BYU Law Review

Volume 1985 | Issue 3 Article 8

9-1-1985

Opinion Work Product, Expert Witness Discovery, and the Interaction of Rules 26{b)(3) and 26(b)(4)(A): Bogosian v, Gulf Oil Corporation

Carlisle G. Packard

Opinion Work Product, Expert Witness Discovery, and the Interaction of Rules 26(b)(3) and 26(b)(4)(A): *Bogosian v. Gulf Oil Corporation*

I. Introduction

The most provocative problems in the law usually result from the clash of two seemingly irreconcilable policies. So it is with discovery. Federal Rule of Civil Procedure 26(h)(3) protects attorneys' opinions, impressions, conclusions, and theories, or opinion work product, from disclosure to opponents. Rule 26(b)(4)(A) provides for liberal discovery of experts' opinions and the facts on which those opinions are based. Under this provision courts frequently order disclosure of documents relied upon by experts when preparing their opinions and testimony. A conflict arises when material relied on by an expert is opinion work product and is therefore arguably entitled to immunity from disclosure under Rule 26(b)(3). This conflict was before the Third Circuit in *Bogosian v. Gulf Oil Corp.*[1]

II. The *Bogosian* Case

Paul Bogosian, a gasoline dealer, brought an antitrust class action against fifteen major oil companies. His case was to be proved primarily by expert testimony.[2] The district court ordered Bogosian to produce all documents relied on by the experts in forming their opinions and answering their interrogatories, including all documents sent to the experts by the plaintiffs. Plaintiffs produced over 700 documents in response to this order. They also identified, but did not produce, an additional 115 documents specified as attorney work product. The court granted a defense motion to compel production of these additional documents. Bogosian resisted the production order and petitioned for a writ of mandamus to compel the district court to withdraw its order.[3]

---

1. 738 F.2d 587 (3d Cir. 1984).
2. *Id.* at 589.
3. *Id.* at 589-90.

In ordering production, the district court reasoned that the defendants needed all the experts' information to facilitate thorough cross-examination. The district court resolved the conflict between the Rule 26(b)(3) principle of work product protection and the Rule 26(b)(4) principle of disclosure by concluding that because the first line of 26(b)(3) states that it is "[s]ubject to the provisions of subdivision (b)(4)," and because the examining party should be able to review the material an expert witness has received, the work product protection should be overridden and discovery ordered.[4]

On appeal the Third Circuit examined the language of Rules 26(b)(3) and 26(b)(4) and held that the district court's conclusion was unwarranted. First, the court held that the "subject to the provisions of subdivision (b)(4) of this rule" language of subdivision (b)(3) did not limit the restrictions on disclosure of opinion work product. Second, the majority examined the language of Rule 26(b)(4). It noted that Rule 26(b)(4)(A)(i) allows interrogatories seeking the identity of experts and the substance of their testimony at trial. Rule 26(b)(4)(A)(ii) allows further discovery only in the discretion of the court. Thus, the language of Rule 26(b)(4)(A) does not provide for the discovery of everything the expert had reviewed, particularly when the documents sought were opinion work product. Such discovery could be useful only for examining the lawyer's role in forming the expert's theory. The court held that "the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory" has "marginal value" and "does not warrant overriding the strong policy against disclosure of documents consisting of core attorney's work product."[5]

Judge Becker, dissenting, saw the issue as "whether the defendants' interest in having this material available for cross-examination of the expert economist 'at trial' outweighs the plaintiffs' interest in protecting this core work product."[6] Asserting that the majority was insensitive to the defendants' needs, Judge Becker proposed a balancing test: "I would suggest that the judge inspect the documents *in camera* and decide whether their impeachment value in the particular case would significantly outweigh the chill on development of legitimate attorney work

4. *Id.* at 594.
5. *Id.* at 595.
6. *Id.* at 597 (Becker, J., dissenting).

product that would admittedly accompany disclosure."[7] Judge Becker placed himself on a middle road between the majority, which would always protect opinion work product, and the district court, which "apparently would have admitted it under almost all circumstances."[8]

III. Analysis

The *Bogosian* majority should have taken a more flexible approach in resolving the tension between Rules 26(b)(3) and 26(b)(4)(A). To understand why, the work product doctrine and its underlying policies, and then Rule 26(b)(4)(A) and its liberal expert discovery policy, must be examined. With this background, the superiority of the dissent's balancing approach is apparent.

A. Rule 26(b)(3): The Work Product Doctrine

The work product doctrine was announced in the Supreme Court's 1947 landmark decision in *Hickman v. Taylor*.[9] The owners and insurers of a tugboat that sank retained an attorney to prepare for potential litigation. The attorney took statements from the survivors of the accident. Later, after litigation commenced, the plaintiffs demanded discovery of the attorney's interview notes and witness statements.[10]

The Supreme Court held that "written materials obtained or prepared by an adversary's counsel with an eye toward litigation" were protected from discovery because of "the general policy against invading the privacy of an attorney's course of preparation."[11] In support of this conclusion the Court reasoned:

> In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the frame-

7. *Id.* at 598 (Becker, J., dissenting).
8. *Id.* (Becker, J., dissenting).
9. 329 U.S. 495 (1947).
10. *Id.* at 498-99.
11. *Id.* at 511-12.

> work of our system of jurisprudence to promote justice and to protect their client's interests.[12]

The Court called these protected materials the lawyer's work product. It continued:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[13]

The purpose of the Court's work product doctrine was to protect the adversary system and facilitate the administration of justice.[14]

Hickman distinguished different degrees of work product. While a showing of necessity would be sufficient to discover ordinary work product, such as witnesses' written statements,[15] the Court held that no showing of necessity could be made under the circumstances of the case to justify production of the attorney's mental impressions.[16] This distinction between the standards of discovery for ordinary or fact work product and mental impression or opinion work product has been more clearly established in lower court cases after *Hickman*.[17]

Hickman's holding, including the varied treatments of different kinds of work product, was codified in the 1970 amendments to the Federal Rules of Civil Procedure.[18] Discovery of

---

12. *Id.* at 510-11.

13. *Id.* at 511.

14. *See generally id.* at 514-19 (Jackson, J., concurring).

15. 329 U.S. at 512.

16. *Id.*; *see also* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE ¶ 2022 (1970).

17. *E.g.*, Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970) ("Of course, the less the lawyer's 'mental processes' are involved, the less will be the burden to show good cause [for discovery]."), *aff'd by an equally divided Court*, 400 U.S. 348 (1971).

18. *See* FED. R. CIV. P. 26 advisory committee note, *reprinted in* 48 F.R.D. 487, 499-502 (1970). The text of 26(b)(3) pertinent to this note states:

> 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 his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a

ordinary work product requires a "showing that the party seeking discovery [have] a substantial need of the materials in the preparation of his case and that he [be] unable without undue hardship to obtain the substantial equivalent of the materials by other means." On the other hand, "mental impressions, conclusions, opinions [and] legal theories" are to be protected from disclosure.[19]

Since the adoption of Rule 26(b)(3) in 1970, the federal courts have approached the protection of opinion work product in different ways. One approach is absolute protection. One of the most frequently cited illustrations of this view is found in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*.[20] In *Duplan*, the Fourth Circuit asserted that the "whole tenor of the *Hickman* opinion" was the Court's concern "with protecting the thought processes of lawyers and thus the very adversary system."[21] The adversary system would be damaged if attorneys' mental impressions were discoverable. Such a policy would discourage attorneys from recording their thoughts, resulting in "justice for no one, and truth, instead of being more readily ascertainable, [becoming] lost in the murky recesses of the memory in the minds of men, who, after all, are human and subject to the human frailty of rationalization."[22] The court further held that absolute protection of opinion work product followed from the language of Rule 26(b)(3), which commands "protect[ion] against disclosure of mental impressions, conclusions, opinions [and] legal theories" even when a court orders discovery of work product upon the necessary showing of substantial need and undue hardship.[23]

---

showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

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

20. 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

21. *Id.* at 734.

22. *Id.* at 736; *cf. Hickman*, 329 U.S. at 511.

23. 509 F.2d at 734-35. See C. WRIGHT & A. MILLER, *supra* note 16, § 2026, which the court cited. *See also In re* Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973) ("[T]he work product sought in this case is absolutely, rather than conditionally, protected."); United States v. Chatham City Corp., 72 F.R.D. 640, 643 n.3 (S.D. Ga. 1976) (Rule 26 mandates that "the impressions, opinions and conclusions" of an attorney are to be absolutely protected); *In re* Grand Jury Investigation, 412 F. Supp. 943, 949 (E.D. Pa. 1976) (memorandum of phone conversation between attorney and witness is "so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure"). But see Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333,

Other courts have followed something less than an absolute protection standard. They either recognize certain rare exceptions to absolute protection or hesitate to recognize absolute protection in theory but follow it in practice.

The Supreme Court gave this latter approach authoritative support in *Upjohn Co. v. United States.*[24] The lower courts had ordered production of an attorney's interview memoranda. The Court held that 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."[25] The Court continued: "While we are not prepared at this juncture to say that such material is always protected by the work product rule, we think a far stronger showing of necessity and unavailability by other means . . . would be necessary to compel disclosure."[26]

The Eighth Circuit, prior to *Upjohn,* declined to declare opinion work product absolutely undiscoverable because "there may be rare situations, yet unencountered by this court, where weighty considerations of public policy and a proper administration of justice would militate against the nondiscovery of an attorney's mental impressions."[27] But it did mention some of the "weighty considerations" that would be relevant in determining whether to order discovery. These include the type of proceeding in which discovery is sought[28] and the "nature of and necessity for the desired material."[29] This second consideration may refer to the number or degree of a lawyer's mental impressions or opinions in a document. At least two other courts have held that this is a relevant consideration in determining whether to order discovery of opinion work product.[30]

337-41 (1978), for a criticism of *Duplan* and the absolute protection approach as being contrary to *Hickman* and Rule 26(b)(3).

24. 449 U.S. 383 (1981).

25. *Id.* at 401.

26. *Id.* at 401-02.

27. *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977).

28. *See In re* Grand Jury Proceedings, 473 F.2d 840, 849 (8th Cir. 1973). For example, considerations of work product discovery may be different in civil and criminal cases. Comment, *"Work Product" in Criminal Discovery,* 1966 WASH. U.L.Q. 321, 335-44; *see also* United States v. Brown, 478 F.2d 1038, 1041 (7th Cir. 1973) ("The strong public interest as expressed by Congress in enforcement of the Internal Revenue Act may, however, be relevant in considering the degree of necessity which need be shown prior to the enforcement of an order to produce.").

29. *In re* Murphy, 560 F.2d 326, 336 n.19 (8th Cir. 1977).

30. Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd*

In spite of this uncertainty over the level of protection to be given opinion work product, two well-settled exceptions to absolute or near absolute protection exist.[31] First, "when the activities of counsel are inquired into because they are at issue in the action before the court, there is cause for production of documents that deal with such activities, though they are 'work product.' "[32] This exception is explained in *Bird v. Penn Central Co.*[33] Lloyd's of London underwriters sought to rescind two insurance policies covering defendant Penn Central. As grounds for rescission, they alleged misrepresentation and omissions in the application for insurance. Penn Central asserted that the plaintiffs were estopped from bringing an action because they knew the grounds for rescission long before they sued. Penn Central requested document production, including some of plaintiff's attorneys' work product, to demonstrate this foreknowledge.[34]

The court found that "only through discovery of information in the hands of plaintiffs, and their agents, can defendants substantiate their defense."[35] Because the mental impressions, legal theories, and conclusions of counsel were at issue in the case and the need for production was compelling, the court made an exception to the usual protection standard of Rule 26(b)(3).[36]

The other recognized exception to the strict protection standard is applied when an attorney perpetrates a crime or fraud.[37] The law allows no privilege when " 'the relation giving birth to it has been fraudulently begun or fraudulently continued.' Therefore, an attorney's opinion work product cannot be privileged if

---

by an equally divided Court, 400 U.S. 348 (1971); Condon v. Petacque, 90 F.R.D. 53, 54 (N.D. Ill. 1981). *Decker* was decided before the 1970 amendments to Rule 26 took effect. Therefore, it "must be resorted to with discrimination and care." C. WRIGHT & A. MILLER, *supra* note 16, § 2023, at 193.

31. *See* Note, *supra* note 23, at 341.

32. 4 J. MOORE, J. LUCAS & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 26.64[3.-2], at 26-385 (2d ed. 1984).

33. 61 F.R.D. 43 (E.D. Pa. 1973).

34. *Id.* at 43-46.

35. *Id.* at 46.

36. *Id.* at 47. For other "at issue" exception cases, see, *e.g.*, Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 931 (N.D. Cal. 1976); Truck Ins. Exch. v. St. Paul Fire and Marine Ins. Co., 66 F.R.D. 129, 135-36 (E.D. Pa. 1975); SEC v. National Student Mktg. Corp., 18 Fed. R. Serv. 2d (Callaghan) 1302, 1305 (D.D.C. 1974).

37. "Every circuit which has considered the question has held or assumed that the crime-fraud exception applies to the work product privilege." *In re* Sealed Case, 676 F.2d 793, 811 n.67 (D.C. Cir. 1982) (citations omitted).

the work was performed in furtherance of a crime, fraud, or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system."[38] Generally, the courts have held that a lawyer being investigated for criminal activity cannot use the work product protection as a shield after the prosecution has made a showing of *prima facie* fraud and extreme need.[39]

In sum, the work product doctrine protects the adversary system and facilitates administration of justice. The doctrine was propounded to secure a lawyer's privacy in his preparation for litigation. Opinion work product, the most sensitive and personal kind, is absolutely protected from discovery by some courts, and almost absolutely protected by the others.

B. Rule 26(b)(4): Expert Witness Discovery

Rule 26(b)(4)(A) is the exclusive provision for discovery of an expert who is to appear at trial. It sets up a two-step process. First, through interrogatories the discovering party may obtain the identity of "each person whom the other party expects to call as an expert witness at trial," the subject matter of the expert's expected testimony, the substance of his facts and opinions, "and a summary of the grounds for each opinion."[40] Second, upon the discovering party's motion, the court in its discretion may order any further discovery, restricted only by subsection (c) of the rule, which allows the court to require the discovering party to pay a part of the expert's fees and expenses.[41]

---

38. *Id.* at 812 (quoting Clark v. United States, 289 U.S. 1, 14 (1933)).

39. *See, e.g., In re* Int'l Sys. and Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982); *In re* John Doe Corp., 675 F.2d 482, 492 (2d Cir. 1982); *In re* Doe, 662 F.2d 1073, 1079-81 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *In re* Grand Jury Proceedings, 604 F.2d 798, 803 (3d Cir. 1979).

40. FED. R. CIV. P. 26(b)(4)(A) states:

> (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 stata 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.

41. FED. R. CIV. P. 26(b)(4)(C) states:

> 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

Prior to 1970 no consensus existed among federal courts concerning the theory or practice of expert discovery.[42] Some courts held that experts' opinions and conclusions (including reports) were discoverable.[43] Other courts held that only the facts upon which an expert based his opinions and conclusions were discoverable.[44] Yet other courts held that expert witnesses were immune from discovery except in the most compelling circumstances.[45] The rationale for this last restrictive position was variously the attorney-client privilege, the work product doctrine, and the unfairness doctrine—the injustice of compelling a party to divulge, for the benefit of the opposing party, the conclusions of a hired expert.[46]

However, this restrictive position was rejected with the adoption of Rule 26(b)(4) in 1970. The advisory committee adopted a policy of liberal expert discovery in its recognition of the procedure followed in *Knighton v. Villian & Fassio*.[47] *Knighton* held that a party must answer interrogatories identifying its experts and the subject matter on which they would testify. Then "[t]he party who served the interrogatories may proceed by any appropriate method to discover from the expert or the other party facts known or opinions held by the expert

---

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 the 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.

42. "The lack of guidelines [for expert discovery] either by decision or by rule, has led to a proliferation of various ancillary theories for the application of discovery to experts. While they have little in common, these theories generally have confined discovery to extremely narrow areas of expert information." Note, *Discovery of Experts: A Historical Problem and a Proposed FRCP Solution*, 53 MINN. L. REV. 785, 793 (1969). See generally Friedenthal, *Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962), for a criticism of the courts' application of the attorney-client privilege and the work product doctrine to defeat expert discovery.

43. *E.g.*, Franks v. National Dairy Prod. Corp., 41 F.R.D. 234 (W.D. Tex. 1966); United States v. 364.82 Acres of Land, 38 F.R.D. 411 (N.D. Cal. 1965), *modified sub nom.* United States v. Meyer, 398 F.2d 66 (1968).

44. *E.g.*, Lee v. Crown Cent. Petrol. Corp., 33 F.R.D. 11 (S.D. Tex. 1963); Walsh v. Reynolds Metal Co., 15 F.R.D. 376 (D.N.J. 1954).

45. *E.g.*, United States v. 900.57 Acres of Land, 30 F.R.D. 512 (W.D. Ark. 1962); United States v. Certain Parcels of Land, 25 F.R.D. 192 (N.D. Cal. 1959).

46. Friedenthal, *supra* note 42, at 479-88.

47. 39 F.R.D. 11 (D. Md. 1965). Judge Thomsen, author of the *Knighton* opinion, was a member of the advisory committee that drafted the 1970 amendments. C. WRIGHT & A. MILLER, *supra* note 16, § 2030, at 251 n.66; *see also* FED. R. CIV. P. 26 advisory committee note, *supra* note 18, at 504.

which are relevant to the stated subject matter and not privileged."[48] A footnote in the court's opinion explains that "any appropriate method" includes the usual depositions, interrogatories, and production of documents and things for inspection, as well as "any agreed procedure."[49] Furthermore, according to *Knighton,* Rule 26's drafters "contemplated that a party will be entitled to obtain full disclosure of an expert's opinion and the facts and reasons upon which it is based," including liberal exchange of experts' reports.[50]

Besides adopting the *Knighton* procedure, the advisory committee explicitly repudiated the notion that an expert's information is privileged "simply because of his status as an expert." The committee similarly rejected "as ill-considered the decisions which have sought to bring expert information within the work product doctrine."[51] Even though the work product of a party's "attorney, consultant, surety, indemnitor, insurer, or agent"[52] is protected from unwarranted disclosure by Rule 26(b)(3), the expert's information and work product does not benefit from a similar shield.

The foundation of the liberal disclosure rule is the idea, articulated in *Hickman* over twenty years before the 1970 amendments, that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."[53] Mutual knowledge is essential for proper cross-examination, particularly in technical cases relying heavily on expert testimony.

> In cases of this character, a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take or the data on which he will base his judgment on the stand . . . . Similarly, effective rebuttal requires advance knowledge of the line of testimony of the other side.[54]

---

48. 39 F.R.D. at 13.

49. *Id.* at 13 n.2.

50. *Id.* at 13.

51. FED. R. CIV. P. 26 advisory committee note, *supra* note 18, at 504-05.

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

53. *Hickman,* 329 U.S. at 507; *see also* United States v. Meyer, 398 F.2d 66 (9th Cir. 1968).

54. FED. R. CIV. P. 26 advisory committee note, *supra* note 18, at 503-04.

To facilitate thorough cross-examination, courts usually liberally grant discovery of documents examined by experts in preparation of their opinions. They reason that these documents affect the expert's conclusions and credibility. A discovering party without access to these documents would be unable to properly cross-examine the expert for impeachment purposes if, for example, the expert had relied on inaccurate information in forming his opinions. This result would frustrate the purpose of Rule 26(b)(4).[55]

Federal Rules of Evidence 703 and 705 underscore the need for broad expert discovery to enable complete cross-examination. Rule 703 provides that if the facts or data upon which an expert bases his opinion are "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 permits the expert to give his opinion and "reasons therefor without prior disclosure of the underlying facts or data, unless required by the court. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Rules 703 and 705 thus permit an expert to give his opinion at trial without first revealing the facts and data upon which he relied in forming that opinion. This obviates the common law practice of counsel asking the expert a hypothetical question, including all relevant facts, to elicit his expert opinion.[56] "Thus, the Federal Rules of Evidence[,] while eliminating the hypothetical question requirement[,] place the full burden of exploration of the facts and assumptions underlying the testimony of an expert witness squarely on the shoulders of opposing counsel's cross-examination."[57]

Therefore, liberal expert discovery is required to complement federal evidence rules designed to expedite the trial process. The advisory committee note to Rule 705 recognizes that

> [i]f the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge

---

55. *E.g.*, Heitmann v. Concrete Pipe Mach., 98 F.R.D. 740 (E.D. Mo. 1983); Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983); *see also Bogosian*, 738 F.2d at 589.

56. FED R. EVID. 705 advisory committee note.

57. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part One, An Analytical Study*, 1976 U. ILL. L.F. 895, 897.

> which is essential for cross-examination . . . . Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area . . . .[58]

Thus, proper application of Rules 703 and 705 is predicated on liberal expert discovery to enable opposing counsel to prepare for cross-examination.

Another important reason for broad expert discovery is the same as that for discovery itself: it helps narrow the issues, eliminates undisputed or unfounded claims, and increases the opportunities for settlement, thus making litigation more economical. Exchange of information will reveal "the weaknesses of some of a party's allegations" and disclose "underlying agreement on issues as to which the pleadings indicate a superficial disagreement. When these weaknesses and agreements have been exposed, the parties themselves may remove the surplusage through admissions and stipulations . . . ."[59] The focus is enabling counsel to present better evidence and make settlement more likely through a heightened awareness of the strengths and weaknesses of the case.

A final reason for comprehensive expert discovery is articulated in *Quadrini v. Sikorsky Aircraft Division.*[60] The court ordered production of

> [a]ll reports, memoranda, papers, notes, studies, graphs, charts, tabulations, analyses, summaries, data sheets, statistical or informational accumulations, data processing cards or worksheets, and computer generated documents, including drafts or preliminary revisions of any of the above, prepared in connection with this litigation by or under the direction or supervision of any witness whom [plaintiff] expect[s] to call as an expert witness at the trial of this matter.[61]

Over plaintiff's objection, the court held that "[d]iscovery of the reports of experts, including reports embodying preliminary conclusions, can guard against the possibility of a *sanitized presen-*

---

58. FED. R. EVID. 705 advisory committee note.

59. *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 944 (1961); *see also* FED. R. CIV. P. 26 advisory committee note, *supra* note 18, at 504 (If the party seeking discovery cannot have advance knowledge of the expert's line of testimony, "then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated.").

60. 74 F.R.D. 594 (D. Conn. 1977).

61. *Id.* at 594.

tation at trial, purged of less favorable opinions expressed at an earlier date."[62]

In spite of some early resistance in the district courts to broad expert discovery,[63] research indicates that most practitioners ignore Rule 26(b)(4) and freely exchange expert information without resort to the court.[64] However, when attorneys proceed according to the letter of the rule, courts generally are as liberal in applying it as lawyers are in ignoring it.[65]

In sum, Rule 26(b)(4)(A) provides a two-step process of interrogatories and discovery for obtaining conclusions and their factual bases from prospective expert witnesses. The rule should be liberally construed so that expert information, including depositions of experts, is freely exchanged. Such a construction aids effective cross-examination, enables counsel to focus the issues and enhance the chances for settlement, and ensures that the trier of fact receives all relevant information, including the expert's preliminary conclusions, to guard against a "sanitized presentation at trial."[66]

C. *Protection or Disclosure?*

The court in *Bogosian* was faced with denying or ordering discovery of the lawyers' opinion work product that had been

---

62. *Id.* at 595 (emphasis added).

63. *E.g.,* Breedlove v. Beech Aircraft Corp., 57 F.R.D. 202 (N.D. Miss. 1972) (because expert's report was prepared in anticipation of litigation, discovering party could obtain expert's report only on a showing of 26(b)(3) substantial need); Wilson v. Resnick, 51 F.R.D. 510 (E.D. Pa. 1970) (answers to 26(b)(4)(A)(i) interrogatories were sufficient and no further expert discovery would be ordered without 26(b)(3) showing of need).

64. Graham, *Discovery of Experts Under Rule 26(b)(4) of the Federal Rules of Civil Procedure: Part Two, An Empirical Study and a Proposal,* 1977 U. ILL. L.F. 169, 177-79. Professor Graham sent questionnaires to practitioners and judges around the country:

> The results of the survey indicate that the actual practice of discovery of expert witnesses expected to be called at trial varies widely from the two-step procedure of Rule 26(b)(4)(A). The interrogatory overwhelmingly is recognized as a totally unsatisfactory method of providing adequate preparation for cross-examination and rebuttal. In practice, full discovery is the rule, and practitioners use all available means of disclosure including both the discovery of expert's reports and depositions.

Id. at 172.

65. *E.g.,* Heitmann v. Concrete Pipe Mach., 98 F.R.D. 740, 740 (E.D. Mo. 1983); Herbst v. International Tel. & Tel. Corp., 65 F.R.D. 528, 530-31 (D. Conn. 1975) ("Once the traditional problem of allowing one party to obtain the benefit of another's expert cheaply has been solved, there is no reason to treat an expert differently than any other witness.").

66. See the paragraph in text preceding *supra* note 64.

shown to expert witnesses. As previously noted, opinion work product is accorded either absolute or near absolute protection from discovery. On the other hand, all documents inspected by an expert witness are typically amenable to discovery. The *Bogosian* court's decision to deny discovery set up an inflexible, and thus unsatisfactory, standard for discovery.

The absolute protection standard advanced in *Bogosian* is unsatisfactory because cases may arise involving counsel unduly influencing an expert. This could have an impact on how the trier of fact views the case. For example, suppose an expert for the opposing party is either unqualified or has testified on both sides of an issue several times in previous litigation. A memorandum from the opposing lawyer to this expert outlining the direction and bases of the witness's testimony, combined with the expert's lack of qualifications or past testimony, would have important impeachment value. However, such impeachment would be considerably less successful if the memorandum could not be discovered. The fundamental purpose of a trial, production of accurate evidence, requires rejection of the absolute protection standard.

Some might question the need for discovery of expert-related work product since Rules 33 and 36 provide for interrogatories and requests for admission that may inquire into the other party's lawyer's opinions and conclusions.[67] However, interrogatories often elicit no more than vague and evasive answers to questions not dealing with hard fact,[68] and Rule 36 requires no explanations for denials of requests for admission. Hence, determining the ideas an attorney has conveyed to the expert is made extremely difficult, and thorough cross-examination is hindered.

Just as absolute protection of opinion work product is unsatisfactory, so is a policy of absolute disclosure. The court in *Boring v. Keller*[69] held that work product protection is waived when the material is shown to experts "because immunized materials should not remain undiscoverable after they have been used to influence and shape testimony." The *Keller* court concluded that denying discovery in such a case would frustrate the

67. *See* FED. R. CIV. P. 26 advisory committee note, *supra* note 18, at 502.

68. *See supra* note 64.

69. 97 F.R.D. 404, 407 (D. Colo. 1983).

purpose of Rule 26(b)(4) to allow the discovering party to prepare for cross-examination and impeachment.[70]

The *Bogosian* majority ignored *Keller*. In addition, it gave, in a footnote, only cursory attention to the Federal Rule of Evidence 612 cases, which embody the policy of requiring discovery of all that an expert has viewed.[71] Rule 612 provides that an adverse party is entitled to discover a writing used to refresh a witness's memory while testifying, and to discover a writing used for the same purpose "before testifying, if the court, in its discretion, determines it is necessary in the interest of justice." Some courts have held that because all documents inspected by a witness prior to testimony will necessarily "have an impact upon the testimony of the witness," the rule's "before testifying" language should be interpreted to mean any time before testifying.[72]

In the leading Rule 612 case, *Berkey Photo, Inc. v. Eastman Kodak Co.*,[73] the court, though more hesitant than the court in *Keller*, was largely in tune with its holding:

> [I]t is disquieting to posit that a party's lawyer may "aid" a witness with items of work product and then prevent totally the access that might reveal and counteract the effects of such assistance. There is much to be said for a view that a party or its lawyer, meaning to invoke the privilege, ought to use other and different materials, available later to a cross-examiner, in the preparation of witnesses. When this simple choice emerges the decision to give the work product to the witness could well be deemed a waiver of the privilege.[74]

---

70. *Id.* at 407-08.

71. While the Rule 612 cases are not exactly on point with Rule 26(b)(4), the underlying policy and effect are the same. That policy is that "materials should not remain undiscoverable after they have been used to influence and shape testimony." *Keller*, 97 F.R.D. at 407. The effect is that this material is ordered discovered, often when it is opinion work product. *See Keller*; cases cited *infra* note 72. However, these cases are not exactly on point. Material is produced under Rule 26(b)(4) because the expert relied on it in formulating his conclusions. Material is produced under Rule 612 because it was used to refresh a witness's (not necessarily expert) memory in preparation for testimony. Nevertheless, the policy and effect of the two rules are the same and the analogy is instructive.

72. The "impact upon the testimony of the witness" language is from FED. R. EVID. 612 advisory committee note, *quoted in* Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 615 (S.D.N.Y. 1977); *see also* James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 144-46 (D. Del. 1982); Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8, 9-10 (N.D. Ill. 1978).

73. 74 F.R.D. 613 (S.D.N.Y. 1977).

74. *Id.* at 616. For a critique of this broad interpretation of Rule 612, see Note,

Such an absolute rule of disclosure or waiver is unsatisfactory because it contravenes the purposes of the work product doctrine by unnecessarily requiring work product disclosure. If the work product can be shown to have no impact on the expert's testimony, or if the discovering party cannot show sufficient need, discovery is unnecessary and work product should be protected.

The undesirability of both these absolute approaches indicates the usefulness of Judge Becker's middle ground: the balancing test. The trial judge should inspect the contested documents *in camera* and determine "whether the [discovering party's] interests in having this material available for cross-examination . . . outweighs the [other party's] interest in protecting this core work product."[75] Relevant considerations in this balancing test are the work product's sensitivity, the expert's reliance on the work product and its impact on his testimony, the significance of the testimony, the availability of the same information elsewhere, and the circumstances of the case.[76]

Only two reported cases besides *Keller* have specifically treated the question whether opinion work product shown to expert witnesses in formulating their opinions is discoverable. Al-

---

Interactions Between Memory Refreshment and Work Product Protection Under the Federal Rules, 88 YALE L.J. 390 (1978).

75. *Bogosian*, 738 F.2d at 597 (Becker, J., dissenting). The quotation in the text is Judge Becker's statement of the issue in the case.

76. *See* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 612-41 (1982). "Circumstances of the case" refers to any unusual considerations that would be significant in determining the propriety of discovery. For example, in *Bogosian* the expert being deposed was not going to testify at trial; instead, his deposition was going to be entered as his testimony. Judge Becker thought that more consideration should have been given to allowing discovery because this would be the defendants' only opportunity to cross-examine.

> Were we in an ordinary discovery situation, I might go as far as the majority does in protecting the work product. Since the primary value of the communications between expert and attorney does not come from its capacity to lead to admissible evidence, *see* Fed. R. Civ. P. 26(b)(1), but rather in its value as impeachment, there is no great need early in the litigation for these documents. Thus, in the ordinary situation where the deponent will testify at trial, if at all, concerns over work product doctrine may best be resolved at an in limine hearing just prior to or during the trial. By that time, the problem may have disappeared or be more carefully focused than it is at discovery, when the issues in the case and the probative value of testimony is [sic] often uncertain. Where as here, however, the witness will apparently be unavailable at trial, the district court may not have this luxury.

Bogosian, 738 F.2d at 598 (Becker, J., dissenting).

though in neither case was there an *in camera* examination, both cases exhibited some elements of the balancing test.

In *Baise v. Alewel's, Inc.*,[77] the defendant sought correspondence between plaintiff's counsel and expert on the ground that the expert's opinion was "based on information contained in the correspondence and that it is entitled to discover the factual basis for his opinion."[78] The court ruled that the defendant was entitled to discovery "but not at the price of invading the work product of counsel" and that "attorney work product does not lose its special status merely because it is transmitted to an expert."[79] The court further ruled that the defendant had not met its burden of a specific showing of need because the expert summarized the "factual substance" of his conversation with the lawyer "which was later memorialized in a letter."[80] Under these circumstances the defendant did not need the documents because he already knew what they contained.[81]

The second case is *Thayer v. Liggett & Myers Tobacco Co.*[82] The factual situation in *Thayer* resembled *Baise*. However, the court initially seemed more receptive to a discovery request. It held that "[i]f the letters sought indeed contain facts that could be considered necessary for proper preparation for cross-examination, and if such facts are otherwise unavailable, then *Hickman* permits discovery."[83] The court acknowledged the technical nature of the case and the need for discovery and thorough cross-examination. In spite of all this, the court concluded that because the expert had been deposed and produced his report, production would not be ordered. "In this context, the mere chance that the requested letters might contain helpful factual

77. 99 F.R.D. 95 (W.D. Mo. 1983).

78. *Id.* at 97.

79. *Id.*

80. *Id.*

81. *Baise* held that because the material sought in discovery was work product, the defendant had the burden to show "substantial need" and "undue hardship" under Rule 26(b)(3). The opinion work product in question was correspondence from the lawyer containing his mental impressions, opinions, and conclusions. The Supreme Court held in *Upjohn* that "a far stronger showing of necessity and unavailability by other means" than the usual 26(b)(3) standard was required to discover opinion work product. Upjohn Co. v. United States, 449 U.S. 383, 402 (1981). But even with the relaxed standard applied by the district court, discovery was still not allowed.

82. 13 Fed. R. Serv. 2d (Callaghan) 976 (W.D. Mich. 1970). This case was decided before the 1970 amendments to Rule 26 took effect. It likely would not, however, be decided differently under the new rule. *See supra* note 30.

83. *Thayer*, 13 Fed R. Serv. 2d at 977.

information was not sufficient to require sacrifice of the protection afforded an attorney's confidential communications by the 'work product' rule."[84]

The holdings of *Baise* and *Thayer* are preferable to those of *Bogosian* and *Keller*. Erecting an absolute standard—opinion work product protection or liberal expert discovery—distorts the importance of one over the other when both are equally important. The balancing test is sensitive to the interests of both parties. In each case it attempts to determine if the facts present the "rare situation"[85] *Hickman* requires for production of opinion work product. Such an approach will ultimately achieve justice, the goal of our judicial system.[86]

IV. Conclusion

The work product protection, codified in Rule 26(b)(3), protects lawyers' mental impressions and provides them with a private sphere in which to carry on their work. The adversary system is thereby preserved. Rule 26(b)(4)(A) provides for discovery of expert opinion evidence of another party. This provision is based upon the premise that lawyers who have all the facts can more effectively cross-examine experts and expedite the trial process.

The two provisions clash when opinion work product has been shown to an expert. To let one provision completely over-

---

84. *Id.* at 978.

85. *Hickman*, 329 U.S. at 513.

86. A possible ground for objection to the proposed balancing test is that *in camera* inspection places too heavy a burden on the district court. The *Bogosian* majority raised this possibility when it stated that it did "not generally encourage extensive *in camera* examination of documents by the district court. The district courts are overburdened with discovery matters." *Bogosian*, 738 F.2d at 595-96. It continued:

> On the other hand, in the few situations where public policy requires protection of portions of a document, *in camera* inspection by the trial judge or magistrata is unavoidable. Documents claimed to contain legal theories fall within that small class of documents requiring *in camera* examination if the adversary is not satisfied with the attorney's claim of total work product protection.

Id. at 596 (citations omitted).

The Supreme Court has said that "an *in camera* review of the documents is a relatively costless and eminently worthwhile method to insure that the balance between petitioner's claims of irrelevance and privilege and plaintiff's asserted need for the documents is correctly struck." Kerr v. United States, 426 U.S. 394, 405 (1976).

Furthermore, the district court has within its discretion the power to control discovery. For example, it could require the party seeking discovery to indicate specifically why it needs each document it seeks. It also may order sanctions against any party abusing discovery for purposes of delay. *See* Fed. R. Civ. P. 37 (b), (g).

ride the other only distorts the importance of one over the other. The preferable approach is to balance the concerns and policies of each provision to achieve a fairer result.

Carlisle G. Packard

Malcolm Richard Wilkey