, 410 F.2d 187 (3d. Cir. 1969).
60. Exxon Corp. v. F.T.C., 476 F. Supp. 713, 718 (D.D.C. 1979); Besly-Welles Corp. v. Balax, Inc., 43 F.R.D. 368 (E.D. Wis. 1968).
61. *In re* Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979).
62. *In re* Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973).
63. 43 F.R.D. 368 (E.D. Wis. 1968).

vant facts, but rather asked for information regarding the broader subject of investigative efforts. The court held that the interrogatories in question asked for information that clearly constituted opinion work product since an attorney's pattern of investigation and exploration of his or her case can indirectly reveal the attorney's thought processes, analysis, and developing impressions of both the legal and factual issues involved. The court noted that "[i]n attempting to locate witnesses on a certain topic an attorney will often talk to numerous prospects; the work product rule was designed to prevent unlimited interference with such preparations."[64]

It has long been an accepted practice during the taking of a deposition for a witness to be asked what information he or she reviewed and what persons were spoken with in preparation for their deposition appearance. Without such information, meaningful and probing examination of the witness's testimony and credibility cannot be effectively carried out. In *Ford v. Philips Electronics Instruments Co.*,[65] defendant's counsel subpoened an independent witness for oral deposition. During the deposition, defendant's counsel asked the witness about a conversation the witness had with the plaintiff's counsel on the morning of the deposition. Plaintiff's counsel objected to this line of inquiry as an attempt to probe his mental impressions and legal theories concerning the case. The court agreed that such a line of questioning generally intruded on the attorney's opinion work product:

> Insofar as defendant's question attempted to elicit from the witness the specific questions that plaintiff's counsel posed to him, or even the area of the case to which he directed the majority of his questions, it exceeds the permissible bounds of discovery and begins to infringe on plaintiff's counsel's evaluation of the case.[66]

The court then went on to hold that while the defendant's counsel could inquire liberally into the substance of the witness's knowledge concerning matters relevant to the subject matter of the action, such an inquiry could not "include questions that tend to elicit the specific questions posed to the witness by plaintiff's counsel, the general line of inquiry pursued by plaintiff's counsel, the facts to which plaintiff's counsel appeared to attach significance, or any other matter that reveals plaintiff's counsel's mental impressions concerning the case."[67]

The view held by the court in *Ford* is widely held by a substantial number of courts and commentators.[68] Any documents, materials or information that could conceivably reveal the impressions, conclu-

64. *Id.* at 371.
65. 82 F.R.D. 359 (E.D. Pa. 1979).
66. *Id.* at 360.
67. *Id.* at 361.
68. *See, e.g.*, Ceco Steel Prod. Corp. v. H.K. Porter Co., 31 F.R.D. 142 (N.D. Ill. 1962); Clermont, *Surveying Work Product*, 68 CORNELL L. REV. 755, 817-20 (1983). *See also* FED. R. CIV. P. 26(b)(3) advisory committee notes, 48 F.R.D. 487, 502 (1970)

sions, or evaluations of counsel are to be regarded as opinion work product and protected in accordance with the fundamental principles announced by the Supreme Court in *Hickman*.[69] Once we recognize that a wide variety of information, including purely factual materials that appear on their face to be devoid of the impressions, opinions, and conclusions of counsel, are still classifiable as opinion work product, we can begin to see how substantial the conflict is between the work product doctrine and the liberal pretrial discovery principles of the Federal Rules of Civil Procedure. A perfect example of that conflict and the lengths to which the opinion work product concept has complicated, confused, and strained the judicial process can be found in *Wheeling-Pittsburg Steel Corp. v. Underwriter Laboratories, Inc.*[70]

In *Wheeling-Pittsburg*, the plaintiff served interrogatories that sought detailed information regarding the nature of the damages alleged by one of the defendants in a counterclaim. The defendant undertook the task of calculating the damages based on documents that had been or were later produced to the plaintiff. Based on these calculations, the defendant answered plaintiff's interrrogatories in detail. Subsequently, an employee of the defendant was deposed by the plaintiff and was questioned on the methodology and rationale employed in determining the damages sought in the counterclaim. Defendant's counsel objected to this line of inquiry on the basis that the answers would reveal the thought processes, opinions, and theories of defendant's counsel regarding the claim for damages. In other words, it would violate the protections accorded the attorney's opinion work product.

If we were to examine the controversy in *Wheeling-Pittsburg* in light of our earlier discussion of *Besley-Welles* and *Ford*, we might agree that the defendant's assertion of the protection accorded opinion work product had some merit. But the court in *Wheeling-Pittsburgh* did not think so. It first observed that the information sought did not appear to even constitute work product, based on the definition of work product in *Hickman*.[71] Then, in the alternative, it held that even if the information was work product, the plaintiff had established good cause to justify its disclosure.[72] The court observed that without knowledge of the rationale employed at arriving at the damage figures, the plaintiff could not properly analyze and evaluate the

("The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories . . . .").

69. 329 U.S. 495, 511 (1947).

70. 81 F.R.D. 8 (N.D. Ill. 1978).

71. The Court defined work product as "written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." Hickman v. Taylor, 329 U.S. 495, 510 (1947).

72. Wheeling-Pittsburgh Steel Corp. v. Underwriter Laboratories, Inc., 81 F.R.D. 8, 12 (N.D. Ill. 1978).

various documents produced by the defendant and the answers given by the defendant to the plaintiff's interrogatories. Without the information sought in the deposition, the court felt that all previously produced materials concerning the counterclaim for damages would be meaningless.[73] And then, essentially following express language found in *Hickman*,[74] the court held that the information being sought by the plaintiff would eventually have to be revealed at trial in order for the defendant to prove its damages and, therefore, there was simply no reason for delaying its disclosure. In other words, whether it constituted opinion work product or not, there was something inherently wrong with precluding or delaying disclosure of information that formed the very foundation of the damages sought by defendant in its counterclaim.

The court's cumbersome analysis reflects the discomfort that assertion of opinion work product protection can often create. But in *Wheeling-Pittsburgh* the court could simply have based its decision on the absence of opinion work product, since what was being sought was the substance of the witness's knowledge concerning the calculations he made for and on behalf of the defendant. The witness was not asked what he had been told by the attorney, but was asked instead what methods and rationale he himself had used in arriving at the figures that constituted defendant's alleged damages. This clearly constitutes the substantive knowledge of a percepient witness and could reasonably sustain a holding that opinion work product was simply not involved.[75]

In comparing the approaches employed by the courts in *Besley-Welles*, *Ford*, and *Wheeling-Pittsburgh*, one confronts the clear conflict between protecting the privacy of an attorney's preparatory efforts and the fundamental principle that a party should have access to all relevant information concerning the case in which it is engaged. The balance that must be struck between these two competing interests is a delicate one, since each concept plays an important role in promoting the efficiency, credibility, and truth-seeking functions of the litigation process.[76] Yet the zone of privacy that has been erected to promote and protect the private thoughts, opinions, and/or conclusions of counsel would seem, even in such a balancing process, to be a sanctuary within which discovery must not penetrate. For to permit compelled disclosure would destroy an attorney's zone of privacy and irrevocably affect the thoroughness with which a client's case was pre-

73. *Id.*

74. "The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding, it, thus reducing the possibility of surprise." Hickman v. Taylor, 329 U.S. 495, 507 (1947).

75. Ford v. Philips Elecs. Instruments Co., 82 F.R.D. 359, 361 (E.D. Pa. 1979).

76. Hickman v. Taylor, 329 U.S. 495, 507, 510-12 (1947).

pared for eventual resolution. If the goals envisioned by the Supreme Court in *Hickman*, when it created the work product doctrine, are to be achieved, opinion work product would not seem to be subject to compelled disclosure.

C. Is Opinion Work Product Discoverable?

In *United States v. Nobles*,[77] the Supreme Court reaffirmed the vitality and importance of the work product doctrine as reflecting the strong public policy underlying the orderly prosecution and defense of legal claims.[78] The Court then went on to observe that "[a]t its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."[79] In the face of the Court's clear declaration that the protection of an attorney's mental processes lies at the very heart of the work product doctrine, how then can opinion work product be discoverable? To require disclosure in response to a request for discovery would undermine the zone of privacy that is accorded an attorney's mental processes by the work product doctrine.

The court in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*,[80] was faced with this very issue and held that "[i]n our view, no showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or legal theories."[81] The court reasoned that the protection of an attorney's mental processes was essential to the functioning of the adversary system. In its veiw, even the remote possibility that opinion work product materials or information might come to light in exceptional circumstances would deter attorneys from freely recording their mental impressions and conclusions in a candid and dispassionate manner. Without absolute protection for opinion work product, the strong public policy underlying the orderly prosecution and defense of legal claims would be irreparably impaired.[82]

While the absolute immunity accorded opinion work product by the court in *Duplan* has been adopted by other courts,[83] the *Duplan* view of the non-discoverability of opinion work product is very much a minority view. An overwhelming majority of courts and commentators reject both the reasoning and result of *Duplan*.[84]

77. 422 U.S. 225 (1975).
78. *Id.* at 236-37.
79. *Id.* at 238.
80. 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).
81. *Id.* at 734.
82. *Id.* at 735-36.
83. *In re* Grand Jury Investigation, 412 F. Supp. 943, 949 (E.D. Pa. 1976); APL Corp. v. Aetna Cas. & Sur. Co., 91 F.R.D. 10, 14 n.2 (D. Md. 1980).
84. *See, e.g.*, Xerox Corp. v. International Business Mach. Corp., 64 F.R.D. 367, 377-81 (S.D.N.Y. 1974); Clermont, *supra* note 68, at 821-26; Note, *Protection of Opinion*

The rejection of absolute immunity for opinion work product by a majority of those who have examined the issue is premised on an examination of the decision in *Hickman*, on the structure of Rule 26(b)(3) and the accompanying advisory committee notes, and on the rejection by the Supreme Court, contemporaneous with the decision in *Hickman*, of a revised rule of procedure granting absolute immunity to opinion work product.

In 1946, a revision to Rule 30(b) of the Federal Rules of Civil Procedure was proposed. The proposal contained a clear declaration that opinion work product was absolutely immune from discovery.[85] Instead of adopting the revised rule, the Supreme Court decided *Hickman* and opted for a caselaw approach to the issue of discoverability.[86] A careful reading of *Hickman* reveals that the Court left open the door to the discoverability question when it held, with regard to the opinion work product in issue, that "[i]f there should be a rare situation justifying production of these matters, petitioner's case is not of that type."[87] The Court, with the revision to Rule 30(b) in hand, could have made clear that opinion work product was absolutely immune from discovery, but chose instead to indicate that "rare situations justifying production" might exist. In the almost four decades since *Hickman* was decided, the Supreme Court, although it has had the opportunity to do so, has never addressed the discoverability issue beyond what it said in its seminal work product decision.[88]

Equally as significant as the rejection of the revisions to Rule 30(b) and the specific language of *Hickman* is the wording and structure of Rule 26(b)(3), which was adopted in 1970. While the drafters of the Rule could easily have incorporated the clear prohibition against disclosure of materials that reflect an attorney's mental impressions, conclusions, opinions, and legal theories that was contained in the earlier

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Work Product Under The Federal Rules of Civil Procedure, 64 VA. L. REV. 333, 337-40 (1978).

85. FED. R. CIV. P. 30(b) as proposed read in pertinent part:

> The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. *The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories* . . . .

5 F.R.D. 433, 456-57 (1946) (emphasis added).

86. "In deciding the Hickman case, the Supreme Court appears to have expressed a preference in 1947 for an approach to the problem of trial preparation materials by judicial decision rather than by rule." FED. R. CIV. P. 26(b)(3) advisory committee notes, 48 F.R.D. 487, 499 (1970).

87. Hickman v. Taylor, 329 U.S. 495, 513 (1947).

88. UpJohn v. United States, 449 U.S. 383, 401-02 (1981).

proposed revisions to Rule 30(b), they did not do so. Instead, the Rule sets out a very explicit standard for disclosure of ordinary work product and then, almost as an afterthought, adds the phrase that "the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney,"[89] when ordinary opinion work product is to be disclosed. In light of the advisory committe notes to Rule 26(b)(3), which repeatedly state that the Rule conforms to the holding in *Hickman* and its progeny,[90] one must be very cautious of the argument that the "shall protect against disclosure" phrase contained in the Rule imposes absolute immunity from discovery for opinion work product.[91] Since the Court in *Hickman* never imposed absolute immunity, and a majority of subsequent cases have found some degree of discoverability for opinion work product,[92] the language of the advisory committee notes substantially weakens any argument that the "shall protect against disclosure" phrase imposes absolute protection from discovery.

The better view, and the one that has been adopted by a majority of courts and commentators, is that opinion work product is entitled to substantially greater protection than ordinary work product, but is not absolutely immune from discovery.[93] Therefore, unlike ordinary work product, opinion work product cannot be discovered simply upon a showing of "substantial need" and an "inability to secure the substantial equivalent of the materials by alternate means without undue hardship."[94] The question remains then, what type of showing is required in order to compel an attorney to disclose materials or information that reflect his or her personal impressions, conclusions, opinions or theories.

D. Approaches to Discoverability

While a majority of courts have agreed that opinion work product is, to some extent, subject to discovery, agreement on when and under what cirucumstances disclosure is required has been far from uniform. On the issue of discoverability the courts have seemingly split into two very distinct camps. One camp's approach, usually referred to as strict protectionism,[95] is best exemplified by *In re Murphy*,[96] which held that "opinion work product enjoys nearly absolute immunity and can

89. *See supra* note 44.
90. FED. R. CIV. P. 26(b)(3) advisory committee notes, 48 F.R.D. 487, 500 (1970).
91. Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).
92. *See supra* note 84.
93. *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977).
94. These are the discoverability standards for "ordinary" work product contained in FED. R. CIV. P. 26(b)(3).
95. Clermont, *supra* note 68, at 828.
96. 560 F.2d 326 (8th Cir. 1977).

be discovered only in very rare and extraordinary circumstances."[97] These circumstances, the court observed, existed only where "weighty considerations of public policy" and the "proper administration of justice" clearly militate in favor of disclosure of the opinion work product in issue.[98]

Courts that have followed the strict protectionist approach have found only a few areas where consideration of public policy and the administration of justice results in the balance of factors tipping in favor of disclosure. For example, a number of such courts have found that opinion work product that was created in futherance of a crime, fraud, or other type of misconduct loses its protected status and is discoverable,[99] since to shield it from disclosure is "fundamentally inconsistent with the basic premises of the adversary system."[100] A second and, in some ways, related area of discoverability exists when the activities, advice, and/or knowledge of an attorney are a central issue in the litigation. For example, when a party affirmatively asserts reliance upon an attorney's advice as a defense in an action, discovery of materials reflecting that advice has been permitted even though the disclosure clearly involves opinion work product.[101] Similarly, when a primary issue in the case involves the time and manner of discovery of certain facts by an attorney (relating to issues involving the statute of limitations),[102] the prior relationship between various parties and their counsel (relating to agreements that allegedly deprived the plaintiff of certain rights),[103] or prior knowledge of an attorney regarding the validity of certain claims brought in an action (relating to allegations of bad faith in asserting claims that the party, through counsel, knew or should have known in advance were invalid),[104] courts have brushed aside the protections accorded opinion work product and have permitted discovery of the information at issue. Once again, the theory behind allowing discovery has been that it would be fundamentally inconsistant with the basic principles of the adversary system to do otherwise.[105] Thus, considerations of public policy and

97. *Id.* at 336.
98. *Id.*
99. *In re* International Sys. & Controls Corp., 693 F.2d 1235, 1241-43 (5th Cir. 1982); *In re* Doe, 662 F.2d 1073, 1079-80 (4th Cir. 1981); *In re* Special Sept. 1978 Grand Jury, 640 F.2d 49, 62-63 (7th Cir. 1980).
100. *In re* Sealed Case, 676 F.2d 793, 812 (D.C. Cir. 1982).
101. Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 931-33 (N.D. Cal. 1976).
102. American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706 (W.D. Mo. 1978).
103. Insurance Co. of N. Am. v. Union Carbide Corp., 35 F.R.D. 520, 524 (D. Colo. 1964).
104. Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F. Supp. 979, 981-83 (E.D. Wis. 1969).
105. While each of these examples of discoverable opinion work product may appear to result from some form of waiver on the part of the resisting party, waiver has never been asserted as the basis for permitting disclosure. The fact that the infor-

the administration of justice overwhelmingly militate in favor of disclosure even when courts are adhering to the so-called strict protectionist approach to the issue of the discoverability of opinion work product.

The second of the two fundamental approaches to discoverability is usually referred to as the balancing approach.[106] The courts that adhere to this view assert that, as opposed to a preconceived set of factual circumstances permitting discovery (the approach employed by the strict protectionists), resolution of the discovery issue "must rest upon the balance struck in the particulars of a concrete case between the competing interests of full disclosure and protection for the fruits of the lawyer's labor."[107] In other words, the balancing approach considers each case on its own merits without resorting to fixed factual categories that alone permit discovery.

Having declared that an unfettered case-by-case approach is the preferred analytical tool, the balancing courts then look at the importance of the information to the merits of the litigation,[108] the difficulties confronting the opposing party's efforts to acquire the needed information for themselves,[109] the degree to which opinion work product is present in the requested materials,[110] and the ultimate prejudice to the party from whom the discovery is sought.[111] Thus, the zone of privacy that surrounds an attorney's mental impressions, conclusions, opinions, and legal theories is balanced against the legal system's need for the information involved so as to insure "a sound and intelligent decision" on the merits.[112]

A strict protectionist would criticize this balancing approach as vague and unstructured, leaving too much to the individual discretion of the court without clear and predictable standards that attorneys and judges could use to resolve the discovery issue. Without clear standards, they would argue, an attorney would play it safe and avoid committing his or her thoughts to paper, thus defeating entirely one of

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mation sought through discovery is at the very heart of the issues involved in the case has been found to be sufficient to permit compelled disclosure. Bird v. Penn Cent. Co., 61 F.R.D. 43, 47 (E.D. Pa. 1973). For a discussion of when concepts of waiver apply to the discoverability of opinion work product, see *infra* notes 130-38 and accompanying text.

106. Clermont, *supra* note 68, at 826.

107. United States v. Swift & Co., 24 F.R.D. 280, 284 (N.D. Ill. 1959).

108. Xerox Corp. v. International Business Mach. Corp., 64 F.R.D. 367, 381 (S.D.N.Y. 1974); United States v. Swift & Co., 24 F.R.D. 280, 284 (N.D. Ill. 1959).

109. United States v. Swift & Co., 24 F.R.D. 280, 284 (N.D. Ill. 1959).

110. *Id. See also* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970).

111. Xerox Corp. v. International Business Machs. Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974); United States v. Swift & Co., 24 F.R.D. 280, 284 (N.D. Ill. 1959).

112. Xerox Corp. v. International Business Machs. Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974).

the principle purposes for creation of the work product doctrine in the first place.[113]

A balancing court, on the other hand, would see the strict protectionist approach as too rigid and mechanistic, lacking in the flexibility necessary to address the exigencies of each case. More importantly, a balancer would see the legal system as the loser if information critical to a fair, orderly, and informed decision on the merits could be kept from the court because it reflected, even in the smallest way, an attorney's mental impressions.[114] While balancers would acknowledge the importance of protecting opinion work product from routine discovery, that protection, they would argue, must give way if the information involved was critical to a sound and just determination of the case on its merits.[115]

Each of the two fundamental approaches to the discoverability issue is based upon principles that clearly underlie the adversary system. The strict protectionists favor opinion work product immunity as a means of promoting the thorough, efficient, and professional preparation of all cases that move through the adversary system.[116] The balancing courts, however, favor the principles inherent in the deposition-discovery rules of the Federal Rules of Civil Procedure that permit each party, and ultimately the court, to obtain the "fullest possible knowledge of the issues and facts . . . ."[117]

Having based their approach to discoverability on two substantially divergent principles, it is hardly surprising that each camp heavily criticizes the other. But must there be two distinctly divergent approaches? Is there a middle ground that accomodates the needs and philosophy of both camps? The answer is that, upon closer examination, the views of both groups have areas of overlap that can form the foundation for a single unified approach to the discoverability issue.

IV. A UNIFIED APPROACH TO DISCOVERABILITY

In creating a unified approach to discoverability, we must first examine what protections are, in reality, currently accorded opinion work product. For, like the creation of myths and superstitions, the use of grand phrases like those that surround the principles underlying the work product doctrine create an image and atmosphere that are often far from the realities of the objective world.

113. Note, *supra* note 84, at 344-45.
114. Xerox Corp. v. International Business Machs. Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974).
115. *Id.*
116. *In re* Grand Jury Subpoena, 524 F. Supp. 357 (D. Md. 1981).
117. Xerox Corp. v. International Business Machs. Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974).

A. Current Litigational Realities

1. Narrowed Protection Under the Federal Rules

The most startling of the current realities surrounding opinion work product is that the protections accorded such materials have been substantially narrowed by amendments to the Federal Rules of Civil Procedure governing interrogatories[118] and requests for admission.[119] The drafters of the 1970 amendments to the Federal Rules made quite clear what they had in mind when they commented in the advisory committee notes that while Rules 33 and 36 allowed for discovery of certain mental impressions, opinions, or conclusions, the documents, prepared by an attorney, which contained these matters were generally insulated from discovery by the work product protection contained in Rule 26(b)(3).[120] In other words, the information was discoverable, but the attorney's private documents were not. While the attorney's thought processes might be validly probed by the opposing party through the use of interrogatories and requests for admission, the written embodiment of those thoughts were generally to be protected. What was being encouraged, therefore, through codification of the work product doctrine was not the formulation of an attorney's mental impressions, opinions, and conclusions but simply the recording of those thoughts after they had come into existence.[121]

Once we recognize that the protections contained in Rule 26(b)(3) promote primarily written preparation of a matter by counsel, we see that the amendments to Rules 33 and 36 promote the goals of the deposition-discovery rules enunciated in *Hickman*, i.e., to permit all parties to obtain the fullest possible knowledge of the issues and facts before trial.[122] This includes the the opinions, conclusions, and legal theories of counsel that are directly related to the facts and allegations present in the case.[123]

Without embarking on a lengthy discussion of the boundries within which one may validly seek an attorney's opinions, conclusion or theories by way of interrogatory or request for admission, let it suffice to say that a party may be compelled to disclose its factual opinions and conclusions regarding the claims and defenses present in a case[124] and

118. FED. R. CIV. P. 33.
119. FED. R. CIV. P. 36.
120. FED. R. CIV. P. 26(b)(3) advisory committee notes, 48 F.R.D. 487, 502 (1970).
121. It should be noted that the concept of an attorney "recording" his or her impressions, opinions, or conclusions encompasses more than simply writing them down in some fashion. With the current state of data storage and retrievable systems, opinion work product may be contained on a piece of paper, a floppy disk, a computer tape, a strip of microfilm, or any number of storage media.
122. Hickman v. Taylor, 329 U.S. 495, 501 (1947).
123. FED. R. CIV. P. 23(b)(3) advisory committee notes, 48 F.R.D. 487, 502 (1970).
124. Leumi Fin. Corp. v. Hartford Accident & Indem. Co., 295 F. Supp. 539, 542

its legal theories applicable to the facts alleged.[125] In general, if the opinion work product sought by way of interrogatory or request for admission serves a valid and substantial purpose in the litigation, such as enabling a party to determine the extent of proof that will be required at trial[126] or narrowing the issues present in the case,[127] then disclosure of the information sought will be required. Only when the discovery seeks the reasoning process by which an attorney has arrived at a particular discoverable conclusion or seeks information not directly related to the facts in the case will discovery be precluded.[128] In the real world of litigation, disputes over opinion work product are primarily disputes over the attorney's internal working papers and not over the information contained therein, since such information is often discoverable by other means.[129]

Recognizing that substantial areas of opinion work product are readily discoverable under the 1970 amendments to the Federal Rules of Civil Procedure is only one step in the process of injecting a healthy dose of reality into our examination of the protections accorded an attorney's impressions, conclusions, opinions, and theories. The next step is to see that concepts of waiver and the applicability of various evidentiary concepts have further limited an attorney's ability to protect his or her opinion work product from discovery.

2. *Waiver and Related Concepts*

Unlike waiver of the attorney-client privilege that occurs when information is disclosed to virtually any third party,[130] waiver of the protections accorded work product occurs only when the protected information is disclosed to an adversary or to a third party whose possession of the information substantially increases an adversary's opportunities to obtain it.[131] Disclosure alone does not, in and of itself, automatically lead to waiver of opinion work product protection. An attorney often discloses his or her thoughts to a third party in order to obtain information, advice, or assitance in the preparation of a client's

(S.D.N.Y. 1969); Lincoln Gateway Realty Co. v. Carri-Craft, Inc., 53 F.R.D. 303 (W.D. Mo. 1971).

125. O'Brien v. International Bhd. of Elec. Workers, 443 F. Supp. 1182, 1187 (N.D. Ga. 1977).

126. Scoville Mfg. Co. v. Sunbeam Corp., 357 F. Supp. 943, 948 (D. Del. 1973).

127. Union Carbide Corp. v. Travelers Indem. Co., 61 F.R.D. 411, 414 (W.D. Pa. 1973).

128. Spector Freight Sys., Inc. v. Home Indem. Co., 58 F.R.D. 162, 164 (N.D. Ill. 1973); FED. R. CIV. P. 33(b) advisory committee notes, 48 F.R.D. 487, 524 (1970).

129. Disclosure may be obtained through the use of interrogatories and requests for admission pursuant to FED. R. CIV. P. 33 and 36, instead of by way of a request for production pursuant to FED. R. CIV. P. 34.

130. *In re* Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982).

131. *In re* Doe, 662 F.2d 1073, 1081 (4th Cir. 1981); United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

case.[132] To hold that such disclosure constitutes waiver of the protections accorded opinion work product would virtually reduce an attorney's case preparation to a lonely cerebral exercise devoid of any contact with the myriad of people who could provide necessary advice and assistance. Thus, the zone of privacy accorded an attorney's preparatory efforts on behalf of a client also encompasses those people with whom the attorney shares information in the preparation of a client's case. Only when such disclosure of an attorney's impressions, opinions or conclusions substantially increases an adversary's ability to obtain the information involved does waiver of opinion work product protection occur.[133]

The concept of waiver, as discussed above, is entirely consistent with the theory and purpose of the work product doctrine as enunciated in *Hickman*. But the reality of the litigative world is that the concept of waiver goes well beyond mere disclosure to someone whose status increases the opposing party's opportunity to obtain the information involved. For example, if an attorney uses work product materials in preparing someone for their deposition, the opposing party is entitled to disclosure of that information to aid them in examination of the witness.[134] This is true even if the materials contain opinion work product and the witness is closely associated with the disclosing party, i.e., an expert.[135] To achieve this result the courts have used Rule 612 of the Federal Rules of Evidence,[136] or have relied on portions of Rule 26 of the Federal Rules of Civil Procedure[137] to hold that work product protection is waived when immunized materials are used to directly shape and influence the testimony of a witness. To do otherwise would be to pervert the legal process and render meaningless an examining party's opportunity for thorough and probing examination of a witness who has been prepared for his deposition or trial appearance by the opposing party. As the Supreme Court

132. Such third parties may be experts, investigators, insurers, and even other parties with an interest common to that of the attorney or the client. *See, e.g., In re* Doe, 662 F.2d 1073, 1081 (4th Cir. 1981); United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980).

133. Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84, 89 (E.D.N.Y. 1981).

134. Spivey v. Zant, 683 F.2d 881 (5th Cir. 1982); Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 617 (S.D.N.Y. 1977).

135. Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983).

136. FED. R. EVID. 612 provides that if, prior to testifying, a witness uses a writing to refresh his or her memory, a court may order the document to be produced to the cross-examiner if the court determines it is necessary in the interests of justice.

137. FED. R. CIV. P. 26(b)(4) permits discovery of facts known and opinions held by experts. The Rule has been used as the basis for ordering disclosure of information relied on by an expert in preparing to testify as a witness. *See* Boring v. Keller, 97 F.R.D. 404, 407-08 (D. Colo. 1983).

noted in the context of trial testimony, a party who calls a witness on direct examination:

> can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.[138]

Running through each of the litigational realities, from the amendments to Rules 33 and 36, to the various manifestations of the application of waiver, a single fundamental precept can be glimpsed. An attorney enjoys a zone of privacy in the unfettered preparation of his or her client's case only as long as the legal system's search for truth in the litigation context is not unreasonably hampered. However, when promotion of thorough case preparation through the protection of an attorney's work product so distorts or hampers a court's ability to receive and consider information critical to a fair, orderly, and just determination of the case, the benefits bestowed by the work product doctrine must give away.[139] Otherwise, case preparation becomes a barrier to clear, informed, and thorough presentation of evidence upon which a court can make an informed decision. It is this principle, appearing over and over in the litigational realities surrounding the work product doctrine, which can and should form the basis for a unified approach to the issue of discoverability of opinion work product.

B. The Foundational Concepts

In developing a unified approach to the discoverability issue we must begin with several foundational concepts. First, we must accept the proposition that opinion work product is potentially discoverable and reject the proposition that it is absolutely immune from disclosure. Since an overwhelming majority of courts and commentators agree that opinion work product is discoverable, such a foundational concept is not a departure from existing theory or practice.[140]

The second foundational concept that underlies the proposed unified discovery approach is that opinion work product enjoys a greater degree of protection than does ordinary work product. Since ordinary work product can be discovered only upon a showing of substantial need and an inability, without undue hardship, to obtain the substantial equivalent of the materials by other means, opinion work product requires something more to compel its disclosure. This notion is virtually a universal view of the protection accorded opinion work product and therefore does not represent a departure from existing theory or

138. United States v. Nobles, 422 U.S. 225, 240 (1975).
139. Xerox Corp. v. International Business Machs. Corp., 64 F.R.D. 367, 381 (S.D.N.Y. 1974).
140. *See supra* notes 80-94 and accompanying text.

practice.[141]

The third foundational concept is that each case must be examined individually, taking into consideration the facts, allegations, theories, and behavior of the parties. Both the balancing courts and the strict protectionists recognize that each case must be examined on its own facts to determine whether disclosure of opinion work product is warranted. The only difference between the two approaches employed by the courts is the range of individual circumstances that result in a favorable disclosure decision.[142]

C. The Unified Discovery Standard

Armed with these three foundational concepts we can proceed to define a standard for discoverability that unifies the views of the strict protectionists and the balancing courts without substantially violating either camp's fundamental view of the role opinion work product plays in the litigation process. Recognizing that we are only dealing with that limited area of opinion work product that does not fall within the zone of discovery permitted by Rules 33 and 36 or that resulting from application of the concept of waiver, the formulation of a unified discovery standard would read as follows:

> Materials that constitute opinion work product are discoverable only upon a showing that they are essential to a determination of the case on its merits, and assertion of work product immunity is fundamentally inconsistent with the basic concepts of fairness and informed decisionmaking that lie at the very heart of the adversary system.

It should be noted that the fundamental structure of the proposed standard promotes the truth-seeking goal of the adversary system by insuring that only information or materials, the protection of which could effectively prevent a party from obtaining relief on a potentially meritorious claim, would be subject to compelled disclosure. Careful examination of the standard reveals that it comports with the three foundational concepts discussed above and also satisfies the primary concerns underlying the approaches espoused by the strict protectionists and the balancing courts.[143]

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141. UpJohn v. United States, 449 U.S. 383, 401 (1981); *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977); Note, *supra* note 84, at 334-37.

142. The balancing courts look to the role the particular information in issue contributes to a "sound and intelligent decision" on the part of the trier of fact. *See* Xerox Corp. v. International Business Machs. Corp., 64 F.R.D. 367, 381 (S.D.N.Y. 1974). The strict protectionists examine the information in issue to see if it clearly falls into one of a limited number of specific categories that are based on considerations of "public policy" and the "administration of justice," before determining whether compelled disclosure is warranted. *See supra* notes 96-105 and accompanying text.

143. Application of the unified discovery standard presupposes that the procedural steps set forth in the concluding section of this Article have been satisfied. Un-

Turning first to the three foundational concepts,[144] it should be noted that the unified discovery standard (1) permits discovery of opinion work product, (2) but only in those rare situations where a party can show that the information is "essential" to a determination of the case on its merits and assertion of work product immunity is "fundamentally inconsistent" with the basic concepts of fairness and informed decisionmaking that lie at the heart of the adversary system, and (3) a determination of what constitutes materials "essential" to a determination on the merits and "fundamentally inconsistent" with basic concepts of fairness and informed decisionmaking rests on an examination of the particular facts surrounding each case. Thus, the three foundational concepts are clearly satisfied by the proposed unified discovery standard.

The strict protectionists adhere to the view that opinion work product is discoverable only in a few exceptional circumstances. These involve primarily the so-called "fraud" and "at-issue" exceptions.[145] It should be apparent that each of these exceptions is clearly covered by the unified discovery standard. Since basic concepts of fairness and informed decisionmaking do not permit evidence of illegal conduct to be shielded from disclosure by assertion of a protection designed primarily to promote the vitality of the adversary system, evidence of illegal conduct—fraud for example—would clearly be discoverable through application of the unified discovery standard.[146] Similarly, when an attorney's actions constitute the very matters that are at issue in a case, materials bearing on those actions are essential to an informed decision on the merits and, like illegal conduct, denial of disclosure would be fundamentally inconsistent with basic concepts of fairness and informed decisionmaking.[147]

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less those procedural steps discussed in the text accompanying notes 159-66 have been carefully applied, application of the unified standard would be premature.

144. *See supra* notes 140-42 and accompanying text.

145. *See supra* notes 99-104 and accompanying text.

146. "[A]n attorney's opinion work product cannot be privileged if the work was performed in furtherance of a crime, fraud, or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system." *In re* Sealed Cased, 676 F.2d 793, 812 (D.C. Cir. 1982); "When the case being prepared involves the client's ongoing fraud, however, we see no reason to afford the client the benefit of this doctrine. It is only the rightful interests of the client that the work product doctrine was designed to protect." *In re* Special Sept. 1978 Grand Jury, 640 F.2d 49, 63 (7th Cir. 1970); "The work product rule recognizes the lawyer's services as an indispensable part of the judicial scheme, but it was not designed as a fringe benefit for protecting lawyers who would, for their personal advantage, abuse it." *In re* Doe, 662 F.2d 1073, 1079 (4th Cir. 1981).

147. "[W]hile an attorney's private thoughts are most certainly deserving of special protections, I believe that the concern for the lawyer's privacy must give way when the advice of counsel is directly at issue." Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 932 (N.D. Cal. 1976); "[W]hen the activities of counsel are inquired into because they are at issue in the action before the court, there is

While exceptional circumstances are clearly accomodated by the unified discovery standard, so are the concerns of those courts that approach discoverability by balancing the parties' competing interests in full disclosure and in protecting the fruits of an attorney's intellectual labors.[148] Since the balancing courts' analytical focus is on the nature of the case, the nature of the information sought, and the ultimate prejudice to the litigation process if the materials are protected from disclosure,[149] the unified standard's requirement that the information be essential to an informed decision on the merits and that the assertion of immunity be fundamentally inconsistent with basic concepts of fairness and informed decisionmaking accomodates the balancers' concerns while imposing a substantial burden upon the party seeking discovery.[150]

Even though the proposed unified discovery standard accomodates the primary concerns of the two existing approaches to the issue of discoverability, the strict protectionists will surely criticize it as too vague and leaving too much discretion in the hands of individual

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cause for production of documents that deal with such activities, though they are 'work product'." 4 J. MOORE, *supra* note 48, § 26.64 [3.-2], at 26-385.

148. Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F. Supp. 979, 982 (E.D. Wis. 1969).

149. *See supra* notes 108-11 and accompanying text.

150. Some notion of the boundaries implicit in the unified discovery standard can be seen in examining two somewhat similar cases. In Hickman v. Taylor, 329 U.S. 495 (1947), the Court held that work product materials regarding interviews with potential witnesses were protected from disclosure because, among other things, the witnesses and their prior testimony at a public hearing were available to opposing counsel who had sought the work product at issue "only to help prepare himself to examine the witnesses and to make sure that he has overlooked nothing." *Id.* at 513. Furthermore, the Court observed that there was no suggestion that the defendants had been incomplete or dishonest in their answers to plaintiff's discovery. In other words, the information was not central to an informed decision on the merits and its protection from disclosure was not inconsistent with fundamental concepts of fairness and informed decisionmaking. In Xerox Corp. v. International Business Machs, Corp., 64 F.R.D. 367 (S.D.N.Y. 1974), the work product at issue was again an attorney's notes regarding interviews with potential witnesses (i.e., employees of defendant). Plaintiff's counsel had deposed many of these witnesses only to discover that they could not remember information regarding events that were central to the issues in the case (i.e., the presence and use of Xerox trade secrets by IBM). The court found that "[a] party should not be allowed to conceal critical, non-privileged, discoverable information, which is uniquely within the knowledge of the party and which is not obtainable from any other source, simply by imparting the information to its attorney and then attempting to hide behind the work product doctrine after the party fails to remember the information." *Id.* at 381-82. Since the information was central to a decision on the merits (i.e., whether IBM had misappropriated Xerox's trade secrets), and fundamental concepts of fairness and informed decisionmaking precluded protecting the information when the witnesses uniformly could not recall critical information when deposed by plaintiff's attorney, discovery of the defense attorney's interview notes was ordered.

judges. Such discretion, they will argue, jeopardizes the sweeping nature of the protection contemplated by the Supreme Court when it recognized opinion work product immunity.

In answer to this criticism, we might first note that, in addition to the "fraud" and "at issue" exceptions, most of the strict protectionist courts also recognize that opinion work product may also be discoverable in "rare and extraordinary circumstances."[151] What constitutes such circumstances is left to the sound discretion of the judiciary, to be determined within the framework of principles that underlie the strict protectionist view that only substantial considerations of public policy and the proper administration of justice can militate in favor of disclosure.[152] Clearly then, discretion is not unknown to the strict protectionist approach to discoverability. As long as clearly articulated principles exist to guide a court's exercise of discretion, even the strict protectionists would agree that discretion in and of itself is not an inherently bad thing. Furthermore, there exists in the proposed unified discovery standard a clear statement of principles, not unlike those espoused by the strict protectionists, which can and should be used to guide a court in the exercise of its discretion.

While work product immunity is a doctrine established by the courts to enhance the vitality of the adversary system, the privilege against self-incrimination is a constitutionally mandated protection that "respects a private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self-condemnation."[153] With such a significant constitutional goal as its foundation, the issue of when discovery, in a civil case, can be had over assertion of a party's privilege against self-incrimination is one that could hardly be left to a court's discretion based upon the facts of the particular case at issue. Yet that is precisely the approach that today exists in the federal courts.[154]

Wehling v. Columbia Broadcasting System,[155] is an example of the view that, in private party civil litigation, assertion of the privilege against self-incrimination in resisting a valid request for discovery requires a court to examine the case on its merits and balance the parties' competing interests in the information sought.[156] Such a concept clearly grants a court a great deal of discretion; in fact, potentially more discretion than that afforded by the unified discovery standard proposed in this Article.

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151. *In re* Doe, 662 F.2d 1073, 1079 (4th Cir. 1981); *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977).
152. *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977).
153. Couch v. United States, 409 U.S. 322, 327 (1973).
154. Wolfson, *Civil Discovery and the Privilege Against Self-Incrimination*, 15 PAC. L.J. 785, 801-06 (1984).
155. 608 F.2d 1084 (5th Cir. 1979), *reh'g denied*, 611 F.2d 1026 (5th Cir. 1980).
156. *Id.* at 1088.

In *Wehling*, the plaintiff, who owned a number of trade schools, filed a suit for libel alleging that he had been defamed by a television news story. The broadcast in question alleged that the plaintiff had defrauded both his students and the federal government by abusing federal student loan and grant programs. When CBS sought pretrial discovery from the plaintiff concerning his operation of the schools, the plaintiff invoked his privilege against self-incrimination and asserted that a grand jury was in the process of investigating his schools. The trial court ordered the plaintiff to answer the questions posed by the defendant. The plaintiff then moved for a protective order asking the court to fashion some type of relief short of outright dismissal that would respect the rights of both parties. The trial court denied plaintiff's motion and ordered him to submit to discovery. Plaintiff once again refused based on his privilege against self-incrimination, and the court dismissed plaintiff's suit on the grounds that his refusal constituted a willful default.

On appeal, the Fifth Circuit sought to balance the defendant's need for the requested information against the constitutional protection the plaintiff had the right to assert. The approach adopted by the Fifth Circuit required the trial court to assess the relative weights of the parties' competing interests with a view toward accommodating the interests of both sides if at all possible.[157] While assertion of the privilege against self-incrimination was given substantial weight, and eventually predominated in the balancing process, the court made clear that circumstances could exist that required that the protections of the privilege give way to a valid request for discovery.[158]

There is little difference between giving a court the discretion to balance the parties' competing interests where assertion of the privilege against self-incrimination is concerned, and requiring a court to determine when information is essential to the fact-finding process and preclusion of its disclosure fundamentally inconsistent with basic concepts of fairness and informed decisionmaking. As long as assertion of opinion work product immunity is given substantial weight in the analytical process, a case-by-case analysis technique in which the court must assess a variety of factors to resolve the discovery issue is not an unstructured and unreasonably discretionary approach to determine whether disclosure is appropriate.

Defining a standard to be used in determining the discoverability of opinion work product is only a first step in providing a unified approach to resolution of the discovery issue. Equally important is the procedural framework within which the standard is to be applied on a case-by-case basis. Without an appropriate procedural framework, an-

157. *Id.*

158. Wheling v. Columbia Broadcasting Sys., 611 F.2d 1026, 1027 (5th Cir. 1980).

alytical consistency and reasonable predictability of result are difficult to insure.

D. Procedural Considerations

In considering the procedural steps appropriate to a determination of the discoverability of opinion work product, it is important to keep in mind that all avenues short of permitting direct disclosure must first be examined and resolved before application of the unified discovery standard is attempted. In this way only exceptional circumstances will ultimately result in a disclosure decision. To achieve this goal, the following analytical framework is suggested.

First, it should be determined whether the information sought is reasonably relevant to the subject matter of the action within the parameters set forth in Rule 26(b).[159] If the information is of questionable relevance, the disclosure question can be resolved on the basis of relevance and the work product issue need not be addressed.

Second, if the requested information is relevant, it should then be determined whether work product immunity has been invoked in a timely and appropriate manner.[160] If the immunity has not been properly invoked, further analysis would be unnecessary.

Third, if the requested information is relevant, and the immunity properly invoked, it should then be determined whether the same or equivalent materials are reasonably and appropriately available from sources other than the opposing party. The ability to obtain the infor-

159. FED. R. CIV. P. 26(b)(1) reads in pertinent part:

> 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 trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Note that this relevancy standard is much broader than the standard for relevance used at trial pursuant to FED. R. EVID. 401.

160. Failure to object to a discovery request within the time fixed by the applicable discovery rule or statute acts as a waiver of available objections. Davis v. Fendler, 650 F.2d 1154, 1160 (9th Cir. 1981). This is true even for an objection that the information sought is privileged. United States v. 58.16 Acres of Land, 66 F.R.D. 570 (E.D. Ill. 1975). The automatic waiver provisions that exist in conjunction with a number of the discovery rules, including interrogatories, FED. R. CIV. P. 33; Shenker v. Sportelli, 83 F.R.D. 365 (E.D. Pa. 1979), requests for admission, FED. R. CIV. P. 36; Perry v. Golub, 74 F.R.D. 360, 363 (N.D. Ala. 1976), and requests for production, FED. R. CIV. P. 34; Balistrieri v. Holtzman, 55 F.R.D. 470, 472-73 (E.D. Wis. 1972), make imperative that assertion of the protections of the work product doctrine be accomplished in a clear, succinct, and timely manner.

mation from another source may avoid the work product issue entirely.[161]

Fourth, if the information is relevant and only available from a party's counsel, then it must be determined whether the information at issue meets the requirements for classification as opinion work product.[162] If it is determined that the materials in question are not opinion work product, the heightened protection accorded opinion work product need not be considered.

Fifth, if the information is found to be opinion work product, it should then be determined whether it is more appropriately available by way of interrogatory or request for admission pursuant to Rules 33 and 36 of the Federal Rules of Civil Procedure.[163] While information sought by way of one discovery device (i.e., requests for production or deposition) may present opinion work product problems, shifting to a different discovery tool may resolve the problem without need to address the more difficult disclosure issues.

Sixth, if a shift to another discovery device is not possible, then it must be determined whether the party resisting discovery has, in some manner, waived the protections normally accorded opinion work product.[164] If disclosure of the information to a third party has substantially increased the probability of discovery by the party seeking the information, waiver has occurred and the ultimate discoverability issue need not be addressed.

Seventh, if waiver has not occurred, it should then be determined whether the relevant information sought by way of discovery can be distilled from the opinion work product materials in such a way as to prevent disclosure of the attorney's impressions, opinions, conclusions, or theories while providing the discovering party the information he or she has requested.[165] Often, this distillation process is undertaken by the court after in camera submission of the materials in issue by the resisting party.[166]

Eighth, if the disputed information cannot be distilled in such a

161. For example, under the provisions of FED. R. CIV. P. 26(b)(3), a non-party, upon request, must be provided a copy of any statement they previously made regarding the action or its subject matter. If plaintiff's counsel obtained such a statement, defendant's counsel may face the bar of the work product doctrine in attempting to obtain it through discovery. However, before addressing the disclosure issue, the non-party whose statement is involved might simply be persuaded to request a copy of the statement pursuant to FED. R. CIV. P. 26(b)(3) and then provide the statement to the party seeking it through discovery.

162. *See supra* notes 33-34 and accompanying text.

163. *See supra* notes 118-28 and accompanying text.

164. *See supra* notes 130-38 and accompanying text.

165. Xerox Corp. v. International Business Machs. Corp., 64 F.R.D. 367, 381 (S.D.N.Y. 1974).

166. Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 928 (N.D. Cal. 1976); Bird v. Penn Cent. Co., 61 F.R.D. 43, 44-45, 47 (E.D. Pa. 1973).

way as to satisfy both parties' interests in the disclosure, then application of the unified discovery standard must be undertaken. This would begin with a determination of whether the information sought is essential to a determination of the case on its merits.[167] Since only a limited category of information can be considered central to the decisionmaking process, many discovery requests would not be able to meet this aspect of the standard and the inquiry would end here.

Ninth, if the information were found to be essential to the decisionmaking process, then it would finally have to be determined whether denial of disclosure was fundamentally inconsistent with the basic concepts of fairness and informed decisionmaking that lie at the heart of the adversary system.[168]

Tenth, even if disclosure is found appropriate, inquiry should be made as to the need for and/or the appropriateness of any conditions, protections or restrictions that should be imposed upon the handling or use of the opinion work product disclosed as a result of the application of the unified discovery standard.[169] The power to impose such conditions, protections or restrictions flows directly from the provisions of Rule 26(c) pertaining to the issuance of protective orders.[170]

If counsel and the courts approach the problem of compelled disclosure of opinion work product in the analytical and procedural manner set out above, few contested matters will be found to require application of the unified discovery standard. Those matters that do

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167. *See supra* notes 145-50 and accompanying text. It should be noted that the Supreme Court introduced into the Federal Rules of Civil Procedure notions of what constitutes discovery essential to a fair determination of a case when it adopted the 1983 revision to FED. R. CIV. P. 26, which reads in pertinent part:

> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

168. *See supra* notes 145-50 and accompanying text.

169. The sensitive nature of opinion work product materials might require that an attorney being granted its disclosure be restricted in (1) who might see or use the materials, (2) whether copies can be made, (3) to what purposes the materials can be put (e.g., physical testing, detailed indexing, etc.), (4) the arrangements for storing and/or handling the materials (e.g., locked storage, restricted access, detailed logging of access and use, etc.), and (5) return of the materials at the termination of the litigation or earlier.

170. FED. R. CIV. P. 26(c) permits a court to enter a protective order directing, among other things, "(2) that the discovery may be had only on specified terms and conditions . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way . . . ."

will yield results that are reasonably consistent, logical, and, in the end, sufficiently predictable to allow parties and their counsel to resolve opinion work product disputes without need of judicial involvement.

V. CONCLUSION

With the creation of the work product doctrine in *Hickman v. Taylor*,[171] the legal profession acquired a protection in many ways broader and more pervasive than that bestowed by the attorney-client privilege.[172] By dividing that protection into "ordinary" work product and "opinion" work product,[173] and according the latter a substantially greater degree of protection,[174] confusion and disagreement soon set in as to the vulnerability of an attorney's zone of privacy when the opposing party sought potential work product through discovery. Since *Hickman* was decided, the courts and the drafters of the Federal Rules of Civil Procedure have had little trouble dealing in a logical and consistent manner with the issue of the discoverability of ordinary work product.[175] But where opinion work product is concerned, the drafters of the Federal Rules have failed to provide any meaningful guidance on the issue of discoverability,[176] and the courts have pursued three very distinct and often divergent approaches to the problem.[177]

The time has come to adopt a single discovery standard for opinion work product that takes into consideration not only the fundamental concerns that underlie both the concept of work product protection and the goals of the litigation process, but also the reality of discovery practice as it exists today in the federal courts. Based upon a careful consideration of all three factors, the discovery standard that has been proposed in this Article, along with the suggested procedural and analytical framework for applying the standard in a given case, allows counsel and the courts to address the discoverability issue in a simple, logical, and coherent fashion consistent with the primary concerns expressed by a majority of courts that have considered the problem.

The unified discovery standard that has been proposed herein does not establish a set of mechanical rules that provide absolute certainty at the expense of those practical considerations that are dictated by the individual facts of each case. The ultimate focus of any inquiry in which the discovery standard is in issue must be on the fundamental

171. 329 U.S. 495 (1947).
172. *See supra* notes 35-40 and accompanying text.
173. *See supra* notes 31-34 and accompanying text.
174. *See supra* note 33.
175. *See supra* notes 44-45 and accompanying text.
176. *See supra* note 48 and accompanying text.
177. *See supra* notes 77-84 & 95-112 and accompanying text.

fairness of the proceeding in light of the concerns for informed decisionmaking and the vitality of the adversary system that lie at the very heart of the perpetual conflict between liberalized discovery and the protection accorded opinion work product.[178]

178. Recently, the Supreme Court observed in a criminal case that excluding truth from the decisionmaking process, as a means of promoting adherence to principles dedicated to the proper administration of the justice system, was often accompanied by enormous societal costs. The Court held that when the costs of excluding truth from the decisionmaking process reached unacceptable levels, the adversary system had to have access to the information involved, even in the face of long accepted countervailing principles. Nix v. Williams, 104 S.Ct. 2501, 2510-11 (1984).