



1984

The Work-Product Doctrine: Protection, Not Privilege

Sherman L. Cohn
Georgetown University Law Center

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1597>

71 Geo. L.J. 917

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>



Part of the [Civil Procedure Commons](#), and the [Legal Profession Commons](#)

The Work-Product Doctrine: Protection, Not Privilege*

SHERMAN L. COHN**

Although the work-product doctrine has received considerable attention before the courts in recent years, several issues regarding the scope and applicability of the doctrine remain controversial. As a prelude to explaining the state of the law on these issues, the author examines the case law through which the doctrine developed and explores the doctrine's modern application through rule 26 of the Federal Rules of Civil Procedure. He next discusses the rule's various requirements and its treatment of particular categories of information including opinion work product and party statements. Finally, Professor Cohn explains how the rule's protection may be waived and discusses the rule's operation with respect to subsequent litigation and a party's use of experts. The author draws distinctions throughout the article between operation of the attorney-client privilege and the work-product doctrine and concludes that the work-product doctrine operates not as a privilege that belongs to any party but rather as a protection for the adversary system.

"The provisions of Rule 26(b)(3) are straightforward and easily understood. No interpretation or construction seems necessary." *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397 (E.D. Va. 1975).

I. INTRODUCTION: THE ROOTS OF THE WORK-PRODUCT DOCTRINE

From our common-law ancestors we inherited much. We inherited the forms of action and a separation of law and equity. We inherited a pleading system that required fictions and ritualistic formulas, which in some situations demanded prolixity and in others permitted vague general statements. We also inherited a system of litigation in which one party learned precious little about the other party's case until trial. It was a system that Justice Douglas described as one of "blindman's buff."¹ Professors Wright and Miller have stated that the "judicial proceeding was a battle of wits rather than a search for the truth,"² and, thus, each side was protected to a large extent against disclosure of his case until he chose to disclose it at trial.

* © Sherman L. Cohn, 1983. All rights reserved. Permission to reprint this article must be obtained from the author.

** Professor of Law, Georgetown University Law Center. B.S. in Foreign Service, Georgetown University (1954); J.D. Georgetown University Law Center (1957); LL.M. Georgetown University Law Center (1960).

This article will appear as a chapter in the book *Corporate Information: Confidentiality and Disclosability in the Lawyer-Client Context*, Rothstein and Brunner, Editors, West Publishing Company 1983.

1. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

2. 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2001, at 14 (1970).

Reform arrived in the mid-nineteenth century with the enactment of the Field Code.³ Abolition of the common-law forms of action was accompanied by the procedural merger of law and equity. An attempt was made to eliminate fictions, prolixity, and vagueness from the pleading stage of litigation. Yet, the game of blindman's buff continued because all that one knew of his opponent's case was what was in the pleadings and the bill of particulars. Although a party was required to furnish facts sufficient to allege a cause of action,⁴ such allegations told far from the entire story.⁵

A major change occurred in 1938 with the adoption of the Federal Rules of Civil Procedure. The rules set forth a system of discovery which permitted one party to obtain information about another party's evidence prior to trial. They established devices to force disclosure from anyone, parties or nonparties, who had knowledge of any non-privileged information that was relevant to the subject matter of the case.

Under this new philosophy the only relevant information protected from disclosure was that falling within one of the evidentiary privileges: attorney-client, husband-wife, physician-patient and the like. All other information was to be disclosed upon proper demand. The game of blindman's buff was to end; the cry of "fishing expedition" was to be ignored. All parties were to have access to all available, relevant information, thus preventing surprise at trial.⁶ The sides were to be evened and, hopefully, a purer justice would emerge from the litigation.

Questions soon arose concerning how far to extend this new philosophy of complete disclosure. Did we really intend there to be no surprises at trial? Did other values need to be integrated into this philosophy? The conflict that emerged is epitomized by the seminal case of *Hickman v. Taylor*.⁷ In *Hickman*, a tugboat sank; five of the nine crew members were killed.⁸ Three days later, the tug owners and their underwriters employed Fortenbaugh, an attorney, to defend them against possible suits arising from the incident. Three weeks later, a public hearing was held by the United States Steamboat Inspectors at which the four surviving crewmembers were examined. Their recorded testimony was publicly available. With an eye toward anticipated litigation,

3. 1848 N.Y. Laws ch. 379, 497.

4. *Id.* ch. 379, § 120 (2).

5. Although the law courts had no discovery in today's sense of the word, an attorney could file a bill of discovery, a cumbersome device, in an equity court for use in a law court. *See* *Pressed Steel Car Co. v. Union Pac. R.R.*, 241 F. 964, 966-67 (S.D.N.Y. 1917). Equity courts provided more discovery than the common-law courts. *See generally* F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 171-73 (2d ed. 1977) (equity courts permitted bills of discovery in aid of action or defense at law, and bills to take deposition; and compelled defendant in discovery to supply written, sworn answers to interrogatories).

6. Justice Murphy put it this way:

No longer can the time honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. 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).

7. 329 U.S. 495 (1947).

8. *Id.* at 498. The statement of facts in *Hickman* appears at *id.* at 498-99.

Fortenbaugh privately interviewed the survivors and obtained signed statements from them. Fortenbaugh also interviewed other persons whom he believed to have some information concerning the accident and in some instances made memoranda of the conversations. Nine months after the incident, suit was filed by a representative of one of the deceased crewmembers. A year after filing suit, counsel for the plaintiff, through an interrogatory, asked whether the tug owners had obtained any statement from any member of the tug crew or of any other vessel. Counsel also asked the tug owners to attach to their answer "exact copies of all such statements if in writing, and if oral, [to] set forth in detail the exact provisions of any such oral statements or reports."⁹ Supplemental interrogatories broadened the request to include any oral or written statement, record, report or other memorandum made concerning any matters related to the towing by the tug, the sinking, salvaging and repair of the tug, or the death of the crew. The tug owners took exception to these interrogatories and refused to answer.¹⁰

Read literally, the Federal Rules of Civil Procedure permit such discovery. Rule 26(b)(1) provides for the discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action"¹¹ Clearly, the information sought by the plaintiff in *Hickman* was relevant to the subject matter of the action. Moreover, it did not fall within the protection of the attorney-client privilege because it had been obtained from someone other than the client.¹²

Further, the plaintiff in *Hickman* argued, to prohibit discovery of statements obtained during counsel's investigation would give a tremendous advantage to the party who first retained counsel or had greater investigatory resources.¹³ If an incident portends future litigation, the resources of a corporate party would allow it to "pull a dark veil of secrecy over all the pertinent facts" long before the individual party employs counsel to begin work on the matter.¹⁴ Plaintiff also contended that the disputed interrogatories operated within the stated purpose of the discovery rules: to prevent surprise; to even up the sides in their search for information; and to encourage the full release at trial of all evidence pertinent to the issues, thus insuring the result most reflective of the actual events.¹⁵

Although these purposes are not served to the extent that one party's attorney hoards any information pertinent to the issues in a lawsuit, forcing the hoarding attorney to disclose his information would handicap achievement of other goals arguably central to our adversarial system: full preparation and zealous advocacy. Disclosure of an opponent's completed litigation file would eliminate the need for much of an attorney's personal research and investiga-

9. *Id.* at 499.

10. *Id.*

11. FED. R. CIV. P. 26(b)(1). The 1970 amendments to the Federal Rules, which drastically restructured the discovery rules, did not alter this language.

12. See *Bird v. Penn Central Co.*, 61 F.R.D. 43, 46 (E.D. Pa. 1973) (attorney-client privilege applies to information obtained from client); *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950) (same).

13. 329 U.S. at 506.

14. *Id.* at 506-07.

15. *Id.* at 506.

tion. Instead, he would depend on his opponent's expenditure of time, money and energy. Certainly, there would be less incentive to make such expenditures if an attorney could take full advantage of an opponent's work product. Thus, there would no longer be a premium on complete, careful first-hand investigation and trial preparation. Such "[p]roper preparation" demands that counsel "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."¹⁶ A rule permitting full discovery would discourage the investigating counsel from taking written notes of conversations and encourage more reliance on memory with all of its attendant difficulties. As Justice Murphy noted in *Hickman*:

An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.¹⁷

These two goals—promoting fairness through full disclosure and promoting an adversarial system of justice by discouraging neither counsel from full preparation and zealous advocacy—had to be balanced. That balance was reached in what has become known as the work-product doctrine: all written materials obtained or prepared by an adversary's counsel in preparation for trial or "with an eye toward litigation" are to be free from discovery, unless "essential" to the case preparation of the party seeking discovery.¹⁸ It is the discovering party's burden to establish that the information sought is no longer available, can be reached only with undue hardship, or that there are other adequate reasons to justify invasion of his opponent's file.¹⁹ Although the *Hickman* Court did not decree absolute protection, it made clear that the burden on the party seeking discovery was to be, at least, far greater to discover the memory and mental impressions of counsel than to discover written statements of witnesses.²⁰

That was 1947; the work-product doctrine was case law. For the next twenty-three years, the lower federal courts struggled to put flesh on the doctrine and to work out the problems of its application. Naturally, not all of the resolutions have been consistent.²¹ An attempt to resolve the conflicts resulted

16. *Id.* at 511.

17. *Id.*

18. *Id.*

19. *Id.* at 511-12.

20. *Id.* at 512-13.

21. For example, many courts interpreted the undue hardship standard as requiring a showing of good cause. *Chitty v. State Farm Mut. Auto. Ins. Co.*, 36 F.R.D. 37, 40 (E.D.S.C. 1964) ("undue hardship" and "injustice" requirements of *Hickman* are equated with a "good cause" showing). Other courts, however, have confused this "good cause" standard with the "good cause" established by a showing of relevancy, which was a prerequisite until 1970 in rule 34 for mandating the disclosure of documents in general under rule 34. FED. R. CIV. P. 26(b)(3) advisory committee note; see *Shapiro v. Allstate Ins. Co.*, 44 F.R.D. 429, 430 (E.D. Pa. 1968) (applying the "good cause" requirement of rule 34 to requests for trial preparation materials). This result was not surprising, as requests for documents generally are made under rule 34 and trial preparation material is normally documentary in nature. The 1970 amendments eliminated the "good cause" requirement of rule 34.

in a complete rewriting of the discovery rules in 1970. The work-product doctrine was codified and incorporated in rule 26 of the revised Federal Rules of Civil Procedure. This solution left some issues unresolved and created new ones.

One general observation concerning the work-product doctrine should be made before turning to those matters. The *Hickman v. Taylor* issue was raised in a civil case in the context of pretrial discovery. The work-product doctrine was written into rule 26(b) of the Federal Rules of Civil Procedure, which solely concerns pretrial discovery in civil cases. Yet, the work-product doctrine is not so limited. Clearly, it applies by virtue of rule 81(a)(3) to court proceedings "to compel the giving of testimony or production of documents in accordance with" an administrative subpoena issued by an agency or officer of the United States.²² This position was reiterated by the Supreme Court in *Upjohn Co. v. United States*.²³ Thus, the doctrine applies to judicial proceedings for the enforcement of subpoenas issued by the Internal Revenue Service²⁴ and grand juries.²⁵

Moreover, it should be noted that the work-product doctrine also applies to both trial situations and, in a limited fashion, to criminal cases.²⁶ In *United States v. Nobles*,²⁷ pursuant to the trial court's order, an investigator called by the defense as a witness in a criminal trial was precluded from giving impeachment testimony absent assurances from defense counsel that the prosecutor would be furnished those portions of the witness' investigatory report relevant to the witness' testimony and prepared for defense counsel.²⁸ The Supreme Court upheld the preclusionary sanction and held that the work-product doctrine was applicable in criminal trial situations even though testimonial use of work-product material generally is regarded as a waiver of that protection.²⁹ Thus, although our focus will be on rule 26(b) of the Federal Rules of Civil Procedure, it is with the realization that the rule's implications go beyond civil cases and the pretrial stage of litigation.³⁰

22. FED. R. CIV. P. 81(a)(3); *cf. In re Sealed Case*, 676 F.2d 793, 808 n.49 (D.C. Cir. 1982) (federal rules dictate procedure to enforce nondiscovery IRS summonses and grand jury subpoenas, but rule 81(a)(3) does not apply substantive restrictions of rule 26 to what information grand jury or IRS may seek to compel disclosure).

23. 499 U.S. 383, 397 (1981) (applying work-product doctrine to IRS subpoena).

24. *Id.*

25. *See Donaldson v. United States*, 400 U.S. 517, 530 (1971); *In re Sealed Case*, 676 F.2d 793, 808 (D.C. Cir. 1982).

26. *United States v. Nobles*, 422 U.S. 225, 236 (1975); *In re Sealed Case*, 676 F.2d 793, 808 (D.C. Cir. 1982); FED. R. CRIM. P. 16(b)(2). *Cf.* 18 U.S.C. § 3500 (1976) (limiting the application of the work-product doctrine in criminal proceedings); FED. R. CRIM. P. 26.2 (same).

27. 422 U.S. 225 (1975).

28. *Id.* at 228-29.

29. *Id.* at 238-40. Rules 16(a)(2) and (b)(2) of the Federal Rules of Criminal Procedure recognize a protection from discovery in criminal cases of "documents made by" the defendant, the attorney for the government or the defendant, or by other agents, for either the government or the defendant, in connection with the investigation, prosecution or defense of the case. FED. R. CRIM. P. 16(a)(2), (b)(2); FED. R. CRIM. P. 26.2; 18 U.S.C. § 3500 (1976) (Jencks Act).

30. Judge J. Skelly Wright of the District of Columbia Circuit, writing in *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), has suggested that the work-product doctrine in criminal cases and in enforcement of subpoenas issued by a federal grand jury or by any other officer or agency of the United States has a separate development, and perhaps a different substantive content than the work-product doctrine applicable to discovery in civil cases through rule 26(b)(3) of the Federal Rules of Civil Procedure. *Id.* at 808, n.49. Judge Wright recognized that in *Upjohn Co. v. United States*, 449 U.S. 383, 398-99 (1981), the Supreme Court "seemed to assume, without firmly holding, that Rule 26(b)(3) rather than the

This article will address the work-product doctrine as it is embodied today in rule 26(b)(3) and (b)(4). It will explain the rule, focus on the problems that have surfaced since its adoption, and present various solutions offered by the courts. No attempt is made to explain exhaustively the case law on those problems. Decisions under the pre-1970 version of the federal rules will be discussed only when they will be helpful to illuminate alternatives.

One further point on the scope of the work-product doctrine: no distinction is made between in-house corporate, government or other organizational counsel and outside counsel. If in-house counsel acts "primarily in the role of an attorney advising clients," then that attorney probably will be treated in the same manner as an outside counsel with respect to the work-product doctrine.³¹

II. WORK PRODUCT: A DEFINITION

First, it should be noted that the work-product doctrine is a restriction upon otherwise permitted discovery. Rule 26(b)(3) begins by stating that "a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule . . ."³² Rule 26(b)(1) makes discoverable any nonprivileged matter relevant to the subject matter of the action.³³ Although a discovery request is not objectionable on the ground that the information sought will be inadmissible at trial, the information sought must be reasonably calculated to lead to discoverable evidence.³⁴ If this basic test is not met, the discovery request is denied and there is no need to consider further whether discovery is limited by the work-product rule.

A significant aspect of the basic discovery rule is that information is not discoverable if it is privileged under the law of evidence. Most pertinent is the attorney-client privilege, which, unless waived, protects communications relating "to a fact of which the attorney was informed by his client, without the presence of strangers, for the purpose of securing primarily either an opinion of law or legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime or a tort."³⁵ Although information obtained by an attorney directly from a client is, in the broad sense, work product, the work-product doctrine encompasses much more than the attorney-client privi-

common law restricted the scope of the IRS's power to summons work product. *But cf. United States v. Moon*, 616 F.2d 1043, 1047 (8th Cir. 1980)." *In re Sealed Case*, 676 F.2d at 808 n.49. Judge Wright went on to suggest that

it is not clear that Rule 26, which by its terms applies only to discovery, should govern non-discovery applications of the work product privilege. A better interpretation might be that the Federal Rules dictate the procedures to be applied in proceedings to enforce IRS summonses, or grand jury subpoenas, but that Rule 26 does not in itself supply a substantive restriction on what the IRS or a grand jury may seek to obtain by compulsory process. *See In re Grand Jury Subpoena (John Doe, Inc.)*, 599 F.2d 504, 509 (2d Cir. 1979); Fed. R. Evid. 1101(d)(2).

Id. at 808 n.49.

31. *Id.* at 811.

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

33. FED. R. CIV. P. 26(b)(1).

34. *Smedley v. Travelers Ins. Co.*, 53 F.R.D. 591, 594 (D.N.H. 1971).

35. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950) (Wyzanski, J.) (frequently cited formulation of the attorney-client privilege). For a recent restatement of the purposes of the attorney-client privilege, see *Upjohn Co. v. United States*, 449 U.S. 383, 393-96 (1981).

lege: work product includes information obtained by the attorney from persons *other* than a client.³⁶ Moreover, the effects of the two concepts differ. The attorney-client privilege is absolute and can be waived only by the client.³⁷ The work-product protection, however, is qualified and can be overcome by a proper showing.³⁸ And it is usually the attorney, not the client, who asserts, waives, or forfeits work-product protection.³⁹

The work-product concept applies only to "documents and tangible things."⁴⁰ Thus, a party's mental information is not protected by the work-product doctrine, even if that information was obtained by means that would normally fall under work-product protection. Obviously, whatever a party did, saw, heard, or felt may be investigated if relevant.⁴¹ Moreover, information known by a party, but acquired from another person, may be discovered, assuming, of course, that it is relevant and not privileged. Although documents and tangible things are subject to discovery upon the proper showing under rule 26(b)(3),⁴² the opinions and mental impressions of counsel germane to the case *sub judice* are rarely discoverable even if they are written or otherwise recorded.⁴³ Indeed, any tangible attorney work product containing opinions of

36. In the corporate setting, the application of the work-product doctrine has declined since the Supreme Court's rejection of the control-group test for the attorney-client privilege in *Upjohn*, 449 U.S. at 383. That test protected only communications between counsel and those employees of the corporation "in a position to control or . . . to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney . . ." *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962), *petition for mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963). The control-group test would have limited the number of employees whose communications with counsel fell within the attorney-client privilege; consequently, it expanded the number of occasions for the application of the work-product doctrine. Now that the Supreme Court has struck down the control-group test, the attorney-client privilege extends beyond the control group, and there are fewer occasions to apply the work-product doctrine to communications with corporate employees. See *supra* note 31 and accompanying text (discussing applicability of work-product doctrine to in-house counsel).

37. 8 J. WIGMORE, WIGMORE ON EVIDENCE, § 2292, at 554, § 2321, at 629. (McNaughton rev. ed. 1961).

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

39. *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp 136, 156 (D. Del. 1977); *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587 (N.D. Ill. 1981); see also *Duplan Corp. v. Moulinage (I)*, 487 F.2d 480 (4th Cir. 1973); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 930 (N.D. Calif. 1976); *infra* notes 160-78 and accompanying text (discussing client conduct as waiver of work-product protection).

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

41. Justice Rehnquist addressed this same point in the context of the attorney-client privilege in *Upjohn*, 449 U.S. at 383. He noted that "[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney" and quoted *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962).

[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, 449 U.S. at 395-96.

42. FED. R. CIV. P. 26(b)(3). See *infra* notes 99-134 and accompanying text (discussing overcoming work-product protection).

43. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE, § 2023, at 194 (1970). Wright & Miller note that the courts have consistently held that the work-product doctrine does not protect against the discovery of "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." *Id.* The distinct protection in rule 26(b)(3) of documents and tangible things does not allow, however, by implication or otherwise, for the discovery of an attorney's mental impressions whether or not contained in a tangible document.

counsel receives a higher degree of protection⁴⁴ even if the items contain otherwise discoverable information.⁴⁵ Such opinion work product includes the attorney's personal recollections,⁴⁶ memoranda,⁴⁷ handwritten notes,⁴⁸ legal opinions,⁴⁹ and litigation strategy and is discoverable only in the rarest situations.⁵⁰

There are certain situations, however, in which the attorney's files or papers are not merely a record of some other evidence, such as the recording of a witness' statement. They are instead facts at issue in the case. This situation may arise when the attorney's conduct comes into question⁵¹ or when there is a possibility that he may be charged with participating in the pending fraud, crime, or tort.⁵² Additionally, when a party claims the defense of laches, it is material at what point in time the opposing party knew the information on which the original claim is based.⁵³ The attorney's files may be relevant to that

Ford v. Phillips Elec. Instruments Co., 82 F.R.D. 359, 360 (E.D. Pa. 1979). See *infra* notes 135-55 and accompanying text (discussing enhanced protection of opinion work product).

44. *Upjohn*, 449 U.S. at 401-02 (1980).

45. *Cf.* Mead Data Centr., Inc. v. United States Dep't of Air Force, 566 F.2d 242, 260 (D.C. Cir. 1977). The court stated that non-exempt portions of a document must be disclosed unless they are "inextricably intertwined with exempt portions." *Id.*

46. *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 848 (8th Cir. 1973) (personal notes and recollections from attorney's conversation protected as work product).

47. *Id.*; *Natta v. Zletz*, 418 F.2d 633, 637-38 (7th Cir. 1969) (memoranda prepared by outside counsel protected).

48. *Natta v. Hogan*, 392 F.2d 686, 693-94 (10th Cir. 1968).

49. *In re Natta*, 410 F.2d 187, 193 (3d Cir. 1969), *cert. denied*, 369 U.S. 836 (1969) (attorney's assessment of corporation's legal position covered by work-product doctrine).

50. See *Upjohn*, 449 U.S. at 401; *Hickman v. Taylor*, 329 U.S. 495, 513 (1947); *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979).

51. *SEC v. National Student Marketing Corp.*, 18 Fed. R. Serv. 2d (Callaghan) 1302, 1304 (D.D.C. 1974) (counsel accused of being part of securities violation).

52. *In re Sealed Case*, 676 F.2d 793, 807 (D.C. Cir. 1982). Although neither of the other panel judges joined Judge Wright in this portion of the opinion, the discussion illustrates the crime/fraud exception to work-product protection. With respect to grand jury subpoenas, if there is a prima facie showing that there is a "possibility that a privileged relationship has been abused," the privilege will be defeated. *Id.* at 814. As long as there is a showing that "some valid relationship [exists] between the work product under subpoena and the prima facie violation," a specific showing of criminal intent on the part of the attorney or the party is not required to obtain discovery of an otherwise protected document. *Id.* at 814-15. Judge Wright specifically called attention to the difficulties inherent in extensive *in camera* inspection, and thus found that the standard for defining a valid relationship between a prima facie violation and an attorney's work product should "not be too precise or rigorous." *Id.* at 815. Although the *In re Sealed Case* standard applies to grand jury subpoenas, in trial situations Judge Wright would "treat the prima facie determination of crime or fraud as a preliminary fact to be found by the court after hearing sufficient evidence." *Id.* at n.88; see *Duplan Corp. v. Deering Milliken*, 540 F.2d 1215, 1221 (4th Cir. 1976); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Action*, 410 F. Supp. 706, 710 (D. Minn. 1975); *Insurance Co. of N. Am. v. Union Carbide*, 35 F.R.D. 520, 523-24 (D. Col. 1964).

53. *Bird v. Penn Cent. Corp.*, 61 F.R.D. 43, 46 (E.D. Pa. 1973). Such a situation may also permit an invasion of the attorney-client privilege. By claiming laches the client may be deemed to have waived attorney-client protection so far as otherwise privileged information is relevant to that issue. Realistically, it is the attorney who files the pleading raising the issue of laches. Presumably, however, the attorney has acted only with the full knowledge and concurrence of the client after full explanation by counsel of the implications of raising the issue. In case of difficulties, the party always has the power to drop the laches issue or, upon his failure to cooperate fully in discovery, to have it precluded by the court under rule 37(b). The implications for the work-product doctrine are more direct. Because counsel certainly is involved in the drafting of the pleading raising laches, see FED. R. Civ. P. 11, it is quite easy to conclude that counsel has waived whatever work-product protection he might otherwise have been able to claim.

issue and therefore discoverable.⁵⁴ A similar situation arises when counsel's specific advice is relevant to a party's claim that he acted "on advice of counsel."⁵⁵ Except in the case of a written statement made specifically for counsel, work-product protection does not exist for documentary evidence given to counsel by a client or another person.⁵⁶ Nor does the work-product doctrine protect the files of an attorney when the attorney's fee is at issue.⁵⁷ Presumably, work-product protection is not available when the client sues for negligence or other professional malpractice.⁵⁸

III. ANTICIPATION OF LITIGATION V. ORDINARY COURSE OF BUSINESS

The second major aspect of the work-product doctrine is that the document or tangible thing must have been "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) . . ."⁵⁹ This provision sets forth the central requirements for the application of the work-product doctrine. Analytically, it should be broken into two segments: (1) prepared in anticipation of litigation or for trial; and (2) by or for another party or for that other party's representative. Although the cases often meld these two aspects, separate consideration is more appropriate for the sake of analysis. While examining several key cases in this area, two questions should be kept in mind. First, how specifically identifiable must the anticipated suit be in order to fit within the rule? Second, is the retention of counsel at the time that a document or other tangible thing is obtained necessary for the application of the rule?

An early case of great importance is *Thomas Organ Co. v. Jadranska Plovidba*,⁶⁰ which involved a shipment of organs that arrived by boat in damaged condition.⁶¹ The purchaser immediately employed a marine surveyor to investigate the cause of the damage in order to ascertain against whom — the shipper, the packager, or the carrier—to make a claim.⁶² After the purchaser obtained the report of the marine surveyor, he made a claim and eventually brought suit.⁶³

When the defendant sought to discover the report of the marine surveyor, plaintiff's counsel asserted that the report fell within the protection of the work-product doctrine.⁶⁴ Judge Will overruled this objection and stated that

any report or statement made by or to a party's agent . . . which has not been requested by nor prepared for an attorney nor which other-

54. *Id.*

55. *Id.* at 47.

56. *Balistreri v. O'Farrell*, 57 F.R.D. 567, 569 (E.D. Wis. 1972).

57. *See* *Truck Ins. Exch. v. St. Paul Fire & Marine Ins.-Co.*, 66 F.R.D. 129, 134 (E.D. Pa. 1975).

58. *Cf.* *Bird v. Penn. Cent. Corp.*, 61 F.R.D. 43, 46-47 (E.D. Pa. 1973) (documents discoverable when plaintiff's counsel had sole access to relevant documents necessary to substantiate defendant's defense). If a party is an attorney being sued for malpractice, his work product is arguably discoverable.

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

60. 54 F.R.D. 367 (N.D. Ill. 1972).

61. *Id.* at 369.

62. *Id.* at 373.

63. *Id.* at 371-72.

64. *Id.* at 369.

wise reflects the employment of an attorney's legal expertise must be conclusively presumed to have been made in the ordinary course of business and thus not within the purview of the [work-product] privilege⁶⁵

Judge Will was explicit: "no document authored prior to the consultation of an attorney may be deemed to have been prepared in anticipation of litigation" ⁶⁶ In *Thomas Organ* there was, according to Judge Will, merely "speculative contemplation of possible litigation."⁶⁷ When a party acts on his own before consulting counsel, Judge Will's approach would "conclusively presume" that his actions are not in anticipation of litigation.⁶⁸ Thus, despite the apparently straightforward language of rule 26(b)(3) that applies work-product protection to a document prepared "by or for another party" in anticipation of litigation, Judge Will held that the requirements for the application of the doctrine are not satisfied if the party acts without counsel.⁶⁹

This interpretation is further illustrated by Judge Layton's opinion in *Spaulding v. Denton*.⁷⁰ In that case a yacht sank at sea and three survivors were rescued on December 29th.⁷¹ The insurer was advised of the accident on December 30th and immediately hired a marine investigator.⁷² The investigator submitted three reports, one each on January 10th, January 21st and August 11th.⁷³ The insurance company consulted counsel after receiving the January 21st report.⁷⁴ On January 29th the insurer received a letter from plaintiff's counsel advising that a claim was being made.⁷⁵ During discovery, plaintiff's counsel sought to obtain all three reports.⁷⁶ Upon objection that they constituted work product prepared in anticipation of litigation, the court ruled that the first two reports were not protected by rule 26(b)(3) because they had been prepared before counsel was consulted.⁷⁷ Because the third report had been prepared after counsel was consulted, the court held that it fell within the protection of work product.⁷⁸

Making a claim and retaining counsel were crucial to the invocation of the work-product doctrine in *Spaulding*. Similarly, it has been held that mere advice concerning matters which may ultimately come to trial is not protected by the work-product doctrine if the advice is offered prior to the time that a civil claim is made by one party against another or the client is notified of potential criminal liability.⁷⁹

65. *Id.* at 372 (emphasis in original).

66. *Id.* at 373.

67. *Id.* at 374.

68. *Id.* at 372.

69. *Id.* at 372-73.

70. 68 F.R.D. 342 (D. Del. 1975).

71. *Id.* at 343.

72. *Id.*

73. *Id.* at 343-44.

74. *Id.* at 346.

75. *Id.* at 344.

76. *Id.* at 343-44.

77. *Id.* at 346.

78. *Id.* Likewise, in *McDougle v. Dunn*, 468 F.2d 468 (4th Cir. 1972), the Fourth Circuit held that the work-product doctrine did not protect a report by an insurance adjuster concerning an automobile accident because the report was prepared before counsel had been retained by the insurance company. *Id.* at 473.

79: *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 948-49 (E.D. Pa. 1976). A bank

The line of cases following the *Thomas Organ* approach should be contrasted with another line of analysis, the leading case of which is *Almaguer v. Chicago Rock Island & Pac. R.R.*⁸⁰ After an accident, the railroad sent out an investigator who prepared a report prior to the intervention of counsel.⁸¹ The court held that the report was within the work-product protection because anticipation of litigation is "undeniable" in railroad accidents.⁸² This approach was developed further in *American Optical Corp. v. Medtronic*,⁸³ which involved a patent dispute that began in 1967.⁸⁴ In 1968 the two companies settled the dispute by entering into a licensing agreement in which Medtronic agreed to pay royalties to American Optical.⁸⁵ Two years later, however, Medtronic stopped paying and litigation followed.⁸⁶ American Optical sought discovery of a memorandum written in 1968 by a patent specialist retained by Medtronic.⁸⁷ Medtronic's claim of work-product protection was upheld on the ground that Medtronic had retained the patent specialist "with an eye to litigation."⁸⁸ The court stated: "If the prospect of litigation is identifiable because of specific claims that have already arisen, the fact that . . . litigation is still a contingency has not been held to render the [work-product] privilege inapplicable."⁸⁹ The fact that no attorney had been consulted in 1967 was held to be immaterial.⁹⁰

Thus, the lines are drawn as to what "anticipation of litigation" means. One must ask (1) whether a specific claim is identifiable, and (2) whether employment of counsel is necessary. The following continuum of situations illustrates the variation in possible resolutions under the two approaches.

- a. Case is begun; party retains attorney who investigates or directs others to investigate.
- b. Case is not begun, but the party, knowing that litigation will follow, consults an attorney who begins an investigation.
- c. Case is not begun, but an incident has occurred causing the party reasonably to believe that litigation may follow; the party consults an attorney who begins an investigation.
- d. Case is not begun, but an incident has occurred causing the party reasonably to believe that litigation may follow; without consulting counsel, the party or his representative (not an attorney) begins an investigation.
- e. Case is not begun and no specific incident has yet occurred, but from the factual situation the party reasonably believes that there is a

attorney's documents made prior to the issuance of a subpoena are not part of the litigation effort and are not protected by the work-product doctrine. Prior to the first subpoena to a bank officer, the attorney did nothing more than advise the bank concerning possible future obligations.

80. 55 F.R.D. 147 (D. Neb. 1972).

81. *Id.* at 148.

82. *Id.* at 149.

83. 56 F.R.D. 426 (D. Mass. 1972).

84. *Id.* at 428.

85. *Id.*

86. *Id.*

87. *Id.* at 429.

88. *Id.* at 430-31.

89. *Id.* at 431 (quoting *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 337 (S.D.N.Y. 1969)).

90. *Id.*

good possibility that an incident may occur resulting in litigation; with or without consulting counsel, the party or his representative begins an investigation.

Certainly in (a) and (b) the investigation and resulting documents will always be considered to be in anticipation of litigation. Variation (c) is slightly more difficult because the party has only a reasonable belief that litigation will follow; however, inasmuch as counsel has been consulted and is directing the investigation, the resulting documents should still benefit from work-product protection. The problem occurs in variation (d). The *Thomas Organ* line of cases would deny protection because counsel has not been consulted, but the *Almaguer* line would grant protection because a specific claim has arisen. Variation (e) would probably carry with it no work-product protection under either approach.

The test that should be followed, if the rule is to be applied as written, should focus on whether there exists (1) a cause of action with identifiable potential parties; and (2) a reasonable probability that a suit will be brought. If such be the case, then documents and other tangible things gathered should be treated as prepared in anticipation of litigation and granted work-product protection. Despite the express language of rule 26(b)(3), and the *Almaguer* line of cases that recognizes the work-product protection when a specific claim is identifiable, some courts might still insist that an attorney be involved if the doctrine is to apply because there is a presumption that the document was not prepared in anticipation of litigation unless "an attorney's legal expertise" is involved.⁹¹

The other issue in the "in-anticipation-of-litigation" dispute is whether the work for which protection is sought was prepared in the ordinary course of business.⁹² If a report or other document has been prepared in the ordinary course of business, it is deemed not to have been prepared in anticipation of litigation and therefore has no work-product protection. The difficulty lies in drawing a distinction between the two.

A report that is *regularly* drawn for bookkeeping, accounting, personnel, or other purposes is done in the ordinary course of business, even though it may be quite useful or even essential in preparation for litigation.⁹³ Further, a report that is required by a statute or governmental regulation is not protected as work product even though counsel may have worked on or may have given advice in the report's preparation, and the report concerns a specific incident from which litigation may reasonably be expected.⁹⁴ A report or document is deemed prepared in anticipation of litigation and within work-product protection only if that report or document was made for litigation purposes and not required by statute or by government regulation.⁹⁵

When these principles are applied in a corporate setting, it is clear that, de-

91. See *Thomas Organ*, 54 F.R.D. at 372; *supra* text accompanying notes 60-69 (discussing *Thomas Organ*).

92. *Thomas Organ*, 54 F.R.D. at 372.

93. See FED. R. Civ. P. 26(b)(3) advisory committee note ("[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision").

94. *Goosman v. A. Duie Pyle Inc.*, 320 F.2d 45, 52 (4th Cir. 1963); *Galambus v. Consolidated Freightways*, 64 F.R.D. 468, 472 (N.D. Ind. 1974).

95. See *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 948 (E.D. Pa. 1976) ("[a]dvising a

spite the language of Federal Rule 26(b)(3) which would appear to make it unnecessary to bring counsel into the investigation, it is always safer to bring counsel into an investigation as early as possible. Indeed, corporate counsel, whether in-house or otherwise, should direct the investigation. This has not at all been modified by the Supreme Court's recent decision in *Upjohn Co. v. United States*,⁹⁶ which held that employees' questionnaires distributed by corporate counsel were protected by the work-product doctrine.⁹⁷ In fact, the Court emphasized the involvement of counsel and the importance of the role of counsel.⁹⁸

IV. OVERCOMING WORK-PRODUCT PROTECTION

The work-product doctrine is a qualified privilege; it can be overcome. The party who asserts work-product protection for the item sought to be discovered has the burden of establishing that it was prepared in anticipation of litigation.⁹⁹ When that requirement is satisfied, the burden shifts to the party seeking discovery to overcome the qualified work-product protection.¹⁰⁰

To overcome work-product protection, a party seeking discovery must demonstrate two things: (1) he has "substantial need of the materials in the preparation of his case";¹⁰¹ and, (2) he is "unable without undue hardship to obtain the substantial equivalent of the materials by other means."¹⁰²

An understanding of substantial need begins with *Hickman v. Taylor*.¹⁰³ In *Hickman* the Court rejected the argument that a party seeking discovery can overcome work-product protection merely by showing that the material sought is relevant to the subject matter of the action, and does not fall within the attorney-client privilege.¹⁰⁴ The Court also rejected a slightly more restrictive test that would have allowed material to be discovered as long as it is relevant to the issues expected to be tried.¹⁰⁵ Instead, the Court spoke of necessity or justification beyond relevancy, and of the requirement that the material be essential to the proper preparation of a client's case.¹⁰⁶

Subsequent cases have required a special showing of the importance of the materials sought to the discovering party's case.¹⁰⁷ One court has equated "substantial need" with "the critical materiality" of the information and the "distinct trial advantage" that the other party may have unless discovery is permitted.¹⁰⁸ The Eighth Circuit has ruled that substantial need is not shown

client about matters which may or even likely will ultimately come to litigation does not satisfy the "in anticipation of standard"; *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 42-43 (D. Md. 1974).

96. 449 U.S. 383 (1981).

97. *Id.* at 397-99. See *supra* note 30 (discussing applicability of work-product doctrine to in-house counsel).

98. *Upjohn*, 449 U.S. at 397-99.

99. *Feldman v. Pioneer Petroleum, Inc.*, 87 F.R.D. 86, 88 (W.D. Okla. 1980).

100. *Hickman v. Taylor*, 329 U.S. 495, 512 (1947).

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

102. *Id.*

103. 329 U.S. 495 (1947).

104. *Id.* at 509-10.

105. *Id.* at 508-09.

106. *Id.* at 511-13.

107. See *Chitty v. State Farm Mut. Auto. Ins. Co.*, 36 F.R.D. 37, 40 (E.D.S.C. 1964) (showing of undue hardship or resulting injustice required).

108. *Rackers v. Siegfried*, 54 F.R.D. 24, 26 (W.D. Mo. 1971).

by an affidavit alleging merely that such discovery would "expedite the case, 'facilitate the production of proof', 'narrow the issues', and 'reduce the evidence'" needed at trial.¹⁰⁹ With respect to witness interviews and statements, another court has rejected a substantial need argument because the party already had interviewed the witnesses in question and had taken statements from several others.¹¹⁰ Under this rationale, in order to establish substantial need, the party seeking discovery would have to show that some reason exists to suspect that the statements in his possession are not as complete or as accurate as those for which discovery is sought.¹¹¹

At least one court has held that discovery of a witness' statement for contradiction or impeachment purposes is insufficient to overcome work-product protection.¹¹² Other courts, however, have held that impeachment purposes demonstrate "substantial need" if the party seeking discovery had attempted to depose the witness and then shows a "persuasive reason for the court to believe that . . . [the] statement [sought] would be materially different."¹¹³

If a party shows substantial need, he must then show that he cannot obtain the substantial equivalent of the material sought by any other means without undue hardship. Some situations easily satisfy the requirement: the witness cannot be found, has died, or is otherwise unavailable; or the witness is antagonistic, will not cooperate, or claims memory loss.¹¹⁴

A clear example of the problems involved in applying the undue hardship standard occurred in the *Xerox v. IBM*¹¹⁵ litigation in New York. Xerox had accused IBM of seeking to enter the dry-paper photocopying market by hiring away Xerox employees and using Xerox's trade secrets provided by those employees.¹¹⁶ IBM counsel interviewed and obtained written statements from thirty-seven IBM employees, including those who had worked for Xerox and those who had worked closely with the former Xerox employees.¹¹⁷ Counsel for Xerox thereafter interviewed twenty-three of those thirty-seven IBM em-

109. *Brennan v. Engineered Prods.*, 506 F.2d 299, 303 (8th Cir. 1974).

110. *Hodgson v. GMAC*, 54 F.R.D. 445, 446 (S.D. Fla. 1972).

111. *Id.*

112. *Dingler v. Halcyon Lijn N.V.*, 50 F.R.D. 211, 212 (E.D. Pa. 1970).

113. *Fidelity & Deposit Co. v. Strauss, Inc.*, 52 F.R.D. 536, 537 (E.D. Pa. 1971); *cf.* *Haarhues v. Gordon*, 180 Neb. 189, 198, 141 N.W. 2d 856, 863 (1966) (discovering party must attempt to obtain witness' statement before court entertains discovery motion).

The *Hickman* Court acknowledged the potential need for discovery of witnesses' statements for impeachment purposes. 329 U.S. at 511. The Court stated:

Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration.

Id.

114. *Xerox v. IBM*, 64 F.R.D. 367, 382 (S.D.N.Y. 1974) (discovery of attorney's notes ordered following plaintiff's deposition of defendant's employees who refused to cooperate). After *Upjohn*, 449 U.S. at 383, the result in *Xerox* might be different because the statements of the IBM employees would arguably come within the corporate attorney-client privilege as defined in *Upjohn*. See *supra* note 36 (discussing impact of *Upjohn*).

115. 64 F.R.D. 367 (S.D.N.Y. 1974).

116. *Id.* at 369.

117. *Id.* at 375.

ployees and found that not one of them had any memory of pertinent facts.¹¹⁸ Xerox then sought discovery of all the statements taken by IBM counsel.¹¹⁹ Chief Judge Edelstein held that, as for the twenty-three employees whom Xerox had interviewed and who had had no memory, Xerox had satisfied the court that it could not by other means obtain the substantial equivalent of the statements; therefore, the court ordered IBM counsel to turn over the statements of those employees.¹²⁰ As for the remaining fourteen employees interviewed by IBM, the court required Xerox to interview each one to ascertain whether he or she could remember and, if so, whether the individual would cooperate.¹²¹ Only for those who lacked memory or failed to cooperate would Xerox be able to obtain written statements from IBM counsel.¹²²

A different question arises when the party seeking discovery simply shows that the witness is an employee of the opposing party. One view is that such a showing is a factor in establishing substantial need because such a witness will necessarily be reluctant to cooperate.¹²³ Another view is that the bare allegation is not enough; the party seeking discovery must attempt to interview the employee and show the employees' actual reluctance or unwillingness to cooperate.¹²⁴ Another permutation of the concept of unavailability is the situation in which the witness is a long distance away, and it is claimed that the expense of interviewing that witness is prohibitive in light of the amount at issue in a particular case. When such facts have been established, it has been held that the witness is "unavailable" and the undue hardship requirement is thus satisfied.¹²⁵

An interesting application of these principles has been suggested by psychological studies that show a sharp decrease in memory within the first few days after an incident.¹²⁶ Based upon these studies, some courts have ruled that the party seeking discovery of statements taken shortly after the incident (within hours or a few days at most) cannot obtain the "substantial equivalent" of those statements after the first week has passed.¹²⁷ Thus, the extremely diligent party or counsel, who gets on top of a case immediately after the incident, is forced to turn over witnesses' statements, whereas the procrastinating party is not similarly penalized by having to turn over his work product. At least one

118. *Id.*

119. *Id.*

120. *Id.* at 382.

121. *Id.*

122. *Id.*

123. *Southern Ry. Co. v. Lanham*, 403 F.2d 119, 128 (5th Cir. 1968).

124. *Almauer v. Chicago, Rock Island & Pac. R.R.*, 55 F.R.D. 147, 149 (D. Neb. 1972); *Fidelity & Deposit Co. v. Strauss, Inc.*, 52 F.R.D. 536, 537 (E.D. Pa. 1971) (discovering party must attempt to obtain employee's statement; no assumption of adversity).

125. *Puerto Rico v. S.S. Zoe Colocotroni*, 18 Fed. R. Serv. 2d (Callaghan) 322, 325-26 (D.P.R. 1974).

126. *See Hamilton v. Canal Barge Co.*, 395 F. Supp. 975, 977 (E.D. La. 1974) (discussing psychological studies showing rapid decrease in memory).

127. *Teribery v. Norfolk & W. R.R.*, 68 F.R.D. 46, 47-48 (W.D. Pa. 1975); *Hamilton v. Canal Barge Co.*, 395 F. Supp. 975, 977-78 (E.D. La. 1974); *Gillman v. United States*, 53 F.R.D. 316, 318-19 (S.D.N.Y. 1971). In *Gillman* and *Teribery*, the courts emphasized that the cases were wrongful death actions and that plaintiffs' decedents had not been able to tell their versions of what had occurred. Discovery of statements taken by the defendant shortly after the occurrence appeared to be viewed as a method of lessening the relative disadvantages that each plaintiff had suffered because of this lack of information. *Teribery*, 68 F.R.D. at 47-48; *Gillman*, 53 F.R.D. at 318-19.

court has rejected this reasoning, ruling that passage of time alone is never conclusive.¹²⁸ Instead, the party seeking discovery must show that he has interviewed the witness and that the witness claimed loss of memory or that the interviewer has positive evidence of such loss of memory.¹²⁹ Only then, these courts have ruled, has the person seeking discovery shown that he cannot obtain the substantial equivalent by interviewing the witness himself.¹³⁰

Another interesting aspect of the substantial equivalence problem concerns rebuttal evidence; the paradigm is the surveillance film. In a personal injury case in which the plaintiff is claiming physical incapacity, plaintiff's counsel may wish to know whether surreptitious surveillance films have been made. If so, he may desire to see them as part of discovery. The defendant usually counters that the film is clearly work product; it was made in anticipation of litigation or for trial, and plaintiff's counsel can obtain the substantial equivalent of the information on the film merely by asking the plaintiff what activities he has in fact engaged in. Some courts have gone along with such arguments, and thus have denied discovery.¹³¹ A number of courts, however, have rejected that position and maintained that discovery of surveillance films is necessary to allow cross-examination of those who prepared the films because full disclosure allows examination of the film to determine its accuracy, reliability, and probative value.¹³² Judge Weinstein of the Eastern District of New York ordered production of a surveillance film during discovery, ruling that the plaintiff could not obtain the "substantial equivalent" of the actual film itself.¹³³ He stated that "while surprise has a healthy prophylactic effect against possible perjury, on balance, cases are more likely to be decided fairly on their merits if the parties are aware of all of the evidence."¹³⁴

V. OPINION WORK PRODUCT: ENHANCED PROTECTION

Federal rule 26(b)(3) provides that "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."¹³⁵ The rule is the codification of the Supreme Court's holding in *Hickman v. Taylor*,¹³⁶ in which the plaintiff sought discovery of the written statements of witnesses and "the exact provisions of any . . . oral statements or reports" made by the wit-

128. *Almaguer v. Chicago, Rock Island & Pac. R.R.*, 55 F.R.D. 147, 150 (D. Neb. 1972). One can only speculate whether the result in *Almaguer* might have been different if plaintiffs' counsel had brought in the type of expert testimony on psychological studies that convinced the court in *Hamilton v. Canal Barge Co.*, 395 F. Supp. 975, 977 (E.D. La. 1974) (accounts by five eyewitnesses of barge accident held discoverable due to time lapse; psychological studies demonstrated decrease in memory over time).

129. *Almaguer*, 55 F.R.D. at 150.

130. *Id.*

131. *Bogatay v. Montour R.R.*, 177 F. Supp. 269, 270 (W.D. Pa. 1959).

132. *Martin v. Long Island R.R.*, 63 F.R.D. 53, 54-55 (E.D.N.Y. 1974); *Snead v. American Export*, 59 F.R.D. 148, 157 (E.D. Pa. 1973); *Coyne v. Monongahela Connecting R.R.*, 24 F.R.D. 357, 359 (W.D. Pa. 1959); cf. *Blyther v. Northern Lines*, 61 F.R.D. 610, 612 (E.D. Pa. 1973) (discovering party must pay for reproduction of surveillance film).

133. *Martin v. Long Island R.R.*, 63 F.R.D. 53, 54 (E.D.N.Y. 1974).

134. *Id.*

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

136. 329 U.S. 495 (1947).

nesses to defendants' counsel.¹³⁷ The Supreme Court ruled that this discovery request should be denied:

[A]s to oral statements made by witnesses to [defendant's counsel] whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made *under the circumstances of this case* so as to justify production. Under ordinary conditions, forcing an attorney to repeat or write out all the witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production. The practice forces the attorney to testify as to what he remembers or what he saw fit to write down regarding the witnesses' remarks. Such testimony could not qualify as evidence; and to use it for impeachment or corroborative purposes would make the attorney much less an officer of the court and much more an ordinary witness. The standards of the profession would thereby suffer.¹³⁸

As clear as *Hickman* and rule 26(b)(3) may be, several questions are left unanswered. First, does everything in the attorney's mind fall within the categories of "mental impressions, conclusions, opinions, or legal theories"? Second, is the protection absolute and unbreachable, or is it simply an enhanced protection requiring a higher showing of substantial need and inability to obtain the substantial equivalent before the work-product protection can be overcome? Finally, does the absolute, or at least enhanced, protection apply solely to the work product of an attorney or someone operating under the direction of an attorney, or does it also operate as a protection for a party's representative who is not an attorney or operating under the direction of an attorney?

Although the language of the rule appears to include everything in the attorney's memory, and *Hickman* extends protection to the attorney's memory and to the attorney's notes from memory, at least one case distinguishes "creative legal thought" of the attorney from a "mere recognition of observed fact."¹³⁹ In the latter situation there is a greater readiness to permit discovery if all other aspects of work-product protection are overcome.

Some courts have held that the protection of attorneys' mental impressions, conclusions, opinions, and legal theories is absolute.¹⁴⁰ This view is buttressed by the Advisory Committee on Civil Rules, which proposed the language of rule 26(b)(3).

The *Hickman* opinion drew special attention to the need for protecting an attorney against discovery of memoranda prepared from recollection of oral interviews. The courts have steadfastly safeguarded against disclosure of lawyers' mental impressions and legal theories, as well as mental impressions and subjective evaluations of investigators and claim-agents. In enforcing this provision of the subdivision,

137. *Id.* at 508.

138. *Id.* at 512-13 (emphasis added).

139. *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1199-1200 (D.S.C. 1974).

140. *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 848 (8th Cir. 1973); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 949 (E.D. Pa. 1976); *United States v. Booth*, 399 F. Supp. 975, 978 n.1 (D.S.C. 1975).

the courts will sometimes find it necessary to order disclosure of a document but with portions deleted.¹⁴¹

Despite the apparent absolutist language of the rule, some courts have been reluctant to be quite so firm. Judge Hemphill in *Duplan Corp. v. Deering Milliken, Inc.*¹⁴² stated that "as the work product of the attorney becomes less a matter of creative legal thought and more a mere recognition of observed fact, the work product becomes increasingly susceptible to discovery."¹⁴³ In *Xerox v. IBM*,¹⁴⁴ Judge Edelstein held that attorneys' mental impressions, conclusions, opinions, and legal theories "are to be protected when feasible, but not at the expense of hiding the non-privileged facts from adversaries or the court."¹⁴⁵

Although the issue of opinion work-product protection was recently presented to the Supreme Court in *Upjohn Co. v. United States*,¹⁴⁶ the Court failed to provide a conclusive answer.¹⁴⁷ The Court noted the dichotomy between courts which have held that no showing of necessity can overcome protection of work product which "contains personal recollections, notes, and memoranda pertaining to conversation with witnesses,"¹⁴⁸ and those that have refused to adopt an absolute rule. It recognized, however, that such material is entitled to "special protection."¹⁴⁹ The Court declined to decide whether such material would always be protected by the work-product rule, but stated that the appropriate standard would be "far stronger" than the rule 26(b)(3) standard of "substantial need" and "without undue hardship" inappropriately employed by the magistrate.¹⁵⁰

Another issue that must be addressed is whether this enhanced protection applies to the opinion work product of a party's agent who acts outside the control of an attorney. Rule 26(b)(3) specifically protects the opinion work

141. FED. R. CIV. P. 26(b)(3) advisory committee note.

142. 397 F. Supp. 1146 (D.S.C. 1975).

143. *Id.* at 1200 (quoting *Duplan Corp. v. Moulinage (II)*, 509 F.2d 730, 734 (4th Cir. 1974); see also *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979) (" 'opinion work product' is the most sacrosanct"); *Zucker v. Sable*, 72 F.R.D. 1, 3 (S.D.N.Y. 1975) (newspapers, magazine articles, and advertisements "assembled during routine investigation by counsel do not receive the qualified immunity afforded an attorney's 'work product'").

144. 64 F.R.D. 367 (S.D.N.Y. 1974).

145. *Id.* at 381.

146. 449 U.S. 383 (1981). The Court held that the attorney-client privilege applied to the attorney's written record of employee responses to the attorney's interview questions. The attorney's notes and memoranda of interviews that went beyond recordation of those responses, however, were held not to be protected by the attorney-client privilege but were protected, if at all, by the work-product doctrine. *Id.* at 397.

147. *Id.* at 401 (Court "not prepared" to say mental processes always protected by work-product rule).

148. *Id.*

149. *Id.*

150. *Id.* The Court stated:

The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent they do not reveal communications, they reveal the attorney's mental processes in evaluating the communications. As Rule 26 and *Hickman* make clear, such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship.

product "of an attorney or *other representative* of a party."¹⁵¹ Although the Advisory Committee noted that "the courts have steadfastly safeguarded" opinion work product of investigators and claim agents,¹⁵² it did not cite any authority for this broad assertion.

Some courts have taken up the issue, however, and relied upon the Advisory Committee's language to protect the mental impressions of claim agents and investigators. In *Spaulding v. Denton*,¹⁵³ the court allowed discovery of two marine surveyor's reports made prior to the retention of counsel and prior to the making of a claim, that is, made in the "ordinary course of business."¹⁵⁴ A third report made in "anticipation of litigation"—the insurer by this time had retained counsel—but *without the participation or direction of counsel* was held to be immune from discovery because the discoveror's "only need for the . . . report [was] his wish to know the opinions and conclusions of" the marine surveyor.¹⁵⁵

VI. PARTY STATEMENTS

According to the explicit language of the rule, a party may obtain from opposing counsel a copy of his own statement given to opposing counsel or some other representative of the opposing party without showing either substantial need or the inability to obtain the substantial equivalent by other means.¹⁵⁶ Thus, in the classic situation in which an insurance adjuster obtains a written statement from the injured party in his hospital bed before the party has had an opportunity to retain counsel, the party can obtain a copy of that statement merely by making a request. No showing of any kind is required. The court, however, may permit a deposition to be taken of that party before the request for the statement is honored.¹⁵⁷ Similarly, a non-party witness can obtain, merely by request, a copy of his statement concerning the action given to counsel or other representative of a party.¹⁵⁸ Although the cases were divided on this point before the 1970 rewriting of the rule,¹⁵⁹ the paucity of case law since 1970 indicates that this provision of the rule is working without difficulty.

151. *Id.* FED. R. CIV. P. 26(b)(3) (emphasis supplied).

152. FED. R. CIV. P. 26 (b)(3) advisory committee note.

153. 68 F.R.D. 342 (D. Del. 1975); *see supra* text accompanying notes 70-78 (discussing *Spaulding*).

154. *Spaulding*, 68 F.R.D. at 346.

155. *Id.*; *see also* Duplan v. Deering Milliken, Inc., 540 F.2d 1215, 1219 (4th Cir. 1976) (opinion work-product protection applies equally to lawyers and non-lawyers); 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 26.64 [3], at 26-416 (2d ed. 1982). Moore's Federal Practice states that

under the new language, [the 1970 amendment of Rule 26(b)(3)] however, there will be no technical distinction between materials prepared by the attorney in the case and those that are prepared by a claim agent, insurer, or other agent of the party, or by the party himself. Insofar as the "work product" doctrine is concerned, each will be judged upon the need to protect the privacy of the mental impressions, conclusions, opinions, or legal theories, of the attorney or other representative of the party.

Id.

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

157. FED. R. CIV. P. 26(b)(3) advisory committee note.

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

159. *Compare* Smith v. Central Linen Serv. Co., 39 F.R.D. 15, 18 (D. Md. 1966) (no showing required) with Safeway Stores v. Reynolds, 176 F.2d 476, 478 (D.C. Cir. 1949) (showing of "good cause" required).

VII. WAIVER OF WORK-PRODUCT PROTECTION

Before discussing waiver of the work-product protection, this qualified protection must first be distinguished from the absolute attorney-client privilege. Because the attorney-client privilege is intended to protect client confidences, it belongs to and may be waived only by the client.¹⁶⁰ Work-product protection, by contrast, is intended to promote an attorney's preparation and representation in the adversary process. Traditionally, therefore, it has belonged to the attorney, and only the attorney could waive it.¹⁶¹ Recently, however, some courts have found that voluntary disclosure of information by the client can act as a waiver of work-product protection.

In *In re Sealed Case*¹⁶² a multinational corporation resisted a grand jury subpoena for its in-house counsel's records pertaining to the corporation's participation in the SEC's Voluntary Disclosure Program.¹⁶³ The District of Columbia Circuit held that, although work-product protection was usually available for such reports, previous disclosure *by the corporation* in the SEC's Voluntary Disclosure Program waived that protection.¹⁶⁴ The court ordered production of the attorney's work product,¹⁶⁵ stating that, "when a corporation elects to participate in a voluntary disclosure program like the SEC's, it necessarily decides that the benefits of participation outweigh the benefits of confidentiality for all files necessary to a full evaluation of its disclosures."¹⁶⁶ The voluntary disclosure waiver of work-product protection was held to apply equally to opinion work product which usually enjoys enhanced protection.¹⁶⁷

Judge Wright compared this "voluntary disclosure" waiver to the waiver of the attorney-client privilege identified in *United States v. Cote*.¹⁶⁸ In *Cote* the Eighth Circuit held that "when a taxpayer files an amended return it waives its attorney-client privilege for workpapers that would otherwise come within the privilege, because submission of an amended return necessarily implies consent for the IRS to examine the details underlying the information"¹⁶⁹

160. J. McCORMICK, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 92, at 192 (E. Cleary 2d ed. 1972).

161. *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977); *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587 (N.D. Ill. 1981). Waiver of the attorney-client privilege does not waive work-product protection. See *In re Sealed Case*, 676 F.2d 793, 808-09 (D.C. Cir. 1982) (work-product protection broader than attorney-client privilege; work-product protects both attorney-client relationship and individual attorney interest that client does not share).

162. 676 F.2d 793 (D.C. Cir. 1982).

163. *Id.* A Voluntary Disclosure Program (VDP) is a program designed to encourage corporations to perform voluntarily in-house investigations of suspected corporate improprieties in order to save the SEC time and money. *Id.* at 800. In return, the SEC offers participating corporations "leniency for past abuses and a chance to avoid extended formal investigation and litigation." *Id.* at 801. By participating in a VDP, the corporation agrees to make accessible to the SEC all material necessary to corroborate the findings of the in-house investigation. *Id.*

164. *Id.* at 822-23. The court did note, however, that "[c]orporations may protect their privileges . . . simply by . . . identifying material as to which they claim privilege at the time they submit their voluntary disclosure reports. They will, of course, bear the risk that their reports will not be accepted as full disclosures." *Id.* at 823.

165. *Id.* at 825.

166. *Id.* at 822.

167. *Id.* at 824-25.

168. 456 F.2d 142 (8th Cir. 1972).

169. *In re Sealed Case*, 676 F.2d at 822 n.124 (citing *United States v. Cote*, 456 F.2d 142, 144-45 (8th Cir. 1972)).

Reading *Cote* and *In re Sealed Case* together, it is clear that when a client makes a representation to a government agency—in *Cote*, a tax return filed with the IRS; in *In re Sealed Case*, a Voluntary Disclosure Report to the SEC—the client waives all privileges and protections concerning files, papers, and other documents that support that representation.

In *In re Sealed Case* Judge Wright would not hold that client conduct always may be the basis for waiver of work-product protection. He stated:

Courts have often recognized that the interests of attorneys and those of their clients may not always be the same. To the extent that the interests do not conflict, attorneys should be entitled to claim [work-product] privilege *even if their clients have relinquished their claims*.¹⁷⁰

Accordingly, Judge Wright suggested that an attorney neither guilty of nor participating in any fraud or crime could claim work-product protection even if the client had impliedly waived work-product protection by perpetration of fraud.¹⁷¹ The Seventh Circuit adopted such a position in *In re Special September 1978 Grand Jury*.¹⁷²

In that case the client asked his attorney to file contribution disclosure reports with the board of elections.¹⁷³ Because the client failed to provide his attorney with accurate information, fraudulent reports were filed.¹⁷⁴ A subsequent grand jury investigation included the issuance of subpoenae *duces tecum* to the attorney, who successfully moved to quash them by asserting work-product protection.¹⁷⁵ The district court recognized that there had been ongoing client fraud, but ruled that in the absence of the attorney's complicity in the fraud the work-product protection remained vital.¹⁷⁶ The government appealed and the Seventh Circuit applied a bifurcated analysis that undercut simple work-product protection and yet maintained opinion work-product protection.¹⁷⁷ In support of its holding, the court said:

We reach this result because we are persuaded that the strong policy disfavoring client fraud requires that the client relinquish the benefit he would gain from the work product doctrine, which benefit is just as real although it is his attorney, rather than he, who asserts the doctrine. We are persuaded, however, that the attorney's mental impressions, conclusions, opinions and legal theories must still be protected in order to avoid an invasion of the attorney's necessary privacy in his work, an invasion not justified by the misfortune of representing a fraudulent client.¹⁷⁸

The Seventh Circuit's dual analysis protects the attorney's legitimate privacy interest without allowing the client to misuse that protection for his own fraudulent ends.

170. *Id.* at 809 n.56 (emphasis supplied).

171. *Id.* at 812.

172. 640 F.2d 49 (7th Cir. 1980).

173. *Id.* at 53-55.

174. *Id.* at 55.

175. *Id.* at 53-54.

176. *Id.* at 55.

177. *Id.* at 63.

178. *Id.*

Another form of waiver of work-product protection may occur when there is voluntary disclosure to another person who does not have a common interest in the outcome of the litigation. It should be noted, however, that, according to Professors Wright and Miller, "disclosure of a document to third persons does not waive the work-product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information."¹⁷⁹ Thus, disclosure to co-counsel or counsel representing another party who shares an interest in the disposition of major issues in the case does not constitute waiver of the protection.¹⁸⁰ Disclosure to an adversary, however, constitutes a complete waiver of the privilege.¹⁸¹

Waiver also occurs when a party uses protected material or witnesses to his advantage. In *United States v. Nobles*¹⁸² the Supreme Court ruled that, although work-product protection existed for an investigator's report made upon the request of counsel, protection was waived insofar as the investigator's testimony relied upon or made reference to the report.¹⁸³ Waiver also occurs when a document, otherwise protected as work product, is given to a witness to refresh his memory.¹⁸⁴ In addition, if counsel submits an affidavit of an expert witness in support of a motion for summary judgment, one court has found that counsel waives his work-product protection of statements and reports made by that witness which pertain to the affidavit.¹⁸⁵

Finally, work-product protection will probably be waived if it is used in complete bad faith.¹⁸⁶ In *United States v. Reserve Mining Co.*¹⁸⁷ the court found that the defendants engaged in bad faith misrepresentations to the court by withholding alternatives to their polluting procedures and by failing to respond truthfully or fully to plaintiff's interrogatories concerning alternatives to those procedures.¹⁸⁸ The court stated that, even if these alternatives had merited work-product protection, the "bad faith" manner in which they were withheld suggested waiver as an appropriate court-imposed sanction.¹⁸⁹

179. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 210 (1970); see also *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (unlike attorney-client privilege, work-product protection not automatically waived by disclosure to third party).

180. See *Stix Prod., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 338 (S.D.N.Y. 1969) (third party disclosure of legal opinion to plaintiff not waiver of work-product protection when third party's interest in litigation "substantially identical" to plaintiff's interest).

The attorney-client privilege may also extend to insulate information disclosed to counsel representing other parties with similar interests in the litigation. See generally Wilson, *Using the Joint Defense Privilege*, Nat'l L.J., March 14, 1983, at 13, col. 1 (discussing use of attorney-client privilege to protect communications between attorneys made during a joint defense).

181. *D'Ippolito v. Cities Serv. Co.*, 39 F.R.D. 610, 610 (S.D.N.Y. 1969).

182. 422 U.S. 225 (1975).

183. *Id.* at 239 & n.14; see also *Shaw v. Wuttke*, 28 Wis. 2d 448, 456, 137 N.W.2d 649, 653 (1965) (when individual, who previously made protected written statement, becomes witness at trial, attorney's work-product protection vanishes).

184. *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11, 13 (N.D. Ill. 1972); cf. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 617 (S.D.N.Y. 1977) (court acknowledged proposition that "materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties" but denied disclosure because work product used to prepare expert witness).

185. *American Ladder & Scaffold Co. v. Eadie*, 120 So. 2d 65, 66 (Fla. Dist. Ct. App. 1960).

186. *United States v. Reserve Mining Co.*, 412 F. Supp. 705, 711 (D. Minn. 1976); cf. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 617 (S.D.N.Y. 1977) (room to allow discovery when plan exists to "exceed decent limits of preparation on the one hand and concealment on the other").

187. 412 F. Supp. 705 (D. Minn. 1976).

188. *Id.* at 710-11.

189. *Id.* at 711.

VIII. SUBSEQUENT LITIGATION.

An area of much controversy is the invocation of work-product protection when a document has been prepared in anticipation of previous litigation. The Fourth and Sixth Circuits have held that the work-product protection continues because the intrusion on the attorney is the same whether the issue arises in the litigation for which the document was prepared or in subsequent litigation.¹⁹⁰ Conversely, the Second Circuit and the Eastern District of Pennsylvania have held that work-product protection applies in subsequent litigation only if the two cases are closely related.¹⁹¹ Several other courts have rejected both of these views, holding that, once a case has ended and the subsequent litigation does not involve the same parties, work-product protection is no longer needed and should not be carried over to subsequent litigation.¹⁹² Because neither the Federal Rules of Civil Procedure nor the Advisory Committee's notes supply any guidance on this issue, the conflict probably will continue until the matter is settled by the Supreme Court.

IX. USE OF EXPERTS

Rule 26(b)(4) provides special discovery rules concerning expert witnesses.¹⁹³ This is an extension of the work-product doctrine because experts are not witnesses to what happened; instead, they furnish opinions on causation, prognosis, interpretation of data, and other matters of informed speculation. Experts function to aid the fact-finder when the fact-finder requires assistance in interpreting and applying data. Thus, experts must be distinguished from actors, who actually participated in or witnessed the incident.¹⁹⁴

Rule 26(b)(4) divides experts who have been consulted into two categories: those whom counsel plans to call as witnesses at trial¹⁹⁵ and those whom he does not plan to call.¹⁹⁶ The need for disclosure exists only for those experts whom counsel intends to call as witnesses, because opposing counsel needs to be familiar enough with the expert's proposed in-court testimony to prepare cross-examination.

The rule requires that upon a proper interrogatory a party must identify each person whom he expects to call as an expert witness, state the subject

190. *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 660 (6th Cir. 1976); *Duplan Corp. v. Moulinage (I)*, 487 F.2d 480, 483-84 (4th Cir. 1973); *see also Neugebauer v. A.S. Abell Co.*, 77 F.R.D. 712, 714 (D. Md. 1978).

191. *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551, 557 (2d Cir. 1967); *Midland Inv. Co. v. Van Alstyne, Noel & Co.*, 59 F.R.D. 134, 138 (S.D.N.Y. 1973); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 275 F. Supp. 146, 148 (E.D. Pa. 1967); *cf. SCM v. Xerox*, 70 F.R.D. 508, 516 (D. Conn. 1976) (material prepared in anticipation of other litigation protected when underlying dispute of that litigation not settled).

192. *Honeywell Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117, 119 (M.D. Pa. 1970); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 207 F. Supp. 407, 410 (M.D. Pa. 1962); *Tobacco and Allied Stocks, Inc. v. Transamerican Corp.*, 16 F.R.D. 534, 537 (D. Del. 1954).

193. FED. R. CIV. P. 26(b)(4).

194. *Inspiration Consol. v. Lumbermens Mut. Casualty Co.*, 60 F.R.D. 205, 210 (S.D.N.Y. 1973); *Rodrigues v. Hrinda*, 56 F.R.D. 11, 12 (W.D. Pa. 1972); *In re Brown Co. Sec. Litig.*, 54 F.R.D. 384, 385 (E.D. La. 1972); *Duke Gardens Found., Inc. v. Universal Restoration, Inc.*, 52 F.R.D. 365, 366 (S.D.N.Y. 1971).

195. FED. R. CIV. P. 26(b)(4)(A)(i).

196. FED. R. CIV. P. 26(b)(4)(B).

matter on which the expert is expected to testify, present the substance of the facts and opinions to which the expert is expected to testify, and provide a summary of the grounds for each opinion.¹⁹⁷ The response to this interrogatory must be more than conclusory; it must be truly informative.¹⁹⁸ Thus, a response stating that the expert would testify on the "extent of any medical problems" and that he based his opinions on "office records" was held to be insufficient by the District Court for the District of Columbia.¹⁹⁹ Similarly, the District Court for the Northern District of Ohio held the statement that the subject matter of the expert's testimony is "machine design, electrical circuitry, and human factors engineering" to be insufficient.²⁰⁰ Moreover, even after counsel has served an interrogatory requesting the identity and opinions of an opposing party's expert and that interrogatory is answered, the responding party has a continuing duty to name any additional experts whom the responding party decides to call as witnesses at trial, and to furnish all of the required information concerning those experts.²⁰¹

After a satisfactory response to an interrogatory is received, a party may move for "further discovery by other means" concerning the expert.²⁰² The party may request that counsel in possession of the expert's report or deposition furnish such materials.²⁰³ Rule 26(b)(4)(A)(ii) provides that the court, in granting the motion, may make such order "concerning fees and expenses as the court may deem appropriate."²⁰⁴ The issue has arisen as to whether this provision merely protects the nonmoving party from having to pay additional fees for his opponent's discovery (and, perhaps, forces the party seeking discovery to share in the expert witness' preparatory fees to date) or whether it also requires the moving party to show substantial need for this additional discovery. Indeed, the rule specifically provides that a court has the power to require the discovering party to pay the retaining party "a fair portion of the fees and expenses reasonably incurred" by the retaining party "in obtaining facts and opinions from the expert."²⁰⁵ This indicates a concern that one party not bear the entire financial burden for the retention of and investigation by an expert whose findings are shared with the non-retaining party. Although one interpretation of this provision is that the rule is designed solely to ensure equitable cost sharing without requiring a showing beyond the relevant-and-not-privileged standard of the general discovery rule, rule 26(b)(1),²⁰⁶ some courts have held that further discovery of the expert beyond the interrogatory is only indicated if substantial need is shown.²⁰⁷

The second group of experts—those not to be called at trial—are treated differently. The rule specifically provides that one party may "discover facts

197. FED. R. CIV. P. 26(b)(4)(A)(i).

198. See *Olmert v. Nelson*, 60 F.R.D. 369, 371 (D.D.C. 1973).

199. *Id.* at 371 & n.5.

200. *Rupp v. Vock & Weiderhold, Inc.*, 52 F.R.D. 111, 112 (N.D. Ohio 1971).

201. FED. R. CIV. P. 26(e)(1)(B).

202. FED. R. CIV. P. 26(b)(4)(A)(ii).

203. *Id.*

204. *Id.*; see also FED. R. CIV. P. 26(b)(4)(C) (discussing fees and expenses).

205. FED. R. CIV. P. 26(b)(4)(C)(ii).

206. *Herbst v. ITT*, 65 F.R.D. 528, 530-31 (D. Conn. 1975).

207. *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202, 205 (N.D. Miss. 1972); *Wilson v. Resnick*, 51 F.R.D. 510, 511-12 (E.D. Pa. 1970).

known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial," and who is not to be called as a witness at trial, "only . . . upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."²⁰⁸ The only exception pertains to medical reports that are discoverable through the procedure provided in rule 35(b).²⁰⁹

An additional issue is raised by rule 26(b)(4): is an in-house expert one who "has been retained or specially employed" as an expert "in anticipation of litigation or preparation for trial"? The Eastern District of Virginia faced that issue when a large electric utility corporation consulted one of its employees and then argued that that employee was an expert.²¹⁰ The court rejected the argument, holding that the employee was not an expert within the meaning of rule 26(b)(4) because he was neither "specifically employed" by the corporation nor "put on the payroll for the specific purpose of deriving facts and opinions for use in trial preparation for anticipated litigation."²¹¹ The court reasoned that experts must owe primary allegiance to their work as experts and not to the employer corporation.²¹² The court apparently believed that the objectivity required of an expert is compromised in that situation.²¹³ Therefore, the court ruled, an employee of a party can never be an expert.²¹⁴ In contrast, the District Court for the District of Kansas, in an almost identical factual situation, held that an employee who was a partner in an accounting firm may be deemed an expert within the meaning of this rule as long as he has not worked on the matter in controversy.²¹⁵

Ordinary discovery may be used to obtain (a) information from an expert who has not been retained in anticipation of litigation or for trial, but whose information and reports are relied upon by the party against whom discovery is sought;²¹⁶ (b) information obtained by an expert as an actor or viewer with respect to the events in controversy;²¹⁷ and, (c) information possessed by a party himself when he is an expert in his own right.²¹⁸

A collateral issue arises if one party has "informally consulted" with an expert, but has neither retained him for the particular litigation nor specifically made evidentiary use of the expert's opinions. In such circumstances both rule 26(b)(4), generally governing expert discovery, and rule 26(b)(1), governing the

208. FED. R. CIV. P. 26(b)(4)(B).

209. FED. R. CIV. P. 35(b) (physician's report regarding examination discoverable).

210. *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 407 (E.D. Va. 1975).

211. *Id.*

212. *Id.*

213. *Id.* The court stated that "though one be an expert, if his contact with the case is not in his capacity as an impartial observer, but is instead as one going about his duties as a loyal employee, then one 'should be treated as an ordinary witness.'" *Id.*

214. *Id.*; *cf.* FED. R. CIV. P. 26(b)(4) advisory committee note (general employee not specifically employed on case not expert).

215. *Seiffer v. Topsy's Int'l, Inc.*, 69 F.R.D. 69, 72 (D. Kan. 1975); *see also* *Breedlove v. Beech Aircraft Corp.*, 57 F.R.D. 202, 204-05 (N.D. Miss. 1972).

216. *See* *Spaulding v. Denton*, 68 F.R.D. 342, 346 (D. Del. 1975).

217. *See* *Duke Gardens Found., Inc. v. Universal Restoration, Inc.*, 52 F.R.D. 365, 367 (S.D.N.Y. 1971); *see also* FED. R. CIV. P. 26(b)(4) advisory committee note.

218. *See* *Rodrigues v. Hrinda*, 56 F.R.D. 11, 12 (W.D. Pa. 1972).

scope of discovery, have been held to be inapplicable; discovery is not available at all.²¹⁹

Discovery of experts who were specifically employed in anticipation of litigation, but who are not to be called at trial is permissible only in "exceptional circumstances under which it is impracticable" to obtain the information by other means.²²⁰ Counsel can discover, however, the identity of such experts because it is only through such identification that the discovering party may determine whether the exceptional circumstances have been met.²²¹

What constitutes exceptional circumstances is not easy to articulate. Two contrasting cases are helpful. The first case was an employment discrimination action.²²² In anticipation of litigation the defendant engaged a nontrial expert to evaluate employment aptitude tests that the defendant company had been administering.²²³ The plaintiff sought discovery of that expert and his report on the ground that the plaintiff anticipated a good faith defense and needed the report of this expert to establish intent and subjective state of mind.²²⁴ The court rejected that argument and held that sufficient "substantial need" had not been shown.²²⁵

In the second case, the plaintiff provided the defendant with printouts from a computerized model of the Texas beer market.²²⁶ Later, the defendant wanted further discovery of the expert who constructed the computer program, even though that expert was not to be called at trial by the plaintiff.²²⁷ The court permitted such discovery because it found that an understanding of the detailed structure of the computer model was required to decipher the computer printouts and to prepare for thorough cross-examination.²²⁸

Finally, there are sanctions for not playing by the rules. Although sanctions generally are imposed for violations of the discovery rules, the specific sanction called into play here permits the discovering party to take the deposition of the expert at the other party's expense or, in extreme cases, precludes the expert from testifying at all.²²⁹ The most common violation is the failure to advise the other side about an expert witness to be called at trial until the eve of trial or during trial. Some judges are quite disturbed by such tactics, and have fash-

219. *Nemetz v. Aye*, 63 F.R.D. 66, 68 (W.D. Pa. 1974). The 1970 Advisory Committee's Note to rule 26(b)(4) states that the rule "precludes discovery against experts who were informally consulted in preparation for trial, but not retained or specially employed." FED. R. CIV. P. 26(b)(4) advisory committee note.

220. FED. R. CIV. P. 26(b)(4)(B).

221. This discovery may be obtained under rule 26(b)(1), which sets forth the general scope of discovery. *Baki v. B.F. Diamond Constr. Co.*, 71 F.R.D. 179, 182 (D. Md. 1976); *Sea Colony, Inc. v. Continental Ins.*, 63 F.R.D. 113, 114 (D. Del. 1974). *Contra Perry v. W.S. Darley & Co.*, 54 F.R.D. 278, 280 (E.D. Wis. 1971) (no identification of expert not to be called at trial).

222. *Crockett v. Virginia Folding Box Co.*, 61 F.R.D. 312 (E.D. Va. 1974).

223. *Id.* at 319.

224. *Id.* at 320.

225. *Id.*

226. *Pearl Brewing Co. v. Jos. Schlitz Brewing Co.*, 415 F. Supp. 1122, 1134 (S.D. Tex. 1976).

227. *Id.* at 1134-35.

228. *Id.* at 1138-40.

229. *Tabatchnick v. G.D. Searle & Co.*, 67 F.R.D. 49, 57 (D.N.J. 1975); *cf. Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 454, 459 (2d Cir. 1975) (appellate court recognized district court's option of precluding testimony as sanction but its exclusion of expert testimony constituted "manifest error" in the case *sub judice*).

ioned these sanctions to do justice to all parties, as well as to discourage future abuses.²³⁰

CONCLUSION

In summary, the work-product protection is just that: a protection. It has not yet been fully elevated to the status of a privilege. The protection's primary function is not to protect the interests of any particular individual—plaintiff, defendant, *or* counsel. Rather, it is designed to benefit the adversary system itself and to produce an atmosphere in which counsel for both sides can fully prepare and present their clients' best case without the stifling self-editing that would be necessary if an attorney's work product were subject to unchecked discovery. Challenges to an invocation of work-product protection are best viewed with an understanding that the work-product doctrine protects the adversary system. When that system ceases to reap those benefits, the protection is vitiated despite what may best serve individual interests.

230. The Supreme Court has recognized the prophylactic effect of discovery sanctions. *See National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (per curiam) (sanction of dismissal not merely penalty to offending party but deterrent to others tempted to ignore discovery orders).