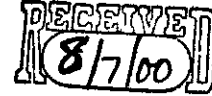


KAPLAN, KILSHEIMER & FOX LLP

Attorneys at Law

August 3, 2000

805 Third Avenue
New York, NY 10022
Telephone (212) 687-1980
Facsimile (212) 687-7714
e-mail mail@kkf-law.com
www.kkf-law.com



Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the United
States Courts
1 Columbus Circle, N.E.
Room 4-170
Washington, D.C. 20544

00-CV-E

Re: Changes in the Federal Rules of Civil Procedure

Dear Mr. McCabe:

I am the Chair of the Committee on Federal Procedure of the Commercial and Federal Litigation Section of the New York State Bar Association. On June 22, 2000, the Section overwhelmingly approved the enclosed Report of Expert Witness Disclosure and "Core" Work Product. This report highlights an area involving the interplay between the work-product doctrine under Rule 26(b)(3) of the Federal Rules of Civil Procedure and the disclosures required of experts under Rules 26(a)(2) and 26(b)(4) of the Federal Rules of Civil Procedure which we believe requires clarification. On behalf of the Commercial and Federal Litigation Section, I would like to submit this report for consideration by the Advisory Committee on Civil Rules.

If you would like further information or wish to pass along any comments, I would be pleased to hear from you.

Sincerely yours,

A handwritten signature in dark ink that reads "Gregory K. Arenson". The signature is written in a cursive style.

Gregory K. Arenson

GKA:sm
Enclosure

cc: Sharon M. Porcellio, Esq. (w/o encl.)
Chair, Commercial and Federal Litigation Section

**REPORT ON EXPERT WITNESS DISCLOSURE
AND "CORE" WORK PRODUCT**

New York State Bar Association
Commercial and Federal Litigation Section
Committee on Federal Procedure

June 22, 2000

Gregory K. Arenson, Chair*
Robert Edward Bartkus, Esq.
Ernest T. Bartol, Esq.
John P. Coll, Jr., Esq.
Robert J. Dinerstein, Esq.
Thomas F. Fleming, Esq.*
Cathi A. Hession, Esq.
Robert J. Jossen, Esq.
Martin E. Karlinsky, Esq.
Thomas J. Kavalier, Esq.

Mitchell A. Lowenthal, Esq.
Thomas McGanney, Esq.*
Charles E. Miller, Esq.
James F. Parver, Esq.
Allan M. Pepper, Esq.
Sharon M. Porcellio, Esq.
Stephen T. Roberts, Esq.*
Hon. Laura Taylor Swain
Scott H. Wyner, Esq.

* Co-Authors of this report.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
SUMMARY	1
I. LAW AND POLICY PRIOR TO THE 1993 AMENDMENTS	2
A. THE WORK-PRODUCT DOCTRINE	2
B. EXPERT DISCOVERY AFTER 1970	5
C. THE INTERSECTION OF EXPERT TESTIMONY AND THE WORK-PRODUCT DOCTRINE	7
1. Bogosian v. Gulf Oil Corp.	7
2. Intermedics, Inc. v. Ventritex, Inc.	10
D. USING DOCUMENTS TO REFRESH A WITNESS' MEMORY	15
II. THE 1993 AMENDMENTS AND THEIR EFFECT ON DISCOVERY OF COMMUNICATIONS BY ATTORNEYS WITH EXPERTS	19
A. THE 1993 AMENDMENTS TO RULE 26	19
B. CASE LAW AFTER 1993	22
1. Cases in Which The Discovery Of "Core" Attorney Work Product <i>Is Not</i> Permitted.	23
2. Cases in Which The Discovery Of 'Core' Attorney Work Product <i>IS</i> Permitted.	27
C. THE COMMENTARY	32
III. CONCLUSION AND RECOMMENDATION	34

SUMMARY

The Supreme Court in *Hickman v. Taylor*, 329 U.S. 495, 511-12, 67 S. Ct. 385, 393-94 (1947), and *Upjohn Co. v. United States*, 449 U.S. 383, 400-02, 101 S. Ct. 677, 688-89 (1981), has recognized that the work-product doctrine to some extent protects from disclosure to adversaries material prepared or gathered by attorneys in anticipation of litigation or in preparation for trial and protects to an even greater extent information revealing an attorneys' mental impressions, conclusions, opinions or legal theories, which has been called "core" work product. To a great degree, these views have been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.

Experts are retained to present testimony concerning scientific, technical or other specialized knowledge supporting a party's position. It is rare that the expert's views are not affected in some manner by information transmitted by the party's counsel. That information will frequently reflect the attorney's mental impressions or conclusions. To the extent that an expert is required to disclose the information considered in reaching an opinion, disclosure of "core" work product may occur.

Prior to the 1993 amendments to the Federal Rules of Civil Procedure, there had been a split in authority as to the protection to be afforded to information disclosed to experts by counsel for a party. Following the revamping of expert disclosure in the 1993 amendments, there has continued to be a split in authority.

After reviewing the pre-amendment case law (part I) and the 1993 changes in procedure for disclosure of expert opinion (part II), the Section has concluded that it was the intent of the amendments not to provide protection to “core” work product disclosed to experts. After considering the competing purposes for protection of “core” work product and for disclosure of information considered by expert witnesses, the Section recommends that the Federal Rules of Civil Procedure be amended to make explicit that all information disclosed to testifying experts by attorneys is discoverable.

I. LAW AND POLICY PRIOR TO THE 1993 AMENDMENTS

There are several concepts that intersect at the issue of the disclosure of communications between attorneys and experts: the work-product doctrine, the exploration of the bases for an expert’s opinion, and the evidentiary requirement that a document from which a witness testifies should be disclosed to the interrogator. However, it was not until after 1970, when the reluctance to permit pre-trial discovery of experts was reversed through the adoption of Rule 26(b)(4) of the Federal Rules of Civil Procedure and the protection of material prepared in anticipation of litigation or for trial was enshrined in Rule 26(b)(3) of the Federal Rules of Civil Procedure, that the issues at the intersection became apparent.

A. THE WORK-PRODUCT DOCTRINE

Hickman v. Taylor, 329 U.S. 495, 511-12, 67 S. Ct. 385, 393-94 (1947), first articulated the work-product doctrine. After decades of not always consistent case law development, the 1970 amendments to the Federal Rules of Civil Procedure added Rule 26(b)(3), which codified

an approach to materials prepared in anticipation of litigation or for trial, including information subject to the work-product doctrine.¹

Rule 26(b)(3) defined two categories of material subject to protection: (1) “fact” or “ordinary” work product, and (2) “opinion” or “core” work product. Documents or tangible things comprising the former were discoverable upon a showing of substantial need and an inability to obtain the equivalent without undue hardship. *Upjohn Co. v. United States*, 449 U.S. 383, 400, 101 S. Ct. 677, 688 (1981). The latter were either absolutely protected, *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 736 (4th Cir. 1974), *cert. denied*, 420 U.S. 997, 95 S. Ct. 1438 (1975), or disclosable only after an extraordinary showing of necessity, *In re Murphy (United States v. Pfizer Inc.)*, 560 F.2d 326, 336 (8th Cir. 1977). The Supreme Court, while recognizing that “opinion” work product was subject to a higher standard for disclosure, in *Upjohn* refrained from deciding whether it was absolutely protected. 449 U.S. at 401-02, 101 S. Ct. at 688-89. *See generally*, Annot., *Protection from Discovery of Attorney’s*

¹ The 1970 version of Rule 26(b)(3) was:

Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Opinion Work Product Under Rule 26(b)(3), Federal Rules of Civil Procedure, 84 A.L.R. Fed. 779 (1987).

A strong public policy to promote the proper functioning of our system of justice underlies the work-product doctrine. *Upjohn*, 449 U.S. at 398, 101 S. Ct. at 687; *Hickman*, 329 U.S. at 510, 67 S. Ct. at 393. The work-product doctrine allows an attorney to “work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” *Hickman*, 329 U.S. at 510, 67 S. Ct. at 393.

Proper preparation of a client’s case demands that he [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.

Id., 329 U.S. at 511, 67 S. Ct. at 393. “Forcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes,” *Upjohn*, 449 U.S. at 398, 101 S. Ct. at 687, and exposes the attorney to the possibility of being called to testify about what he or she remembers or what he or she wrote down regarding a witness’ remarks, *Hickman*, 326 U.S. at 513 (Murphy, J.), 517-18 (Jackson, J. concurring), 67 S. Ct. at 394, 396-97.

However, work-product protection may be waived by attempting to make testimonial use of work-product materials. *United States v. Nobles*, 422 U.S. 225, 239 & n.14, 95 S. Ct. 2160, 2170-71 & n.14 (1975).

B. EXPERT DISCOVERY AFTER 1970

With the adoption in 1970 of Rule 26(b)(4) of the Federal Rules of Civil Procedure,² the procedure regarding experts changed dramatically. This was further accelerated in 1975 with

² Rule 26(b)(4) provided:

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts 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 expected to be called as a witness at trial, only as provided in Rule 35(b) or 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.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

the Congressional adoption of the Federal Rules of Evidence, and, in particular, Rules 702, 703 and 705.³

Rule 26(b)(4) was adopted, because “[e]ffective cross-examination of an expert witness requires advance preparation.” Advisory Committee Notes to Rule 26(b)(4), 1970 Amendments. For testifying experts, Rule 26(b)(4) contemplated that interrogatories would normally be served to discover the substance of an expert’s opinions and the grounds for those opinions, and depositions of experts would not be the rule. However, in practice, “[t]he information disclosed . . . in answering interrogatories . . . was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert.” Advisory Committee Notes to Rule 26(a)(2), 1993 Amendments. Moreover, with the adoption of the Federal Rules of Evidence discouraging

³ Rule 702 stated:

Testimony by Experts. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 703 stated:

Bases of Opinion Testimony by Experts. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 705 stated:

Disclosure of Facts or Data Underlying Expert Opinion. The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

hypothetical questions, encouraging cross-examination to discover the factual bases for an expert's opinion, and broadening the materials upon which an expert might rely to include materials not admissible in evidence, the need for pre-trial discovery of experts increased. See *Smith v. Ford Motor Co.*, 626 F.2d 784, 794 (10th Cir. 1980); Advisory Committee Notes to 1972 Proposed Rules 703 and 705.⁴

C. THE INTERSECTION OF EXPERT TESTIMONY AND THE WORK-PRODUCT DOCTRINE

Prior to 1993, there was a split of authority on whether documents containing work product revealed to an expert were discoverable. The leading case prohibiting discovery was *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587 (3d Cir. 1984); the leading case permitting discovery was *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384 (N.D. Cal. 1991). Each is discussed below.

1. Bogosian v. Gulf Oil Corp.

Bogosian was an antitrust class action by gasoline dealers against 15 major oil companies. 738 F.2d at 589. The district court directed that plaintiffs' eight experts on gasoline marketing, statistics, economics, chemistry and automotive engineering would be deposed under Rule 26(b)(4)(A)(ii) and that plaintiffs would produce, among others, all documents sent to the experts

⁴ The Advisory Committee Notes to 1972 Proposed Rule 705 stated, in part:

Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area [the supporting facts or data for any expert's opinion], obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts.

by plaintiffs or their counsel and all documents utilized, relied upon, consulted or reviewed by each expert for the opinion the expert would express at trial. *Id.* Plaintiffs produced over 700 documents and identified hundreds of additional documents that were otherwise publicly available, but withheld 115 documents specified as work product. 738 F.2d at 590. The Third Circuit assumed that the 115 documents were “core” work product. 738 F.2d at 593.

The court first held that showing the material to the experts did not waive the protection for attorney work product. 738 F.2d at 593. *Cf. Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977).

Judge Sloviter then analyzed the language of Rule 26(b)(3), and, in particular the introductory proviso to the first sentence, “Subject to the provisions of subdivision (b)(4) of this rule.” 738 F.2d at 594. Distinguishing between the first sentence of Rule 26(b)(3), which requires a showing of “substantial need” before work product must be produced, and the second sentence, which requires greater protection against disclosure of the mental impressions, conclusions, opinions or legal theories of attorneys, the court found that the proviso did not limit the second sentence. *Id.*

The Third Circuit then turned to Rule 26(b)(4). It acknowledged that the Advisory Committee Notes to the 1970 amendments stated that the rule rejected “as ill considered the decisions which have sought to bring expert information within the work-product doctrine,” *id.*, but it found:

The thrust of Rule 26(b)(4) is to permit discovery of facts known or opinions held by the expert. Examination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert’s

opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory. . . . [T]he marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product.

738 F.2d at 595. The court then held that the district court should review the documents *in camera* to separate the facts from the legal theories of counsel, and protect the latter from disclosure. 738 F.2d at 595-96.

Judge Becker dissented. He believed that the majority had failed to consider the most important interest of the party seeking the information: "the need to impeach plaintiffs' expert economist at his deposition." 738 F.2d at 597. Judge Becker wrote:

I disagree with the majority's pronouncement . . . that evidence demonstrating an economist's theory did not originate or evolve as a result of his own research, but rather as a result of the hiring lawyer's suggestion, is of only "marginal value." Rather, such a revelation could, in some cases, critically alter the finder of fact's assessment of the expert's testimony.

738 F.2d at 598. However, Judge Becker, like his colleagues, suggested that the district judge review the documents *in camera* and decide whether their impeachment value would significantly outweigh the chill on the development of legitimate attorney work product if disclosed. *Id.*

Cases that followed *Bogosian* prior to December 1993 include *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 108 F.R.D. 283, 286 (M.D.N.C. 1985) (under *Duplan* "'opinion' work product is absolutely immune from discovery even if shared with an expert witness"); *Bethany Medical Center v. Harder*, Civ. A. No. 85-2415, 1987 WL 47845 at *8, *10 (D. Kan. Mar. 12, 1987) (providing to expert materials containing attorney's legal analysis and mental impressions, which were not relied upon by expert, held not to waive work-

product protection and no showing of substantial need or undue hardship was made to overcome the protection); and *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 284 (D. Kan. 1989) (discovery denied where no showing that the expert reviewed the documents to develop his opinion, to refresh his recollection or to prepare testimony and no strong showing of substantial need for the disclosure for impeachment after *in camera* review of the documents).

2. **Intermedics, Inc. v. Ventritex, Inc.**

In *Intermedics*, despite the mootness of the controversy that gave rise to a motion to compel an expert to respond to deposition questions and produce documents, Magistrate Judge Brazil announced the “law of the case” to govern discovery of communications between attorneys and testifying experts relating to subjects about which the experts would testify. 139 F.R.D. at 385.

The *Intermedics* court disagreed with the *Bogosian* court’s reading of the proviso in Rule 26(b)(3). From the 1970 Advisory Committee’s Notes, Magistrate Judge Brazil found “it clear that a purpose of creating a separate subsection of the Rule and devoting it specifically to discovery from experts was to ‘reject as ill-considered the decisions which have sought to bring expert information within the work product doctrine.’” 139 F.R.D. at 388. The Magistrate Judge inferred that

the drafters of these rules wanted to make sure that courts recognized that analysis of discovery of work product and analysis of discovery of information from expert witnesses were two conceptually quite distinct enterprises

Id. From this inference, Magistrate Judge Brazil concluded that the *Bogosian* court was incorrect to conclude that the proviso in the first sentence of Rule 26(b)(3) did not apply to the

second sentence. *Id.* He then examined the language of the two sentences and found that the reference in the second sentence to “‘such materials’ clearly relates back to and incorporates by reference the concepts at the center of the immediately preceding sentence” so that the proviso of the first sentence must therefore qualify and limit the second sentence. 139 F.R.D. at 388, 389.

The *Intermedics* court did not stop at this point, though. It acknowledged that the drafters of the 1970 amendments probably did not consider the interplay between work product and expert testimony, 139 F.R.D. at 389, and it found an unarticulated and unanticipated tension between paragraphs (3) and (4) of Rule 26(b), as well as between Rule 26(b)(3) and Federal Rules of Evidence 702, 703 and 705, 139 F.R.D. at 391.

Given that we are dealing with rules of presumptively comparable standing, we believe that it is appropriate to resolve the tensions between them by . . . a truly open balancing analysis in which we (1) identify the interests that the work product doctrine is intended to promote, (2) make a judgment about how much those interests would be either (a) harmed by a ruling that the kinds of communications in issue here are discoverable or (b) advanced by a ruling that these kinds of communications are not discoverable, (3) identify the relevant interests that are promoted by Federal Rule of Civil Procedure 26(b)(4) and by Federal Rules of Evidence 702, 703 and 705, and then (4) make a judgment about how much those interests would be either (a) harmed by a ruling that the kinds of communications in issue here are not discoverable or (b) advanced by a ruling that these kinds of communications are discoverable.

139 F.R.D. at 391-92.

Magistrate Judge Brazil identified the interests promoted by the work-product doctrine as “preserving the incentive system that is perceived as essential to our adjudicatory process and creating an environment in which counsel are free to think dispassionately, reliably, and creatively both about the law and the evidence in the case and about . . . strategic approaches

to the litigation.” 139 F.R.D. at 392. The Magistrate Judge then asked: “[H]ow much harm is likely to be caused to work product interests when lawyers know in advance that communications between them and testifying experts will be discoverable if those communications are related to the matters about which the experts will testify?” *Id.* Magistrate Judge Brazil found that such a rule would not interfere with an attorney’s capacity to think dispassionately and creatively about the client’s case in private, as long as the attorney did not share thoughts with an expert expected to testify, and as long as any uninhibited, roaming, or educational exchanges with experts were with non-testifying experts. 139 F.R.D. at 392, 393. The court conceded that retaining such a non-testifying expert carried a financial cost. 139 F.R.D. at 393.

The court also addressed the argument that making attorney communications with a testifying expert discoverable “would impair lawyers’ ability to teach experts efficiently what they need to know to prepare to offer useful and well grounded opinions.” *Id.* The court found that this accelerated learning would come at too high a price: “What obviously is threatened by such communications is the independence of the expert’s thinking, both her analysis and her conclusions. The risk is that the lawyer will do the thinking for the expert, or, more subtly, that the expert will be influenced, perhaps appreciably, by the way the lawyer presents or discussed the information.” 139 F.R.D. at 393-94. These risks would be reduced if it were known that all communications with counsel would be reviewable by other experts and made known to the trier of fact. 139 F.R.D. at 394.

In sum, we are not persuaded that a rule that would permit discovery of communications from counsel to an expert about matters related to the expert’s

testimony would in fact cause significant harm to the principal interests that the work product doctrine is intended to advance.

Id.

Magistrate Judge Brazil identified the relevant interests promoted by Federal Rule of Civil Procedure 26(b)(4) and by Federal Rules of Evidence 702, 703 and 705, as “nothing less than the integrity and reliability of the truth finding process.” *Id.* The court found that

assertive, probing, coherent, and well-informed cross-examination was essential to equipping the trier of fact to judge the persuasive power and reliability of such testimony [from experts] and to determine which of competing expert views should be credited, and that often that kind of cross-examination would not be possible unless counsel had been permitted to explore thoroughly in pretrial discovery the mental route that the expert had travelled on the way to his or her conclusions.

Id.

Magistrate Judge Brazil then directly disagreed with the *Bogosian* majority’s conclusion that it was of only marginal value to know that an expert’s view may have originated with an attorney. 139 F.R.D. at 395.

[I]t would be fundamentally misleading, and could do great damage to the integrity of the truth finding process, if testimony that was being presented as the independent thinking of an “expert” in fact was the product, in whole or significant part, of the suggestions of counsel. The trier of fact has a right to know who is testifying.

139 F.R.D. at 395-96.

The fact that so much expert testimony concerns matters that are essentially out of empirical control makes it all the more important for the trier of fact to know, accurately, the source of the testimony. When matters are debatable, the background, attributes of mind, character and personality, and the perspective (or intellectual biases) of each of the debaters can play crucial roles in a jury’s or judge’s assessment of the different positions being taken. These considerations

make it even more important that the trier of fact know what the real source of expert testimony is.

139 F.R.D. at 396-97.

The Magistrate Judge found that these policies would be promoted if counsel knew in advance that their communications with testifying experts would be discoverable, because it would improve the likelihood that an expert's opinions really were the expert's. 139 F.R.D. at 397.

Accordingly, the *Intermedics* court "h[e]ld that all communications from counsel to a testifying expert that relate to the subjects about which the expert will testify are discoverable." *Id.*

Cases that reached the same result as *Intermedics* prior to 1993 include *Boring v. Keller*, 97 F.R.D. 404, 407, 408 (D. Colo. 1983) (documents constituting "opinion" work product not protected where an expert witness uses them to formulate his or her opinion, so as to preserve the opportunity to impeach the expert on cross-examination); *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 613, 616, 617 (D.N.J. 1989) (draft of expert's report wholly authored by attorney ordered produced based on a demonstrated substantial need to obtain the discovery, which could not be obtained in a substantial equivalent by other means); and *Bio-Rad Lab., Inc. v. Pharmacia*, 130 F.R.D. 116, 119, 122-23 (N.D. Cal. 1990) (work-product protection inapplicable to expert witness who could not distinguish his opinions from those formulated in consultation with trial counsel).

D. USING DOCUMENTS TO REFRESH A WITNESS' MEMORY

It has also been argued that Federal Rule of Evidence 612 bears on the discovery of "core" work product shown to an expert. See *Bogosian, supra*, 738 F.2d at 595 n.3; *Intermedics, supra*, 139 F.R.D. at 386 n.1. Federal Rule of Evidence 612 governs the production to adversaries of writings used to refresh memory while a witness is testifying or before testifying.⁵ Thus, by its terms, Rule 612 is inapplicable to documents shown to an expert to permit the expert to formulate an opinion. It should only apply to documents shown before or while testifying to refresh recollection. Nonetheless, one of the first cases to examine the concepts underlying the work-product doctrine and Rule 612 arose in the context of disclosure of documents shown to an expert. *Berkey Motor, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 614 (S.D.N.Y. 1977). Therefore, while Rule 612 is not directly applicable to all information attorneys share with experts, cases that have arisen under the Rule further illuminate

⁵ Rule 612 states, in part:

Except as otherwise provided in criminal proceedings by section 3500 of title 18, United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either --

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto.

the issues that bear on whether “core” work product should be disclosed to an adversary after being presented to an expert.

As proposed by the Advisory Committee in 1972, Rule 612 provided that, except under 18 U.S.C. § 3500, if a witness used a writing to refresh his or her memory “either before or while testifying,” an adverse party was entitled to have the writing produced at the hearing and to cross-examine on it. Notes of the Committee on the Judiciary, H.R. Rep. No. 650, 93rd Cong., 1st Sess. 8 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7086. Congress changed the proposed rule. Congress kept the rule intact for writings used to refresh memory while testifying, but left the production of writings used to refresh memory before testifying to the court’s discretion “in the interests of justice,” referencing existing law, citing *Goldman v. United States*, 316 U.S. 129, 62 S. Ct. 993 (1942). Notes of the Committee on the Judiciary, H.R. Rep. No. 650, 93rd Cong., 1st Sess. 8 (1973), *reprinted in* 1974 U.S. Code Cong. & Admin. News 7051, 7086. The House Judiciary Committee also wrote that it intended “that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.” *Id.* Rule 30(c) of the Federal Rules of Civil Procedure made Rule 612 applicable to depositions and deposition testimony. *Sporck v. Peil*, 759 F.2d 312, 317 (3d Cir.), *cert. denied*, 474 U.S. 903, 106 S. Ct. 232 (1985).

Application of Rule 612(1) is straightforward. In *S&A Painting Co. v. G.W.B. Corp.*, 103 F.R.D. 407, 408 (W.D. Pa. 1984), a third-party defendant during his deposition referred to handwritten notes he had prepared at the request of counsel setting forth events relevant to the litigation. Although the notes were protected by both the attorney-client privilege and the

work-product doctrine, the court held that the protection had been waived under Federal Rule of Evidence 612(1) and directed production of that portion of the notes to which reference had been made during the deposition. 103 F.R.D. at 408-09.

Application of Rule 612(2) is less straightforward, because, by directing that courts exercise their discretion, Congress imposed a balancing test to determine whether the “interests of justice” require production of documents used to refresh recollection before testifying.

On a case-by-case basis, it is appropriate to balance the competing interests in the need for full disclosure and the need to protect the integrity of the adversary system protected by the work-product rule.

In re Joint E. & S. Dist. Asbestos Litig., 119 F.R.D. 4, 5 (E.D.N.Y. 1988).

Generally, courts prior to December 1993 that denied discovery under Rule 612(2) did so because of the great weight placed on protection of work product. *See Sporck v. Peil, supra*, 759 F.2d at 318-19 (“Proper application of Rule 612 should never implicate an attorney’s selection, in preparation for a witness’ deposition, of a group of documents that he believes critical to a case. Instead, identification of such documents under Rule 612 should only result from opposing counsel’s own selection of relevant areas of questioning, and from the witness’ subsequent admission that his answers to those specific areas of questioning were informed by documents he had reviewed. In such a case, deposing counsel would discover the documents through his own wit, and not through the wit of his adversary.”); *Bogosian, supra*, 738 F.2d at 595 n.3 (*dicta*: “the purposes of Rule 612 are generally fully served without disclosure of core work product”); *Jos. Schlitz Brewing Co. v. Muller & Phipps (Hawaii), Ltd.*, 85 F.R.D. 118, 120 (W.D. Mo. 1980) (attorney’s notes subject to the attorney-client privilege given “special

discretionary safeguards” against disclosure, even though used to refresh his recollection before testifying at a deposition); *Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc.*, 553 F. Supp. 45, 52 (S.D.N.Y. 1982) (documents protected by the work-product doctrine protected from disclosure under Rule 612(2)); *Bloch v. Smithkline Beckman Corp.*, Civ. A. No. 82-510, 1987 WL 9279 at *4 (E.D. Pa. Apr. 9, 1987) (desire to impeach or corroborate a witness’ testimony cannot overcome the strong presumption against the protection afforded an interview memorandum); *Derderian v. Polaroid Corp.*, 121 F.R.D. 13, 16-17 (D. Mass. 1988) (plaintiff’s contemporaneous notes created for the purpose of communicating with counsel and reviewed prior to deposition not discoverable because they were likely of meetings or communications with agents or employees of defendant to whom defendant had full access).

On the other hand, courts that granted discovery prior to December 1993 under Rule 612(2) did so on the ground of the importance of full disclosure and the ascertainment of truth. *See Wheeling-Pittsburgh Steel Corp. v. Underwriters Lab., Inc.*, 81 F.R.D. 8, 9, 10 (N.D. Ill. 1978) (defendant company’s files, including one captioned “communications with counsel” borrowed and reviewed by former employee prior to deposition must be produced to serve the paramount purpose of federal discovery rules to ascertain the truth); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144, 146 (D. Del. 1982) (decision by counsel to educate company’s principals, officers and employees in preparation for deposition by showing binders with documents selected by counsel held a waiver of work-product protection requiring disclosure under Rule 612(2)); *United States v. 22.80 Acres of Land*, 107 F.R.D. 20, 26 (N.D. Cal. 1985) (government did not demonstrate it would suffer substantial harm from disclosure of prior appraisal report used to refresh employee witnesses’ recollection in preparation for

depositions so that the policy in favor of effective cross-examination resulted in disclosure); *In re Joint E. & S. Dist. Asbestos Litig.*, *supra*, 119 F.R.D. at 6 (after review of material *in camera*, court concluded that the documents sought did not reveal much concerning the attorney's thinking or legal strategy and therefore should be produced); *In re Atlantic Fin. Management Sec. Litig.*, 121 F.R.D. 141, 143 (D. Mass. 1988) (deposition transcripts and documents previously produced in the case provide minimal exposure of the attorney's mental process and must be produced after review by witness prior to deposition).

II. THE 1993 AMENDMENTS AND THEIR EFFECT ON DISCOVERY OF COMMUNICATIONS BY ATTORNEYS WITH EXPERTS

A. THE 1993 AMENDMENTS TO RULE 26

The 1993 amendments made significant changes with respect to expert discovery. Rule 26(a)(2) was added to require detailed disclosures, usually including a written report, with respect to proposed expert testimony.⁶ Rule 26(b)(4)(A) was amended to permit specifically

⁶ Rule 26(a)(2) states:

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be

depositions of testifying experts and to eliminate expert interrogatories.⁷ No change was made in Rule 26(b)(3) relating to work product.

used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

⁷ Rule 26(b)(4) now provides:

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts 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 expected to be called as a witness at trial only as provided in Rule 35(b) or 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.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

In amending Rule 26(b)(4) in 1993 to provide for the deposition of testifying experts, the Advisory Committee stated that this conformed “the norm stated in the rule to the actual practice, followed in most courts, in which depositions of experts have become standard.” Rule 26(b)(4) also references new Rule 26(a)(2)(B) in stating that “[i]f a report from the expert is required . . . , the deposition shall not be conducted until after the report is provided.”

Rule 26(a)(2)(B) provides detailed requirements for an expert report:

- (1) a complete statement of all opinions to be expressed, and the basis and reasons therefor;
- (2) “the data or other information considered by the witness in forming the opinions;”
- (3) any exhibits to be used by the expert;
- (4) the detailed qualifications of the witness, including publications;
- (5) the witness’ compensation; and
- (6) a listing of any other cases in which the expert witness has testified within the last four years.

The Advisory Committee devoted five paragraphs of its 1993 Note to elucidating new Rule 26(a)(2). It stated that the expert disclosures are required “sufficiently in advance of trial that opposing parties have a reasonable opportunity to prepare for effective cross-examination” and to obtain an expert witness of their own. In discussing the data and other information and the exhibits and charts to be supplied, the Advisory Committee wrote:

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

The Advisory Committee did not, however, cross-reference this statement to Rule 26(b)(3) or further indicate how this provision was to interrelate with the admonition to protect "core" work product. As a result, Rule 26(a)(2), while it has clarified some issues, has not eliminated argument. Instead, it has stimulated further litigation over the question of how expert witness disclosure and protection of "core" work product are to be reconciled.

B. CASE LAW AFTER 1993

The 1993 amendments have ended certain disputes relating to work product and expert discovery. It appears to be generally accepted that purely factual material transmitted and considered by an expert, even if work product, is discoverable. *See B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57, 63 (S.D.N.Y. 1997). Moreover, in order for the opposing party to discover "the data or other information" given to the expert, it is no longer necessary to show that the expert relied upon it in forming his or her opinion, just so long as he or she "considered" it. *See Musselman v. Phillips*, 176 F.R.D. 194, 196 (D. Md. 1997). However, there has been litigation over whether information was in fact "considered" by expert witnesses or was so far removed from the proposed testimony that it was probably not considered. *See B.C.F. Oil*, 171 F.R.D. at 67.

Yet, the issue of whether “core” or “opinion” work product provided to an expert witness is discoverable has not been completely solved by the 1993 amendments. Indeed, the cases and commentary dealing with the issue have been virtually evenly divided.

1. Cases in Which The Discovery Of “Core” Attorney Work Product Is Not Permitted.

The cases that do not permit discovery of “opinion” work product are typically based, as before the 1993 amendments, on the proposition that, unlike “fact” work product, “opinion” work product is given at least nearly absolute protection from mandatory discovery by Rule 26(b)(3). A relatively early case in which “core” work product was held not to be discoverable when transmitted to a testifying expert was *Haworth, Inc. v. Herman Miller Inc.*, 162 F.R.D. 289 (W.D. Mich. 1995). The issue there arose at the deposition of plaintiff’s expert when he was questioned about conversations with plaintiff’s counsel. Plaintiff objected; the Magistrate Judge granted defendant’s motion to compel; the district court reversed on appeal.

The district court first addressed whether the proviso in the first sentence of Rule 26(b)(3) also affected the second sentence concerning “core” work product. The court rejected the application of the proviso to the second sentence, holding that the expert discovery requirements dealt only with “fact” work product and did not reach “core” work product. 162 F.R.D. at 294 (“[t]his Court reads the words as meaning only that all factual information considered by the expert must be disclosed in the report”).

The court then discussed the 1993 Advisory Committee Note quoted above, suggesting that materials provided to experts was not privileged or protected from disclosure, but concluded that

the Advisory Committee only intended to deal with the argument of whether factual material shown to an expert is to be turned over to the opposing party. The court concluded: "For the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute," 162 F.R.D. at 295, citing *Hickman v. Taylor*, 329 U.S. 495, 514, 67 S.Ct. 385, 395 (1947).

Next, the court considered the argument that cross-examination of an expert is significantly helped by knowing the nature of counsel's influence on the expert. In the court's judgment, "a more effective cross-examination and impeachment of the opposing party's expert witness . . . is not the type of circumstance the Supreme Court contemplated would overcome the strong policy against disclosing an attorney's opinion work product." *Id.* The court viewed the use of opposing experts as adequate to handle the problem.

Several other courts have, since 1993, expressed similar sentiments and reached similar results. *See, e.g., Magee v. Paul Revere Life Insurance Co.*, 172 F.R.D. 627, 643 (E.D.N.Y. 1997) ("[a]lthough the level of protection afforded "core" work product materials has not been defined precisely by either the Supreme Court or the Second Circuit Court of Appeals, it is clear that it is substantially higher than that provided by the 'substantial need' and 'undue hardship' test," citing *In re Murphy (United States v. Pfizer Inc.)*). These cases generally rely on *Hickman*: "It would be 'a rare situation' which would justify disclosure of attorney opinion work product. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." 329 U.S. at 514, 67 S.Ct. at 395.

The primary rationale for providing “opinion” work product with additional protection is to maintain and encourage the free exchange of ideas in developing litigation strategy. *Kennedy v. Baptist Memorial Hospital-Booneville, Inc.*, 179 F.R.D. 520, 522 (N.D. Miss. 1998). It is argued that this necessary and important exchange would not be possible without statutory and judicial assurance that disclosure of attorney opinions and strategy to experts does not waive privilege upon such disclosure. *Musselman v. Phillips*, 176 F.R.D. 194, 196 (D. Md. 1997). The creation of a bright-line rule requiring discovery of all materials turned over to an expert would, it is argued, discourage attorneys from providing experts with necessary documents and materials, “thus arguably impairing the expert’s ability to fully evaluate the relevant issues and the attorney’s ability to receive a full and objective assessment of the issues.” *Nexus Products Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 10 (D. Mass. 1999).

Likewise, some courts have found that, although attorneys have control over whether and which materials to disclose to witnesses, it is unfair to require a litigant to incur the additional expense of hiring a separate expert as a consultant in order to both have a free exchange of ideas with an expert and protect “core” work product documents from discovery. James Wm. Moore et al., *Moore’s Federal Practice (3d)*, ¶26.80[1] (1998) (noting that the *Haworth* line of cases has the additional benefit that it “does not favor wealthy parties who can afford to hire both testifying and non-testifying experts”).

Further, these cases argue, to mandate disclosure of all materials considered or relied on by an expert is not necessary to ensure adequate cross-examination and protect against undue attorney influence. In *Ladd Furniture, Inc. v. Ernst & Young*, No. 2:95CV00403, 1998 WL

1093901 at *13 (M.D.N.C. Aug. 27, 1998), the court found that “the adversarial system acts as a check against attorneys who would [improperly influence an expert’s opinion] because experts are required in the first instance to explain the bases of any opinions expressed in their Rule 26(a)(2)(B) reports.” *See also Magee*, 172 F.R.D. at 643. The *Haworth* court stated that “the reasonableness of an expert opinion can be judged against the knowledge of the expert’s field,” and that an expert’s opinions and analyses are “always subject to the scrutiny of other experts.” 162 F.R.D. at 295-96; *see also Nexxus*, 188 F.R.D. at 10. Even without the production of “core” work product, these courts believe that an opposing party has ample opportunity to test the expert’s opinion in court and to call additional experts to refute untrustworthy testimony. Any deficiencies in the basis of the expert’s opinion will become apparent during subsequent cross-examination of the expert and in the course of testimony from the opposing experts. *Nexxus*, 188 F.R.D. at 10.

For these reasons, several courts have agreed with *Haworth* in stating that the strong protection accorded to “core” work product, both statutorily and judicially, requires an unambiguous statement by Congress that disclosure to an expert witness constitutes waiver. *See Ladd Furniture, Inc.*, 1998 WL 1093901 at *13. The 1993 amendment of Rule 26(a)(2)(B) requiring the production of factual materials considered by the expert -- “data or other information” -- is not interpreted by these courts as being either clear or explicit enough to override the strong policy against mandatory disclosure. *Nexxus*, 188 F.R.D. at 10.

2. Cases in Which The Discovery Of "Core" Attorney Work Product Is Permitted.

There are also several thorough and instructive decisions that have come to the opposite conclusion -- *i.e.*, that "opinion" work product ought to be produced if it has been given or shown to the expert to be considered in forming the expert's opinion. The most frequently stated rationale for this result is that showing the document to the expert constitutes a waiver. Other courts have reasoned that the need for effective cross-examination of an opposing expert is such that this circumstance should be one of the few exceptions to the virtually absolute protection given "core" work product.

One of the more instructive decisions is that of District Judge Motley in *B.C.F. Oil Ref., Inc. v. Consolidated Edison Co.*, 171 F.R.D. 57 (S.D.N.Y. 1997). There were a number of issues dealing with documents related to expert testimony presented in that case:

(1) Invoices sent by an expert to plaintiff were held not producible, because they were not documents "considered" by the expert in connection with rendering his opinion. 171 F.R.D. at 61.

(2) Material provided to an expert being used as a consultant was held not producible, but the burden was placed on the party using the expert to demonstrate that the expert was functioning solely in that role. 171 F.R.D. at 62.

(3) Documents written by the expert in connection with his report were held to be producible, because it was not clear that the documents were not related to the expert's testimony. *Id.*

(4) Documents containing facts provided by the attorney to the expert were held to be producible under the clear language of Rule 26(a)(2)(B) (the expert report must include the "data or other information considered by the witness"). 171 F.R.D. at 63.

(5) Attorney opinions reviewed by the expert were held producible for a variety of reasons. *Id.*

(a) Rule 26, by its amended language, was intended "to resolve the tension between work product and disclosure of expert testimony." 171 F.R.D. at 66. The Advisory Committee Note stated that arguments over the issue should be resolved by the amendment. *Id.* The court rejected the *Haworth* analysis finding that the only significant pre-amendment discovery dispute related to producing "core" work product, so the Advisory Committee must have been talking about "core" work product. 171 F.R.D. at 65, 66.

(b) The work-product codification in Rule 26(b)(3) is "subject to the provisions of subdivision (b)(4) of this rule," thus making clear that expert disclosure takes precedence over work product. 171 F.R.D. at 66-67.

(c) As a policy matter, both fact-finder and opposing counsel should be fully aware of the extent to which the expert's views have been influenced (or created) by counsel. 171 F.R.D. at 66.

(d) A ruling requiring disclosure should cause no serious hardship, since work-product protection can still be preserved if the “core” work product is not shared. *Id.*

(e) The “bright line” test allows both attorneys and the court to determine easily what is producible and what is not. *Id.*

(6) Documents created by attorneys of their conversations with experts, but not shown to the experts, were not producible under Rule 26(b)(4), because they were not “considered” by the expert. 171 F.R.D. at 67.

The cases that are in accord with *B.C.F. Oil* all recognize the “nearly absolute” privilege afforded “opinion” work product. Nevertheless, they read the revised rule as providing that the privilege traditionally afforded to “core” work product is waived when the documents are disclosed to a testifying expert witness. *Musselman*, 176 F.R.D. at 196 (“opinion” work product receives “nearly absolute” immunity which “may, of course, be waived”); *see also Culbertson v. Shelter Mutual Insurance Co.*, No. 97-1609, 1999 WL 109566 (E.D. La. Mar. 2, 1999); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 304-5 (W.D. Va. 1998). These cases set forth a series of policy- and rule-based arguments in support of their finding that “core” work product is waived by disclosure to the expert.

First, these cases observe that the role of experts in both civil and criminal trials has increased greatly in the last few years. *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 639 (N.D. Ind. 1996). Often experts testify on subjects with which none of the judge, jury or counsel are familiar, and the experts are permitted to base their opinions on facts not admissible in evidence.

Id.; see also *Musselman*, 176 F.R.D. at 196. This increased use of experts, the importance of their testimony, and the difficulty in evaluating this type of testimony increases the possibility that experts who are unqualified, or unduly influenced, will not be detected, thus damaging the integrity of the truth-finding process. *Karn*, 168 F.R.D. at 639 (“the impact of expert witnesses on modern-day litigation cannot be overstated; yet to some, they are nothing more than willing musical instruments upon which manipulative counsel can play whatever tune desired”).

Effective cross-examination is extremely important to impeach an unqualified witness and to determine to what extent the attorney has influenced the expert’s testimony. *Karn*, 168 F.R.D. at 639 (“Given this premise, it stands to reason that useful cross-examination and possible impeachment can only be accomplished by gaining access to all of the information that shaped or potentially influenced the expert witness’s opinion. Without pre-trial access to attorney-expert communications, opposing counsel may not be able to effectively reveal the influence that counsel has achieved over the expert’s testimony.”); see also *Musselman*, 176 F.R.D. at 196 (“the trial judge depends upon the efficacy of cross-examination by the party opposing the expert’s testimony to point out any weaknesses which might affect its admissibility as does the jury in determining how much weight to give to the expert’s testimony”). These courts stress the potential for an attorney to unduly influence an expert witness’s testimony and maintain that “[a]lthough it is not improper for an attorney to assist a retained expert in developing opinion testimony for trial . . . opposing counsel must be free during discovery to determine the nature and extent of this collaboration.” *Musselman*, 176 F.R.D. at 201.

Many courts have found that mandatory disclosure of all documents considered or relied upon by an expert does not affect the integrity of the work-product doctrine as set forth in *Hickman. Karn*, 168 F.R.D. at 640. The work-product doctrine “is intended to allow counsel unfettered latitude to develop new legal theories or to conduct a factual investigation.” *Id.* “[P]roviding work product to an expert witness does not further this policy in that it generally does not result in counsel developing new legal theories or in enhancing the conducting of a factual investigation. Rather, the work product either informs the expert as to what counsel believes are relevant facts or seeks to influence him to render a favorable opinion.” *Id.* Additionally, an attorney’s opinions or impressions would not be discoverable unless they were shared with the expert. Attorneys retain the ability to reflect in private on the strengths and weaknesses of the case and may still privately consult with an expert with respect to such matters “provided that the expert is not called to testify.” *Oneida Ltd. v. United States*, 43 Fed. Cl. 611, 619 (Ct. Cl. 1999).

These courts also feel that their interpretation provides necessary clarity among the often confusing rules of discovery. Courts and practitioners can easily determine throughout the entire process of litigation “exactly which documents will be subject to disclosure and can react accordingly.” *Karn*, 168 F.R.D. at 639; *Lamonds*, 180 F.R.D. at 306 (“[a]n attorney wishing to maintain the protection afforded by the work-product doctrine can choose to provide the expert with all relevant facts instead of directing the expert’s attention to certain facts and instead of including opinions and conclusions drawn by the attorney”).

Finally, like Judge Motley in *B.C.F. Oil*, these courts consider this interpretation of Rule 26(a)(2)(B) as mandated by the 1993 amendments. *See Karn*, 168 F.R.D. at 639. They have interpreted the wording of amended Rule 26(a)(2)(B) and of the Advisory Committee commentary as an attempt to remedy the conflict between the pre-1993 cases involving work-product protection and expert disclosure requirements by enabling Rules 26(a)(2) and 26(b)(4) to “trump” any assertion of the work-product doctrine.

C. THE COMMENTARY

The commentators also are split on this issue. Wright & Miller lists the cases (weighted heavily on the waiver side) and comments: “It appears that counsel should now expect that any written or tangible data provided to testifying experts will have to be disclosed.” 8 Wright & Miller, *Fed. Prac. & Proc. 2d*, §§ 2016.2, 2031.1 at 442 (1999 Pocket Part). The Moore treatise states that it finds *Haworth* meritorious, because the Advisory Committee Notes do not state or suggest “that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product recognized by the Supreme Court in *Upjohn v. United States*.” James Wm. Moore et al., *Moore’s Federal Practice (3d)*, ¶26.80 at 26-234 (1998). However, the same treatise notes that a different result might well be desirable if it is obvious that the attorney had injected himself into the formation of an expert’s opinion, citing *Kennedy v. Baptist Memorial Hosp.-Booneville, Inc.*, 179 F.R.D. 520, 522 (N.D. Miss. 1988).

Other commentators have focused on the uncertainty caused by the conflicting cases. *See* Note, Discoverability of Opinion Work Product Materials Provided to Testifying Experts, 32 *Ind. L. Rev.* 481 (1999), which concludes that Rule 26 should be amended to clarify that Rule

26(b)(3) work-product protection takes precedence over the expert discovery rules. In an article entitled "Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure," published at 164 F.R.D. 97 (1996), Gregory Joseph concluded that work-product protection should prevail because such a result:

(1) does not favor wealthy parties, who can afford both testifying experts and non-testifying experts (on whom counsel can try out his or her theories);

(2) does not encourage "coy or strained conversations cloaked as hypotheticals" to avoid disclosure; and

(3) avoids a challenge under the Rules Enabling Act.

164 F.R.D. at 106.

The last point requires some explanation as it is not discussed in detail in the cases. The Rules Enabling Act, 28 U.S.C. § 2074(b), prohibits the adoption of rules, without affirmative Congressional action, which create, abolish or modify an evidentiary privilege. Joseph argues that Rule 26(a)(2)(B) makes waiver of "core" work product an "unavoidable cost" of putting an expert forward to testify, and thus has the effect of "abolishing or modifying" work-product protection. 164 F.R.D. at 106. This argument seems to go too far; one is not compelled to share "core" work product with an expert witness. Moreover, as Joseph acknowledged, it is not clear that work-product protection is a "privilege" within the meaning of Section 2074(b).

The draft of Civil Discovery Standards proposed by the Section of Litigation of the ABA in May 1999 takes the position that the requirement for an expert's report in Rule 26(a)(2)(B)

“does not require the disclosure of communications that would reveal an attorney’s mental impressions, opinions or trial strategy protected under the attorney work product doctrine.” Standard 21(e). However, the Litigation Section includes the precaution that in jurisdictions where the issue has not been decided, “the parties should either stipulate how to treat this issue or seek a ruling from the court at the earliest practical time as to its view on the scope of protection for this information.” The Standard does not explicitly acknowledge (although it is stated in the Comment) that, of the jurisdictions that have addressed the issue, approximately half have reached the opposite result. Moreover, the Standard and the Comment might themselves be considered ambiguous: Is “core” work product absolutely protected, or only absolutely protected if not relied upon by the expert in formulating his opinion?

III. CONCLUSION AND RECOMMENDATION

The Section recommends that Rule 26 of the Federal Rules of Civil Procedure should be amended to make explicit in the rule itself that oral and written “core” work product furnished to a testifying expert witness in connection with the witness’ proposed testimony is not protected from disclosure to the opposing party when the expert is being deposed or testifying at trial. There are several reasons:

- (1) The language of the 1993 Advisory Committee Notes to Rule 26(a)(3) indicates that this was the result sought to be accomplished at that time, but was inadequately expressed in the 1993 amendments to the rule.

(2) There is great value in having a bright-line rule in this area, so that practitioners can determine how to proceed in their pre-trial preparation. Under the cases decided since 1993 on this subject, there is a division of authority; as a result, an attorney is unable to determine (absent an advisory ruling by the trial judge, which is not easy to obtain) what will be the consequences of sharing “core” work product with an expert.

(3) Most importantly, while there are strong arguments to be made on both sides of the issue, at bottom, evidence that an expert’s testimony “did not originate or evolve as a result of his own research, but rather as a result of the hiring lawyer’s suggestion” may often be a critical factor for the fact-finder in determining what weight should be given the expert testimony. Becker J., dissenting, in *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 598 (1984). Full disclosure of the attorney’s influence on the expert’s preparation outweighs the considerations for protecting “core” work product.

New York State Bar Association
Commercial and Federal Litigation Section
Committee on Federal Procedure

June 22, 2000

Gregory K. Arenson, Chair*
Robert Edward Bartkus, Esq.
Ernest T. Bartol, Esq.
John P. Coll, Jr., Esq.
Robert J. Dinerstein, Esq.
Thomas F. Fleming, Esq.*
Cathi A. Hession, Esq.
Robert J. Jossen, Esq.
Martin E. Karlinsky, Esq.
Thomas J. Kavalier, Esq.

Mitchell A. Lowenthal, Esq.
Thomas McGanney, Esq.*
Charles E. Miller, Esq.
James F. Parver, Esq.
Allan M. Pepper, Esq.
Sharon M. Porcellio, Esq.
Stephen T. Roberts, Esq.*
Hon. Laura Taylor Swain
Scott H. Wyner, Esq.

* Co-Authors of this report.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C 20544

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

August 14, 2000

Gregory K. Arenson, Esquire
Chair, New York State Bar Association
Committee on Federal Procedure of the
Commercial and Federal Litigation Section
Kaplan, Kilsheimer & Fox, LLP
805 Third Avenue
New York, New York 10022

Dear Mr. Arenson:

Thank you for your suggestion to amend Civil Rule 26 dealing with the discovery of information provided by an attorney to a testifying expert witness. A copy of your letter was sent to the chair and reporter of the Advisory Committee on Civil Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,



Peter G. McCabe
Secretary

cc: Honorable Paul V. Niemeyer
Honorable David F. Levi
Professor Edward H. Cooper