

2003

Pulling Skeletons from the Closet: A Look into the Work-Product Doctrine as Applied to Expert Witnesses

Charles W. Ehrhardt
cwe@cwe.com

Matthew D. Schultz
mds@mds.com

Follow this and additional works at: <https://ir.law.fsu.edu/lr>



Part of the Law Commons

Recommended Citation

Charles W. Ehrhardt & Matthew D. Schultz, *Pulling Skeletons from the Closet: A Look into the Work-Product Doctrine as Applied to Expert Witnesses*, 31 Fla. St. U. L. Rev. (2003) .
<https://ir.law.fsu.edu/lr/vol31/iss1/3>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

FLORIDA STATE UNIVERSITY LAW REVIEW



PULLING SKELETONS FROM THE CLOSET: A LOOK INTO THE
WORK-PRODUCT DOCTRINE AS APPLIED TO EXPERT WITNESSES

Charles W. Ehrhardt & Matthew D. Schultz

VOLUME 31

FALL 2003

NUMBER 1

Recommended citation: Charles W. Ehrhardt & Matthew D. Schultz, *Pulling Skeletons from the Closet: A Look into the Work-Product Doctrine as Applied to Expert Witnesses*, 31 FLA. ST. U. L. REV. 67 (2003).

PULLING SKELETONS FROM THE CLOSET: A LOOK
INTO THE WORK-PRODUCT DOCTRINE AS
APPLIED TO EXPERT WITNESSES

CHARLES W. EHRHARDT* & MATTHEW D. SCHULTZ**

I. INTRODUCTION.....	67
II. A PRELIMINARY GLIMPSE INTO THE WORK-PRODUCT DOCTRINE.....	68
III. FACT WORK-PRODUCT	71
A. <i>Disclosure of Fact Work-Product at Trial</i>	71
B. <i>Discovery of Fact Work-Product Underlying an Expert Opinion</i>	73
C. <i>Conclusions Regarding Fact Work-Product</i>	77
IV. OPINION WORK-PRODUCT.....	78
A. <i>Disclosure of Opinion Work-Product at Trial</i>	78
B. <i>Discovery of Opinion Work-Product Underlying an Expert Opinion</i>	83
C. <i>Conclusions Regarding Opinion Work-Product</i>	88
V. REFRESHING RECOLLECTION.....	89
VI. CONCLUSION	95
APPENDIX OF RELEVANT RULES & STATUTES	97

I. INTRODUCTION

Your medical or vocational expert is battling an intense cross-examination. Opposing counsel asks, “Dr. Caligari, you were hired in this case by my colleague and opposing counsel attorney Jones were you not?” “I was,” replies your expert. “And did attorney Jones furnish any documentation to you summarizing the facts of this case or setting forth his opinions about the subject of your testimony?” May you object at this point? On what grounds? Before you answer, you should consider whether this exchange occurred during trial or deposition, during a civil or criminal case, and whether in a state or federal court action; for the grounds and validity of your objections may depend upon all of the above. This brief Article explores the potential for discovering pretrial or revealing on the stand any fact and opinion work-product materials that you or your opponent might have supplied to an expert witness.¹ Though Florida courts have broached

* Mason Ladd Professor of Evidence, Florida State University College of Law. Among his many other accomplishments, Professor Ehrhardt is author of the highly regarded treatise *Florida Evidence* and the courtroom evidence manual *Florida Trial Objections*.

** J.D. with Highest Honors, Florida State University College of Law, 2002. Mr. Schultz worked as Professor Ehrhardt’s research assistant from 2000-2002. He currently serves as a judicial clerk to the Hon. Robert L. Hinkle, United States District Court, Northern District of Florida, and will join the Pensacola firm of Levin, Papantonio, Thomas, Mitchell, Echsner & Proctor in 2004.

1. The term “expert,” as used throughout this Article, refers to testifying experts.

the subject, it has received cursory and, in our view, insufficient analysis with accordingly dubious results. There are sound arguments that both fact and opinion work-product transmitted to experts may not only be revealed during trial, but may be discovered beforehand, despite contrary authority from the Florida courts. We hope, at a minimum, to alert you to some interesting and potentially devastating possibilities.

II. A PRELIMINARY GLIMPSE INTO THE WORK-PRODUCT DOCTRINE

As we survey the work product landscape, it will be important to keep in mind the nature of its essential features, including the policies underpinning its existence. Such a discussion logically begins with reference to the doctrine as originally formulated in *Hickman v. Taylor*.²

The plaintiffs in *Hickman*, a wrongful death case, served interrogatories upon the defendant seeking written and oral statements by witnesses who survived the incident as well as records, reports, and memoranda concerning the incident, including those prepared by the defense attorneys.³ The district court ordered production and the Third Circuit Court of Appeals reversed. The United States Supreme Court affirmed the Third Circuit, noting that “[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.”⁴ The *Hickman* Court sought to thwart “attempt[s], without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties.”⁵ Though the Court could not deem such materials “privilege[d],”⁶ it recognized that:

[I]t 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

2. 329 U.S. 495 (1947).

3. *Id.* at 498-500.

4. *Id.* at 510. Note here that the Court condemned only “unwarranted” intrusions into the “files and . . . mental impressions of an attorney,” suggesting that such inquiries might be warranted on different facts. *Id.* Elsewhere the Court qualified the work-product immunity as protection against “unnecessary intrusion” and “undue and needless interference” from one’s adversaries. *Id.* at 510-11.

5. *Id.*

6. *Id.* at 508.

framework of our system of jurisprudence to promote justice and to protect their clients' interests.⁷

However, the Court also recognized that "[w]here relevant and non-privileged facts remain hidden in an attorney's file" discovery could be had if those facts were deemed "essential to the preparation of one's case."⁸ The Court ultimately held that the plaintiff could make no such showing with respect to witness testimony that was equally available elsewhere.⁹ With respect to the oral testimony received by defense counsel, production of which would have divulged his personal memoranda and mental impressions, the Court likewise did "not believe that any showing of necessity can be made under the circumstances of th[e] case," thus suggesting that such a showing could be made under different circumstances.¹⁰

The *Hickman* Court's distinct treatment of witness statements and counsel's mental impressions was incorporated into the federal rules upon which Florida's work-product rule is patterned.¹¹ The Florida rule recognizes the distinction between what has come to be known as *fact* work-product and what has come to be known as *opinion* work-product, though the rule uses neither term.¹² Fact work-product is comprised of "documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent."¹³ Such materials ordinarily may be discovered only upon a showing that the party seeking discovery "has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means."¹⁴ In ordering the production of fact work-product, Florida courts must "protect against disclosure" of opinion work-product, which includes "the mental im-

7. *Id.* at 510-11.

8. *Id.* at 511.

9. *Id.* at 508-09.

10. *Id.* at 512.

11. *See, e.g.*, *Smith v. Fla. Power & Light Co.*, 632 So. 2d 696, 698 n.3 (Fla. 3d DCA 1994) ("The Florida rule on attorney work product closely resembles the federal rule; district courts of appeal may look to federal case law for guidance.") (citing *Cotton States Mut. Ins. Co. v. Turtle Reef Assocs., Inc.*, 444 So. 2d 595, 596 (Fla. 4th DCA 1984)). The federal rule governing experts was substantially amended in 1993. Florida's rule was not.

12. FLA. R. CIV. P. 1.280(b)(3) (reprinted in Appendix of Relevant Rules & Statutes following this Article). In keeping with the terminology most often employed by Florida courts, we refer throughout this Article to *fact work-product* and *opinion work-product*. Federal courts frequently refer instead to *ordinary work-product* and *core work-product*.

13. *Id.*; *see also* *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1385 (Fla. 1994).

14. *Id.*

pressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.”¹⁵

Though these are treated as distinct subsets of information, both arise from the unified policy expressed in *Hickman*, fostering thorough case preparation unfettered by freeloading adversaries.¹⁶ At odds with the protective work-product policy, as the *Hickman* Court recognized, is that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation” such that “either party may compel the other to disgorge whatever facts he has in his possession” under appropriate circumstances.¹⁷ This tension between the need for unfettered preparation and the right to discover relevant facts is heightened where an expert witness bases her opinion on work product supplied by counsel because the party offering the expert need not reveal the facts or data underlying the expert’s opinion at trial, and those facts or data need not be independently admissible.¹⁸ Rather, this critical information may be compelled only upon cross-examination, and “[i]t is assumed that the cross-examiner has the advance knowledge that is essential for effective cross-examination.”¹⁹

Accordingly, we find ourselves at the intersection of two compelling but competing interests. Balancing these interests is necessarily difficult, and Florida courts have struggled with the task, though clearly articulated results are scant. We approach the issues categorically. We first consider disclosure of fact work-product at trial and during discovery, followed by a discussion regarding disclosure of opinion work-product at trial and during discovery. We then discuss

15. FLA. R. CIV. P. 1.280(b)(3). We note here preliminarily that discovery of experts is governed not by Rule 1.280(b)(3), but by 1.280(b)(4). The work-product doctrine set forth in Rule 1.280(b)(3) is expressly “[s]ubject to the provisions of subdivision (b)(4) of this rule.” This important qualification is discussed at length below. *See infra* text accompanying notes 39, 79-86.

16. *See, e.g., Smith*, 632 So. 2d at 698 (“[T]he Supreme Court explained [in *Hickman*] that immunity from discovery was necessary to preserve the privacy of an attorney’s preparation and ensure the proper functioning of the adversarial system.”); *State v. Rabin*, 495 So. 2d 257, 263 (Fla. 3d DCA 1986) (“The protection of an attorney’s mental process is essential to the proper functioning of the adversary system. The possibility that an attorney’s work product might be revealed, even in later unrelated causes, may deter the attorney from freely recording his mental impressions, conclusions, theories, or opinions.”) (citing *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974)). *But cf. Kathleen Waits, Opinion Work Product: A Critical Analysis of Current Law and a New Analytical Framework*, 73 OR. L. REV. 385, 430 (1994) (“[T]he arguments supporting opinion work product protection have generally been dogmatic and conclusory.”).

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

18. FLA. STAT. §§ 90.704-.705(1) (2002) (Sections 90.704-.705 are reprinted in their entirety in the Appendix of Relevant Rules & Statutes following this Article).

19. FLA. STAT. ANN. § 90.705(1) (West 1999) (Law Revision Council Note, 1976). Also relevant here is Justice Jackson’s observation in *Hickman* that “[i]t . . . long has been recognized that discovery should provide a party access to anything that is evidence in his case.” 329 U.S. at 515 (Jackson, J., concurring) (citations omitted).

the relevance of section 90.613, *Florida Statutes*, governing the disclosure of materials used to refresh recollection while testifying.²⁰ Where relevant, we attempt to draw distinctions that might exist between civil and criminal proceedings; and where helpful, we refer to federal authorities for the persuasive value they possess under Florida law.²¹ We also attempt throughout the Article to maintain the distinction between an argument for waiver of work-product protections and an argument for the inapplicability of those protections, though both notions are embraced, often simultaneously. We close with a summary of our observations.

III. FACT WORK-PRODUCT

A. *Disclosure of Fact Work-Product at Trial*

Returning to our hypothetical expert Dr. Caligari, let us first suppose that she received materials constituting or including fact work-product, and that she relied upon those materials in forming her opinions. Section 90.705(1), *Florida Statutes*, states unequivocally that “[o]n cross-examination the expert shall be required to specify the facts or data” underlying her opinions. In turn, section 90.704 describes the “facts or data upon which an expert bases an opinion or inference” as including “those perceived by, or made known to, the expert at or before the trial.”²² It follows, then, that any facts or data made known to Dr. Caligari at or before trial must be revealed upon proper cross-examination during trial if Dr. Caligari’s opinion is based upon them.

There is curiously little authority assessing section 90.705 in light of the work-product doctrine, though there is no obvious reason why a work product exception might be read into the statute. Indeed, the Fourth District Court of Appeal has correctly noted:

20. Section 90.613 is reprinted in its entirety in the Appendix of Relevant Rules & Statutes following this Article.

21. See *Smith*, 632 So. 2d at 698 n.3.

22. Section 90.705 permits inquiry into facts or data *underlying* an opinion, while section 90.704 speaks in terms of facts or data upon which an expert *bases* an opinion or inference. It might be argued that the facts or data *underlying* an opinion are broader in scope than those facts or data upon which an opinion is *based*. It is reasonable, however, to harmonize these sections inasmuch as what underlies an opinion can fairly be said to be its basis, and a court should not find conflict between these sections where it is possible to do otherwise. See, e.g., *McGhee v. Volusia County*, 679 So. 2d 729, 730 n.1 (Fla. 1996) (“The doctrine of *in pari materia* requires the courts to construe related statutes together so that they illuminate each other and are harmonized.”). We often discuss the topic using the less cumbersome phrase *relied upon*. Where this phrase appears, it refers to facts or data underlying an expert’s opinions, i.e., those upon which an opinion is based, as distinguished from its use in section 90.704, *Florida Statutes*, regarding the admissibility of otherwise inadmissible facts or data “of a type reasonably relied upon by experts” in a given subject area.

Cross-examination of experts on relevant and material issues is especially important in view of the rules of evidence that permit experts to testify and express opinions without setting out in detail all of the predicates upon which the opinion or testimony may be based. Those matters are now left largely to be explored on cross-examination. Hence if cross-examination is limited . . . an expert's views and the soundness thereof may go largely untested.²³

In an analogous situation, the Fifth District Court of Appeal upheld the exclusion of expert witnesses at trial based upon their refusal during deposition to waive the attorney-client privilege with respect to facts and data underlying their opinions. The court reasoned that the experts' invocation of the privilege impeded legitimate inquiry into their opinions and thus warranted their exclusion from trial.²⁴

A similar waiver argument may be made regarding fact work-product. Where matters generated in anticipation of litigation are revealed at trial, the *Hickman* policy of unfettered preparation is not implicated inasmuch as all preparation is complete and the otherwise protected work product is voluntarily disclosed, albeit through the conduit of expert testimony. Hence, the protection is voluntarily relinquished. A different approach would undermine the rule that documents to be introduced at trial lose any claim they might otherwise enjoy to work-product status,²⁵ and would vitiate the provision of section 90.705 that permits cross-examination into the facts and data underlying an expert's opinion. It would make little sense to preclude cross-examination of an expert for fear of revealing fact work-product upon which she relied where the work product itself would enjoy no such protection.²⁶ In short, refusing to permit inquiry into fact work-product underlying an expert's opinion during trial would not further the policies giving rise to the work-product doctrine but would run afoul of the language in section 90.705, which permits broad cross-examination of experts. We may safely conclude,

23. *Dempsey v. Shell Oil Co.*, 589 So. 2d 373, 379 (Fla. 4th DCA 1991).

24. In *Stewart & Stevenson Services v. Westchester Fire Insurance Co.*, 804 So. 2d 584, 588 (Fla. 5th DCA 2002), the court found:

[T]he attorney experts' refusal to answer questions and produce documents circumvented [the opponent's] ability to uncover facts or data underlying the opinions of the experts . . . [H]aving chosen to use attorneys who were involved in the underlying proceedings, it was incumbent upon [the party] to obtain a waiver of any attorney-client privilege if it intended to present those attorneys as testifying experts.

25. *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980) ("[T]hose documents, pictures, statements and diagrams which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery.") (quoting *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108 (Fla. 1970)).

26. Alternatively, one might say that an expert could never rely at trial upon fact work-product because the expert's reliance during trial testimony upon the otherwise *work-product* materials would divest those materials of their work-product status. The result is the same in either event.

therefore, that an attorney may and should during trial cross-examination inquire into and require revelation of fact work-product that underlies an opposing expert's opinions.

B. Discovery of Fact Work-Product Underlying an Expert Opinion

Might the result differ were the cross-examination of Dr. Caligari carried out not at trial, but during a pretrial deposition? The Florida Evidence Code envisions vigorous pretrial discovery to effectuate the broad cross-examination of experts afforded under section 90.705. The Law Revision Council Note to the section states: "The cross-examiner has the opportunity to bring out the supporting data, if he should so desire. It is assumed that the cross-examiner has the advance knowledge that is essential for effective cross-examination. The judge also has the discretionary power to require preliminary disclosure."²⁷

The Florida Supreme Court arguably addressed the discoverability of fact work-product underlying expert opinions in *Reaves v. State*.²⁸ The *Reaves* case concerned the exclusion of letters "that contained work product" exchanged between a prosecutor and an expert witness.²⁹ The opinion failed to disclose whether the *work product* at issue constituted fact work-product or opinion work-product, though the statement that the attorney's letter "contained" work product tends to suggest that it comprised opinion work-product.³⁰ In any event, *Reaves* upheld the exclusion without citation to authority or further elaboration, stating that the letters were "privileged and not subject to discovery."³¹ The *Reaves* opinion thus does little to clarify the discoverability of fact work-product upon which an expert bases her opinion, and certainly cannot be said to have settled the matter. To the extent *Reaves* might be read to foreclose discoverability of fact work-product outside of the criminal context, we would disagree with its holding for reasons that will be explained soon enough.³²

27. FLA. STAT. ANN. § 90.705(1) (1999) (Law Revision Council Note, 1976).

28. 639 So. 2d 1 (Fla. 1994).

29. *Id.* at 6.

30. *Id.*

31. *Id.* In addition to referring generically to "work product," the court failed to explain what it meant by "privileged"; for the term used loosely may mean subject to a privilege that may be overcome upon proper showing, or it may mean not discoverable in any circumstances. Its use does nothing to clarify whether the letters at issue constituted fact work-product or opinion work-product.

32. If the letters at issue in *Reaves* did not constitute or include fact work-product, they necessarily constituted or included opinion work-product which *Reaves*, though anemic in its one-sentence treatment of the issue, held immune from discovery. Given that *Reaves* involved discovery in a criminal proceeding, its conclusion, though terse, would be correct. The discoverability during deposition in a criminal proceeding of opinion work-product underlying an expert opinion is addressed below. See *infra* text accompanying notes 93-95.

A case easily mistaken as dispositive on this issue is *Whealton v. Marshall*.³³ The document sought through discovery in *Whealton* was an internal law firm memorandum that included “counsel’s opinions relating to potential theories of liability, references to the expert’s opinions, and factual summaries of the patient’s medical records.”³⁴ The case did *not* involve materials supplied by a party to its expert. As such, *Whealton* stands only for the general proposition that fact work-product *reflecting* an expert opinion is, like all fact work-product, discoverable upon satisfying the need and undue hardship test of Rule 1.280(b)(3).³⁵

A different question is posed, however, where one seeks not a memorandum *reflecting* expert opinions, but materials actually *supplied to* an expert in anticipation of litigation upon which the expert has based her opinions. A cogent argument can be made along two lines for the discovery of such materials in civil actions. First is the plain language of the rule governing discovery of experts in such proceedings. Florida Rule of Civil Procedure 1.280(b)(4) permits discovery of “facts known and opinions held by experts . . . and acquired or developed in anticipation of litigation or for trial.”³⁶ Given that fact work-product is defined in Rule 1.280(b)(3) as materials “prepared in anticipation of litigation or for trial,”³⁷ Rule 1.280(b)(4) expressly contemplates discovery of any fact work-product that might be characterized as “facts known and opinions held by [an] expert[.]”³⁸ Likewise, Rule 1.280(b)(3), which governs the discovery of fact work-product generally, states that its provisions are “[s]ubject to the provisions of subdivision (b)(4) of this rule.” Rule 1.280(b)(3) thus subordinates its general work product discovery language in deference to the more specific provisions of 1.280(b)(4) governing discovery of facts known and opinions held by experts,³⁹ implicitly recognizing the im-

33. 631 So. 2d 323 (Fla. 4th DCA 1994).

34. *Id.* at 325. The case also addressed summary opinion notes drafted by an expert, but those were deemed protected under the medical malpractice presuit investigation statute and thus were not analyzed under the work-product doctrine. *See id.*

35. *Id.* (citing *State v. Rabin*, 495 So. 2d 257, 263 (Fla. 3d DCA 1986)). The matters constituting opinion work-product remained inviolate, of course.

36. FLA. R. CIV. P. 1.280(b)(4).

37. *Id.* at 1.280(b)(3).

38. *Id.* at 1.280(b)(4); *see also* *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1385 (Fla. 1994). *But see* *Fields v. Cannady*, 456 So. 2d 1208, 1208 (Fla. 5th DCA 1984) (holding that (apparently fact) work-product was not discoverable where “it does not affirmatively appear from a reading of [the expert’s] deposition that he used [the work-product] information . . . to form his opinion testimony”) (split panel opinion).

39. The pre-1993 federal rule included nearly identical language that was subject to much debate in the *opinion* work-product context. Federal courts split over the question of whether the phrase “[s]ubject to the provisions of subdivision (b)(4)” modified only the sentence in which it was contained, i.e., whether it merely subordinated (b)(3)’s fact work-product language to Rule (b)(4), or whether it also modified the next sentence pertaining to opinion work-product as well. This is explored below with respect to opinion work-product;

portance the Law Revision Council attached to vigorous pretrial discovery of the facts and data underlying a testifying expert's opinions.⁴⁰ Note additionally that the "need and undue hardship" requirement for production of fact work-product is contained in the fact work-product language of 1.280(b)(3), but not 1.280(b)(4). It follows that discovery of fact work-product supplied to an expert is not contingent upon a showing of need and undue hardship. Rather, it is discoverable as a matter of right.⁴¹

There is in addition to the plain language of Rule 1.280(b)(4) a more tortuous, but equally compelling, argument for pretrial discovery of fact work-product relied upon by experts that would apply equally to criminal proceedings. This alternative route hops across the relevant statutes and procedural rules, as one would stepping stones, toward a conclusion of discoverability.⁴² This *stepping stone* analysis begins with Rule 1.280(b)(4), which states that facts and data known to experts may be discovered "only" as outlined in the rule. Rule 1.280(b)(4)(A)(ii) specifies that a testifying expert may be deposed "in accordance with Rule 1.390." In turn, Rule 1.390(b) states that "[t]he testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions." The rules for taking depositions are set out in Rule 1.310, which states expressly that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial."⁴³ We may thus turn to section 90.705(1), *Florida Statutes*, which states: "On cross-examination the expert shall be required to

but for present purposes we note there was never any question whether the *fact* work-product language was subordinated to the provisions of (b)(4). See, e.g., *B.C.F. Oil Ref., Inc. v. Consol. Edison Co. of N.Y.*, 171 F.R.D. 57, 62-63 (S.D.N.Y. 1997) ("There is ample authority that any facts provided to an expert, even if provided by an attorney, are required to be disclosed.") (citing pre-1993 federal discovery cases and discussing evolution of the doctrine); see generally Christa L. Klopfenstein, Note, *Discoverability of Opinion Work-Product Materials Provided to Testifying Experts*, 32 IND. L. REV. 481, 488-92 (1999).

40. FLA. STAT. ANN. § 90.705 (1999) (Law Revision Council Note, 1976). See also BRUCE J. BERMAN, *FLORIDA CIVIL PROCEDURE* § 280.3[4][b] (2002) ("A party may discover facts and opinions of experts who are expected to testify at trial, so long as they are otherwise admissible (they must be relevant and not privileged), even if such facts or opinions were developed in anticipation of trial."); HENRY P. TRAWICK, JR., *TRAWICK'S FLORIDA PRACTICE & PROCEDURE* § 16-3.1, at 263 (2001) ("A party may now discover both facts and opinions held by experts who are expected to testify at trial if they are relevant to the subject matter and are not privileged even if required or developed in anticipation of litigation or for trial.").

41. Here again we note that fact work-product supplied to and relied upon by a testifying expert will ultimately be revealed at trial, albeit in the highly refined form of expert opinion testimony. This diminishes any claim of work-product protection that the materials might otherwise enjoy. A question remains whether this logic could extend beyond documentary or other tangible evidence.

42. As discussed below, this *stepping stone* analysis applies equally to the discovery via deposition of opinion work-product underlying the opinions of testifying experts.

43. FLA. R. CIV. P. 1.310(c) (reprinted in its entirety in the Appendix of Relevant Rules & Statutes following this Article).

specify the facts or data” underlying her opinions and inferences.⁴⁴ Section 90.704, *Florida Statutes*, clarifies the phrase “facts or data” as including “those perceived by, or made known to, the expert at *or before* the trial.” It follows, then, that your expert may be required—at least during deposition, though not by interrogatories—to reveal all fact work-product materials made known to her which underlie any of her opinions, i.e., any upon which her opinion is based.⁴⁵

Florida Rule of Criminal Procedure 3.220(h)(1) states that “[e]xcept as provided herein, the procedure for taking the deposition, including the scope of the examination . . . shall be the same as that provided in the Florida Rules of Civil Procedure.” Our *stepping stone* approach thus applies in the criminal context as well. That is to say, section 90.705 applies to depositions of testifying experts in criminal cases. There may be specific exemptions within the criminal procedural rules that narrow the otherwise broad scope of fact work-product materials disclosable under section 90.705,⁴⁶ but these may be addressed on a case-by-case basis and do not diminish the general principle that section 90.705 applies during expert depositions in criminal cases.

Notably, the range of fact work-product discoverable before trial—at least in the civil context—may prove even broader than that which may be elicited during cross-examination at trial. Rule 1.280(b)(4), by

44. Recall that the *Stewart & Stevenson* case applied section 90.705 to pretrial deposition of a party's experts in upholding a motion in limine that excluded their testimony for failure to divulge privileged materials. 804 So. 2d 584, 588 (Fla. 5th DCA 2002).

45. It has been suggested that documentary evidence discoverable of an expert might be limited to those matters set forth in Rule 1.280(b)(4)(A)(iii). See James B. Murphy, Jr., *Discovery of Experts*, in BUSINESS LITIGATION IN FLORIDA § 8.6 (Fla. Bar 2001). As noted in that text, this language codifies the holding of *Elkins v. Syken*, 672 So. 2d 517 (Fla. 1996). It is meant to limit the intrusiveness of financial discovery and should not serve as a general limitation on the discovery of facts and data underlying an expert's opinions. Indeed, Rule 1.280(b)(4)(A)(ii) permits depositions in accordance with Rule 1.390, which in turn authorizes depositions in accordance with Rule 1.310, which permits issuance of a subpoena duces tecum for production of documents at the deposition of a non-party. See FLA. R. CIV. P. 1.310(b)(5).

46. See, e.g., *Geralds v. State*, 601 So. 2d 1157, 1160-61 (Fla. 1992) (holding that crime lab analyst's notes were exempt from disclosure as they were not statements of an expert as contemplated in Rule 3.220 but instead were notes from which a police or investigative report was compiled (relying on fact that expert was a law enforcement officer)); see also *Terry v. State*, 668 So. 2d 954, 959-60 (Fla. 1996) (applying *Geralds'* rationale to notes composed not in the field, but in the forensic expert's lab); *Snow v. Fowler*, 662 So. 2d 1295, 1296-97 (Fla. 3d DCA 1995) (deeming notes and draft opinions by a defense expert nondiscoverable under Florida Rule of Civil Procedure 3.220) (Florida Rule of Civil Procedure 3.220 is reprinted in its entirety in the Appendix of Relevant Rules & Statutes following this Article). These cases do not deal expressly with fact work-product supplied by an attorney to an expert; however, they reveal the possibility that while fact work-product may be discoverable during deposition as a governing proposition, the criminal rules may be construed to provide for specific exemptions from the general rule of discoverability. Additionally, Rule 3.220(g)(1) precludes discovery of opinion work-product in criminal cases. See *infra* text accompanying notes 92-95.

its plain language, permits discovery of “facts *known* and opinions held by experts.”⁴⁷ In contrast, section 90.705, which governs cross-examination, permits inquiry into those facts and data *underlying* an expert’s opinion, while section 90.704 speaks to facts and data upon which an expert has *based* an opinion or inference.⁴⁸ In keeping with the general maxim that discoverability is broader than admissibility at trial, the plain language of Rule 1.280(b)(4) would permit inquiry into any fact work-product *known* to an expert regardless of whether that material forms an outright basis for the expert’s opinions or inferences.⁴⁹ In comparing this with our *stepping stone* analysis, however, we must recall that sections 90.704-.705 are among the *stones* in the *stepping stone* approach and thus may serve to limit discovery of fact work-product to those facts and data *underlying* the expert’s opinion. Therefore, the breadth of discoverability—reaching to facts *known* as opposed to facts *underlying* an expert’s opinion—may depend upon whether one relies on the plain language of Rule 1.280(b)(4) in permitting discovery of facts known to an expert or whether one employs the *stepping stone* approach, which would limit discovery to facts underlying the expert’s opinion. Ultimately, both approaches support the broader proposition that fact work-product is discoverable.

C. Conclusions Regarding Fact Work-Product

In sum, the procedural rules and Evidence Code arguably permit the revelation of fact work-product *known* to a testifying expert (if elicited during discovery) and, in any event, afford discovery of fact work-product *underlying* an expert’s opinion (whether during discovery or at trial), with potential rule-specific exceptions in the criminal context. Despite our recognition that broad discovery and cross-examination may alter the character, and perhaps the flow, of information supplied by a party to its expert, our conclusions prove most sensible. The Evidence Code does not require an expert to reveal the foundation for her opinions on direct examination. Rather, the Code envisions robust pretrial discovery and effective cross-examination of

47. FLA. R. CIV. P. 1.280(b)(4) (emphasis added).

48. See FLA. STAT. §§ 90.704-.705 (2002).

49. The *Stewart & Stevenson* opinion relied upon both section 90.705 and Rule 1.280(b)(1) in upholding exclusion of experts for their failure to divulge during pretrial deposition privileged communications upon which their opinions relied. See 804 So. 2d at 587-88. Even under such a reading, discovery obviously could be had only for matters reasonably calculated to lead to the discovery of admissible evidence—a standard readily satisfied when inquiring into the facts and data underlying an opposing expert’s opinions. *But see* *Fields v. Cannady*, 456 So. 2d 1208, 1208 (Fla. 5th DCA 1984) (holding that (apparently fact) work-product was not discoverable where “it does not affirmatively appear from a reading of [the expert’s] deposition that he used [the work-product] information . . . to form his opinion testimony”) (split panel opinion). An intriguing but apparently unanswered question is whether this logic would reach intangible evidence and communications.

every ground upon which an expert relies in rendering her opinions before the jury. Given that virtually all materials relied upon by an expert in formulating opinions are generated or prepared in anticipation of litigation, it is difficult to imagine a viable alternative approach. The result also keeps with the broader work-product policy, which affords no protection to matters sought to be introduced at trial.⁵⁰

We know at this point, therefore, that when your expert, Dr. Caligari, is asked about matters comprising work product, whether during deposition or at trial, you are without an effective objection to the extent that the question elicits fact work-product underlying her opinions, or perhaps even fact work-product known to her. This holds true both in the civil and criminal contexts. A more difficult question is whether your opponent can elicit from Dr. Caligari those facts or data supplied to her which constitute your *opinion* work-product. On this issue, Florida courts have spoken more specifically, though perhaps not more definitively.

IV. OPINION WORK-PRODUCT

A. Disclosure of Opinion Work-Product at Trial

The first case of note to address opinion work-product possessed by experts was *Gore v. State*,⁵¹ a criminal case in which the state demanded production during deposition of two letters provided by the defendant's attorney to his testifying mental health expert. The Fourth District Court of Appeal held that the letters—a twenty-two page summary of defendant's testimony in a related case and a five page chronology of events—contained opinion work-product and thus were not discoverable.⁵² The court then addressed, albeit in dicta, section 90.705, which permits cross-examination into the "facts or data" underlying an expert's opinion. Section 90.705, it said, does not "allow the prosecutor to find out before trial precisely what the defendant's lawyer has told his expert witness."⁵³ The court did not say

50. An additional wrinkle here is whether the facts *known to* an expert or *underlying* an expert's opinion would be limited to the facts themselves or to the source documents, or at least those in the expert's possession, and whether the answer might differ were the documents elicited during deposition rather than trial. On this point, see generally CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 704.1 (2002).

51. 614 So. 2d 1111 (Fla. 4th DCA 1992).

52. *Id.* at 1113-14.

53. *Id.* at 1115. *But see Stewart & Stevenson*, 804 So. 2d at 587-88 (applying right of vigorous section 90.705 cross-examination to pretrial deposition). The *Stewart & Stevenson* approach is correct in light of the *stepping stone* analysis, which concludes that section 90.705 applies during depositions, both civil and criminal. This conclusion also comports with the intent of the Code. FLA. STAT. ANN. § 90.705(1) (1999) (Law Revision Council Note, 1976) ("The cross-examiner has the opportunity to bring out the supporting data, if he should so desire. It is assumed that the cross-examiner has the advance knowledge that

whether production of the letters could be compelled during cross-examination at trial, though its opinion suggests that they might be.⁵⁴ Indeed, *Gore* reached its holding on the pretrial discovery issue by distinguishing *Johnson v. State*,⁵⁵ a case in which the Florida Supreme Court permitted a broad and invasive cross-examination at trial of a defendant's mental health expert on the basis that "it is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis."⁵⁶ Given that the documents relied upon by the expert in *Gore* were histories prepared by defense counsel, it seems that these matters could be revealed upon cross-examination at trial.⁵⁷

The *Gore* opinion thus prohibited pretrial discovery of opinion work-product transmitted to a testifying expert by defense counsel in a capital criminal case while suggesting that such matters might properly be elicited at trial. Such matters should indeed be admissible at trial pursuant to section 90.705, which does not include a work-product exception when speaking of a litigant's right to elicit upon cross-examination the facts and data underlying an expert's opinion. This interpretation is consistent with the work-product doctrine as it was originally conceived in *Hickman*. Recall that the *Hickman* Court sought to thwart "attempt[s], without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties."⁵⁸ Eliciting opinion

is essential for effective cross-examination. The judge also has the discretionary power to require preliminary disclosure."). The portion of *Gore* dealing with pretrial *discoverability* of opinion work-product is addressed in more detail below. See *infra* text accompanying notes 70-91.

54. *Gore*, 614 So. 2d at 1115 ("If anything, it [section 90.705] delays such a disclosure until the witness is in court and testifying at the trial or proceeding.") (dicta).

55. 608 So. 2d 4 (Fla. 1992).

56. *Gore*, 614 So. 2d at 1114 (quoting *Johnson*, 608 So. 2d at 10-11).

57. *Id.* at 1115 (dicta). See also *Johnson*, 608 So. 2d at 10-11; *Jones v. State*, 612 So. 2d 1370, 1374 (Fla. 1992) ("The defense opened the door to this testimony [on cross-examination] through the expert's reliance on Jones' background, and the court did not err in admitting this testimony."). Both *Johnson* and *Jones* cite to *Parker v. State*, 476 So. 2d 134 (Fla. 1985). In *Smith v. State*, 26 Fla. L. Weekly D798, D798 (Fla. 3d DCA Mar. 19, 2001), *vacated on reh'g*, 823 So. 2d 145 (Fla. 3d DCA 2002), the court distinguished *Parker* on grounds that it pertained to trial testimony rather than deposition testimony. *Smith* relied upon *Gore* for the proposition that section 90.705 does not extend to deposition testimony; a conclusion with which we disagree. See *Smith*, 26 Fla. L. Weekly at D798. It would seem, however, that even if section 90.705 applies to deposition testimony in criminal cases, the work-product exception contained in Florida Rule of Criminal Procedure 3.220(g)(1) would preclude inquiry into opinion work-product underlying a testifying expert's opinion in a criminal case. See *infra* text accompanying notes 92-94 (Florida Rule of Criminal Procedure 3.220 is reprinted in its entirety in the Appendix of Relevant Rules & Statutes following this Article). Perhaps not incidentally, the *Smith* panel granted rehearing, vacated its opinion, and denied certiorari without further comment. See *Smith v. State*, 823 So. 2d 145, 145 (Fla. 3d DCA 2002).

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

work-product from an opposing expert on the stand is hardly tantamount to the freeloading behavior sought to be prohibited in *Hickman*. Quite the contrary, Florida courts recognize the vital importance of thorough and effective cross-examination, particularly where experts are concerned.⁵⁹ The *Hickman* Court condemned only “unwarranted inquiries into the files and the mental impressions of an attorney.”⁶⁰ Effective cross-examination not only is warranted, it is expressly envisioned by and encouraged in section 90.705. Moreover, by the time of trial there is little to protect in the way of counsel’s litigation strategy, for the strategy—at least insofar as the expert’s role is concerned—has reached fruition. By the time of trial, it seems that the interests to be balanced are between those of a litigation strategy that is unfolding through the expert’s testimony versus the possibility that the expert is serving as a mouthpiece for the attorney’s personal view of the case. One commentator has observed:

Encouraging free thinking and full investigation of the usefulness of legal strategies justifies work product protection only as to the development of the legal information. Once the work product materials are created, the work product policies provide no rationale for protecting further uses of the material, if those uses do not themselves constitute work product. Putting work product material relating to the subject of testimony in the hands of a testifying expert can have only two purposes: to inform the expert regarding factual aspects of the litigation that might affect the expert’s opinion, or to influence or prompt the expert to adhere to an opinion that favors counsel’s legal theory. Neither act of disclosure creates or aids the creation of legal information.⁶¹

Consider *Gray v. Russell Corp.* in this regard.⁶² In *Gray*, the First District Court of Appeal held that a hearing officer did not abuse his discretion by excluding an expert’s testimony where the expert blindly relied upon statistical data compiled by an attorney’s office

59. See, e.g., *Dempsey v. Shell Oil Co.*, 589 So. 2d 373, 378-79 (Fla. 4th DCA 1991).

60. 329 U.S. at 510 (emphasis added).

61. Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 785 (1994) (citations omitted). The Supreme Court remarked in *United States v. Nobles*, 422 U.S. 225, 239 (1975), that “the concerns reflected in the work-product doctrine do not disappear once trial has begun.” While this undoubtedly is true, it carries less force where the work-product is supplied to an expert and advantageously reformulated in testimony that is unfolding at the very moment when the work-product is sought to be revealed. In other words, although a lawyer’s mental impressions may be jealously guarded even through the close of trial, they have reached fruition once they take the form of expert testimony, and cross-examination upon them not only is appropriate, but empowers the jury to honestly assess the testimony, which is, after all, a jury’s primary function.

62. 681 So. 2d 310, 315 (Fla. 1st DCA 1996).

(indeed, by the attorney's paralegal).⁶³ Without effective cross-examination, faults such as these in the foundation of an expert's opinions could not be detected, and outright manipulation of experts would go unchecked. To the extent an expert is serving as a mouthpiece for counsel, notions of waiver again come into play, for counsel should not be permitted to use the work-product doctrine as a shield against discovery of the very theories that he intends to have his expert parrot before the jury. In this regard the United States Court of Appeals for the Federal Circuit recently observed:

[W]e are quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party. . . . [B]ecause any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver to the same extent as with any other disclosure.⁶⁴

Though this observation was made with respect to discovery, it is, if anything, more compelling in the trial context. In short, "a jury is entitled to know everything that influenced an expert's opinion in order to assess his credibility," and this should include those opinions and theories with which an attorney has influenced his or her experts.⁶⁵ Florida's Evidence Code recognizes this principle by its endorsement of vigorous cross-examination; so, too, have Florida courts, at least in principle.⁶⁶

63. *Id.* at 314-15 (noting also that the expert had collated statistical data based upon the manner in which counsel had "characterized" certain subjects of the expert's statistical analysis).

64. *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375 (Fed. Cir. 2001) (citations omitted); *see also Nobles*, 422 U.S. at 240 (noting that a criminal defendant could "no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination").

65. *Constr. Indus. Servs. Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43, 51 (E.D.N.Y. 2001) (quoting *Barna v. United States*, 1997 WL 417847 (N.D. Ill. 1997)); *see also Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 395 (N.D. Cal. 1991) ("Knowing that some or all of the reasoning and opinion that is being presented by an expert is not her own, but is a lawyer's, might well have an appreciable effect on the probative value the trier of fact ascribes to the expert testimony.").

66. *See Jones v. State*, 612 So. 2d 1370, 1374 (Fla. 1992) (approving decision to permit extensive cross-examination into background materials underlying expert opinion, stating: "[I]t is proper for a party to fully inquire into the history utilized by the expert to determine whether the expert's opinion has a proper basis." (quoting *Parker v. State*, 476 So. 2d 134 (Fla. 1985)); *Johnson v. State*, 608 So. 2d 4, 10-11 (Fla. 1992) (permitting cross-examination concerning otherwise inadmissible criminal history relied upon by expert); *Muehleman v. State*, 503 So. 2d 310, 315 (Fla. 1987) ("[W]e once again affirm the proposition that the bottom line concern in questions involving the admissibility of evidence is relevance. The evidence became relevant when a psychiatric expert witness for the defense stated that he had considered the report in formulating his opinion.") (citations omitted);

It may be added that disclosure at trial would of course affect only testifying experts. A party may still retain a non-testifying expert to whom all manner of opinion work-product might be communicated with impunity.⁶⁷ It is true that with non-testifying experts come additional litigation costs.⁶⁸ But this is ameliorated somewhat by the fact that the testifying expert also charges for the time spent discussing what otherwise might be discussed with a non-testifying expert. The cost argument also ignores the entire class of cases in which non-testifying experts are employed regardless of the rule concerning disclosure of opinion work-product. In the final analysis, a rule permitting disclosure at trial may admittedly impose additional cost to some litigants in some cases, but the potential benefit applies in all cases at all times, whether the benefit be the revelation of the extent to which an attorney has formulated his expert's opinions or the normative consequence that the frequency of expert manipulation will diminish for fear of revelation.⁶⁹

Policy arguments aside, a rule of disclosure would comport with the intent and letter of the Evidence Code and its conception of robust cross-examination of experts. It is not foreclosed by Florida case law and, indeed, the principle is endorsed by it. We may conclude, then, that despite the visceral reaction most attorneys experience when considering disclosure of opinion work-product, it may be elicited upon cross-examination at trial where it constitutes facts or data underlying an expert's opinion, whether civil or criminal, pursuant to section 90.705, *Florida Statutes*.

see also *Stewart & Stevenson Servs. v. Westchester Fire Ins. Co.*, 804 So. 2d 584, 588 (Fla. 5th DCA 2002):

[T]he attorney experts' refusal to answer questions and produce documents circumvented [the opponent's] ability to uncover facts or data underlying the opinions of the experts . . . [H]aving chosen to use attorneys who were involved in the underlying proceedings, it was incumbent upon [the party] to obtain a waiver of any attorney-client privilege if it intended to present those attorneys as testifying experts.

Id.; *Gore v. State*, 614 So. 2d 1111, 1115 (Fla. 4th DCA 1992) ("If anything, [section 90.705] delays such a disclosure until the witness is in court and testifying at the trial or proceeding.") (dicta).

67. Facts known to and opinions held by a non-testifying expert are not subject to disclosure absent a showing of "exceptional circumstances." FLA. R. CIV. P. 1.280(b)(4)(B); *Muldrow v. State*, 787 So. 2d 159, 160 (Fla. 2d DCA 2001) (citing *Myron v. Doctors Gen., Ltd.*, 573 So. 2d 34 (Fla. 4th DCA 1990)).

68. *See, e.g.*, *Krisa v. Equitable Life Assur. Soc'y*, 196 F.R.D. 254, 259 (M.D. Pa. 2000) (noting that the non-testifying witness rationale "ignores the economic burdens retaining an extra expert would place on many litigants [which] . . . would necessarily disadvantage litigants without the resources to retain testifying and non-testifying experts").

69. In considering policy ramifications, also keep in mind the distinction between transmission of attorney work-product to the expert and expert transmission to the attorney, e.g., for edification purposes.

B. Discovery of Opinion Work-Product Underlying an Expert Opinion

More difficult still is the question of discovering opinion work-product. Though discovery ordinarily is broader than admissibility at trial, the waiver argument is more attenuated during pretrial discovery. More important, you may recall the dicta in *Gore* that opinion work-product may be elicited at trial, but the court flatly refused to permit discovery of opinion work-product during pretrial deposition. Section 90.705, said the *Gore* court, does not “allow the prosecutor to find out before trial precisely what the defendant’s lawyer has told his expert witness.”⁷⁰ You might also recall that the Florida Supreme Court’s opinion in *Reaves* deemed unspecified “work-product” materials as “privileged and not subject to discovery.”⁷¹ A similar ruling was issued in *Smith v. State*.⁷² In *Smith*, the state’s order demanded “all documentation, reports, statements and any other item relied upon by the expert in order to formulate his opinion.”⁷³ The court cited *Gore* in holding that section 90.705 gives no right to pretrial disclosure of facts on which an expert’s opinion is based.⁷⁴ It also noted that production of the materials would reveal the attorney’s selection of which documents were important, which would run afoul of the general rule that a “group of documents, as a discrete unit, [is] immune from discovery.”⁷⁵ Finally, *Smith* skirted an apparently contrary decision in *Eller Media v. State*⁷⁶ because *Eller Media* involved

70. 614 So. 2d at 1115. This may well be true in the criminal context, but not for the reasons set forth in *Gore*. As discussed below, section 90.705 applies to expert depositions in criminal cases; but the criminal procedural rules, specifically Rule 3.220(g)(1), may preclude discovery of opinion work-product before trial. See *infra* text accompanying notes 92-95.

71. *Reaves v. State*, 639 So. 2d 1, 6 (Fla. 1994). Both *Reaves* and *Gore* were capital criminal cases involving disclosure of defense materials. Neither decision relates this circumstance to its holding, but it is worth observing that the stakes were high, thus distinguishing *Reaves* and *Gore* from the normal run of cases, and that the courts in *Reaves* and *Gore* might not have been immune from considering this *sub silentio*.

72. 26 Fla. L. Weekly D798, D798 (Fla. 3d DCA Mar. 19, 2001), *vacated on reh’g*, 823 So. 2d 145 (Fla. 3d DCA 2002).

73. *Id.*

74. *Id.*

75. *Id.* (quoting *Smith v. Fla. Power & Light Co.*, 632 So. 2d 696, 697 (Fla. 3d DCA 1994)). This observation begs the question at hand inasmuch as the rule against disclosing discrete groups of documents arises from a fear that the organization of the documents will reveal opinion work-product, e.g., thought processes and legal analysis. See *State v. Williams*, 678 So. 2d 1356, 1358 (Fla. 3d DCA 1996). If opinion work-product is otherwise discoverable, then the discrete grouping argument is irrelevant because there is nothing to protect. If one rejects the discoverability of opinion work-product, then this may be of some concern in the production of voluminous fact work-product that has been furnished to an expert. Those situations would have to be addressed on a case-by-case basis, though it is worth noting that to the extent the selection of documents provided to an expert might reveal the attorney’s strategies, those strategies will likely be revealed through the substance of the expert’s testimony in any event.

76. 770 So. 2d 1238 (Fla. 3d DCA 2000) (table opinion).

a denial of certiorari from an order compelling disclosure of similar materials. As such, *Eller Media* did not constitute binding precedent.⁷⁷ In sum, *Smith* reiterated the rule of *Gore* that a party may not obtain during pretrial discovery any matters transmitted by opposite counsel to his testifying expert to the extent those matters would reveal opinion work-product. Notably, however, the Third District vacated *Smith* upon rehearing for reasons the court did not enunciate.⁷⁸

Federal courts traditionally have split over discovery of opinion work-product, though the 1993 amendments to Rule 26 appear to have resolved the issue in favor of disclosure.⁷⁹ Of most interest here is the pre-1993 debate over Rule 26, given that it mirrored Florida's present rule. To begin with, the Advisory Committee's Note to Federal Rule of Evidence 705, like the Law Revision Council Note to section 90.705, *Florida Statutes*, recognizes that "advance knowledge through pretrial discovery of an expert witnesses' [sic] basis for his

77. *Smith*, 26 Fla. L. Weekly at D798.

78. *Smith v. State*, 823 So. 2d 145, 145 (Fla. 3d DCA 2002).

79. FED. R. CIV. P. 26(a)(2), (b)(4); see also FED. R. CIV. P. 26 advisory committee's note:

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.

Id. See generally *Oneida, Ltd. v. United States*, 43 Fed. Cl. 611, 618 (Fed. Cl. 1999) ("[A] split exists among federal courts as to the discoverability of 'opinion' work product, often known as 'core work product,' provided to a testifying expert."). Despite the split, the greater weight of federal authority favors disclosure. See *Herman v. Marine Midland Bank*, 207 F.R.D. 26, 29 (W.D.N.Y. 2002):

[B]ecause any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver to the same extent as with any other disclosure. . . . Although contrary authority exists . . . the overwhelming majority of district courts in this Circuit as well as in other jurisdictions have concurred with the Federal Circuit's ruling that the expert disclosure requirement of Rule 26(a)(2)(B) trumps the substantial protection otherwise accorded opinion work product under Rule 26(b)(3).

Id.; *In re Pioneer Hi-Bred Int'l, Inc.*, 238 F.3d 1370, 1375-76 (E.D. Mo. 2001):

[W]e are quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then to deny discovery of such material to the opposing party. . . . [B]ecause any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver to the same extent as with any other disclosure.

Id. (citations omitted); *William Penn Life Assur. Co. of Am. v. Brown Transfer & Storage Co.*, 141 F.R.D. 142, 143 (W.D. Mo. 1990) ("Without discovery of such material the adversary is deprived of the opportunity to adequately explore the extent to which counsel's observations affected the expert's opinion, and to impeach the expert on that basis.") (citation omitted).

opinion is essential for effective cross-examination.”⁸⁰ With this in mind, the courts turned their attention to the textual argument alluded to above,⁸¹ which has been summarized this way:

Before the 1993 Amendments to Rule 26 . . . courts considering whether work product materials provided to experts should be disclosed had to determine the relationship between Rules 26(b)(3) (the work product rule) and 26(b)(4) (the expert discovery rule).

The primary confusion surrounded the phrase, “[s]ubject to the provisions of subdivision (b)(4) of this rule,” at the beginning of the work product rule. The question was whether that phrase was meant to apply only to the first sentence of that paragraph (the general work product rule providing that materials prepared in anticipation of trial are discoverable only upon a showing of need), or if it was also meant to apply to the second sentence (the opinion work product rule providing that an attorney’s mental impressions are not discoverable notwithstanding a showing of substantial need). If the drafters intended the phrase to apply only to the first sentence, then the opinion work product rule in the second sentence is not subject to subdivision (b)(4) (the expert discovery rule), and opinion work product given to experts is not discoverable pursuant to subdivision (b)(3). Conversely, if the phrase applied to both sentences, then the expert discovery rule prevails over both, and opinion work product given to experts is discoverable.⁸²

The same dilemma inheres in Florida’s Rule 1.280(b), though no Florida court appears to have tackled this precise (and dispositive) issue. It would be disingenuous to suggest that there is an easy answer given the rift that this language caused between various federal courts.⁸³ Nor would there be any point in rehashing those arguments here.⁸⁴ They were resolved in the federal system by a rule amendment which, like all amendments, might be seen on one hand as clarifying the intent of the original rule or, on the other hand, as correcting a deficiency. Perhaps for our purposes, the important lesson from the federal experience with this language is that the discovery rule does not necessarily *prohibit* discovery of opinion work-product from expert witnesses. From a policy perspective, it is worth considering that the opinion work-product doctrine:

80. *Oneida*, 43 Fed. Cl. at 619 (citing 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2029 n.16 (2d ed. 1994)).

81. *See supra* note 39.

82. Klopfenstein, *supra* note 39, at 488.

83. *See generally Oneida*, 43 Fed. Cl. at 618-19. State courts examining similar rules in other states have likewise split. *Compare* McKinnon v. Smock, 445 S.E.2d 526, 528 (Ga. 1994) (examining Georgia discovery rule and concluding “that (b)(3) is ‘subject to’ (b)(4) only to the extent of the first sentence of (b)(3)”), *with* Tracy v. Dandurand, 30 S.W.3d 831, 835 (Mo. 2000) (reading Missouri’s rule (b)(4) “to require production of all of the materials provided to the expert”).

84. An excellent survey of the governing federal case law and competing policies may be found in *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 395 (N.D. Cal. 1991).

preserves the incentive system that is perceived as essential to our adjudicatory process and [creates] 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 which strategic approaches to the litigation are likely to be in their client's best interests However, providing 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. Thus, requiring disclosure of an attorney's communications to the expert does not impinge on the goals served by the opinion work product doctrine.⁸⁵

This opinion observed further that a bright-line rule permitting inquiry into opinion work-product at trial "actually preserves opinion work product protection in that there is no lingering uncertainty as to what documents will be disclosed."⁸⁶

Putting the textual argument aside, and even if an opinion work-product exception is deemed present in Rule 1.280(b)(4), the *stepping stone* logic employed above with respect to discovery of fact work-product applies equally to opinion work-product and would render it discoverable. Namely, Rule 1.280(b)(4)(A)(ii) specifies that a testifying expert may be deposed "in accordance with rule 1.390,"⁸⁷ which, in turn, states that "[t]he testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions."⁸⁸ The "rules for taking depositions" found in Rule 1.310 state that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial."⁸⁹ Section 90.705(1), which governs cross-examination at trial, states: "On cross-examination the expert shall be required to specify the facts or data" underlying her opinions and inferences.⁹⁰ Section 90.704 clarifies the phrase "facts or data" as including "those perceived by, or made known to, the expert at or before the trial."⁹¹ Just as with fact

85. *Karn v. Ingersoll-Rand Co.*, 168 F.R.D. 633, 640 (N.D. Ind. 1996) (citations omitted).

86. *Id.* at 641.

87. FLA. R. CIV. P. 1.280(b)(4)(A)(ii).

88. *Id.* at 1.390(b) (reprinted in its entirety in the Appendix of Relevant Rules & Statutes following this Article).

89. *Id.* at 1.310(c).

90. FLA. STAT. § 90.705(1) (2002).

91. *Id.* § 90.704. Here again, Florida Rule of Criminal Procedure 3.220(h)(1) states that "[e]xcept as provided herein, the procedure for taking the deposition, including the scope of the examination . . . shall be the same as that provided in the Florida Rules of Civil Procedure." Section 90.705 thus applies to discovery depositions conducted in the course of criminal proceedings. However, opinion work-product is not discoverable in criminal cases for other reasons. See *infra* text accompanying notes 92-95.

work-product, this *stepping stone* analysis demands revelation during pretrial deposition of all opinion work-product materials underlying the expert's opinions.

And as with the fact work-product analysis, if one accepts that the entirety of 1.280(b)(3) is subordinate to 1.280(b)(4)—which, incidentally, would supply an independent ground for discovery—then 1.280(b)(4) might require revelation of all opinion work-product constituting facts *known* to your expert regardless of whether it serves as a basis for her opinions. If one instead views Rule 1.280(b)(4) as subordinate to the opinion work-product language of 1.280(b)(3), then the *stepping stone* analysis yields at the least that which would be disclosed at trial, that is, those matters constituting opinion work-product that form the basis of the expert's opinion.

Again, if one considers the policy foundations for the work-product doctrine as originally conceived in *Hickman*, we might reconsider any negative initial reaction to such a result. As a practical matter, by the time an expert is deposed, the opinion work-product divulged to that expert has necessarily been formulated (diminishing the argument for creative breathing space), has already been incorporated into the expert's opinion and is intended to become public via the expert's opinion (strengthening the argument for waiver), and, perhaps most important, has been shared in either a legitimate or not-so-legitimate attempt to color the expert's testimony (a matter that, if revealed, is of tremendous value vis-a-vis settlement, mediation, and trial).

The result may differ in the criminal context, however. With the *Smith* decision having been vacated, two Florida cases remain for the proposition that opinion work-product is not discoverable—*Reaves* and *Gore*. Both involved criminal prosecutions. As discussed above, the *stepping stone* analysis should operate to apply section 90.705 to expert depositions in criminal cases, contrary to the holdings in *Reaves* and *Gore*. However, these decisions reached the correct result by wrongly reasoning that section 90.705 does not apply during deposition. Criminal Rule 3.220(g)(1) contains an opinion work-product exception.⁹² Unlike the opinion work-product exception in the civil context, which arguably is subordinate to the expert civil discovery provisions, Rule 3.220(g)(1) seemingly applies to all criminal discovery. Thus, even if *Reaves* and *Gore* were mistaken in asserting that section 90.705 does not apply to expert depositions in criminal proceedings (as we suggest they were), Rule 3.220(g)(1) would neverthe-

92. Florida Rule of Criminal Procedure 3.220(g)(1) states: "Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs."

less preclude discovery of opinion work-product known to or relied upon by an expert witness.⁹³ The upshot, then, is that fact work-product remains discoverable in criminal proceedings by application of section 90.705, but opinion work-product is inviolate, at least until trial, based upon the protection afforded it under Rule 3.220(g)(1). Finally, however, take note that Rule 3.220(f) permits the court, upon a showing of materiality, to “require such other discovery to the parties as justice may require.”⁹⁴ Opinion work-product underlying an expert’s opinions would invariably prove material, but it is not clear that 3.220(f) is intended to override the work-product exception of 3.220(g)(1). Were 3.220(f) construed to grant such authority, one could not categorically state that “justice may require” the disclosure of opinion work-product underlying an expert’s opinions in every instance, but the argument might be persuasive given proper circumstances.

C. Conclusions Regarding Opinion Work-Product

Might you then object to a question posed to your hypothetical expert, Dr. Caligari, where the question seeks to divulge opinion work-product? The answer under existing law seems to be that if the question is posed at trial, your objection will be overruled. If the question is posed during deposition in a criminal proceeding, it should be sustained.⁹⁵ If posed during deposition in a civil proceeding, the objection should be overruled. While a sound textual argument may be made both for disclosure and exemption under Rule 1.280(b), the *stepping stone* analysis favors disclosure, but you will be armed with *Gore* and

93. A potential counterargument lies in Florida Rule of Criminal Procedure 3.220(h)(1), which states: “[e]xcept as provided *herein*, the procedure for taking the deposition [in a criminal proceeding], including the scope of the examination . . . shall be the same as that provided in the Florida Rules of Civil Procedure” (emphasis added). As we have seen, the scope of an expert deposition in a civil proceeding encompasses opinion work-product known to or relied upon by the expert. Thus, literally applying the procedure and scope of the civil rules might warrant disclosure during deposition of opinion work-product known to or relied upon by experts in criminal proceedings. Moreover, the most plausible interpretation of the word “*herein*” would have it refer to subdivision (h)(1). One might therefore argue that the *only* exceptions to conducting depositions in criminal proceedings, like depositions in civil proceedings, are those exceptions contained in 3.220(h)(1), which does not include an opinion work-product exception. If, however, the term “*herein*” is more loosely construed to mean Rule 3.220 or the criminal procedure rules generally, then Rule 3.220(h)(1) effectively incorporates the opinion work-product exception found in 3.220(g)(1). While the former argument—to conduct depositions just as in civil proceedings, thus permitting discovery of opinion work product—is plausible, if not compelling, under the rule as worded, it remains highly formalistic, and is thus unlikely to persuade a court given the broad opinion work-product exemption in 3.220(g)(1) and the sensitive nature of the matters at issue.

94. FLA. R. CRIM. P. 3.220(f).

95. See *Eagan v. DeManio*, 294 So. 2d 639, 640 (Fla. 1974) (refusing to permit depositions of prosecuting attorneys that would “require disclosure of their work product and seriously impede criminal prosecutions”).

Reaves to respond to such a ruling. A serious question remains whether these decisions can make the leap from the criminal to the civil context. By the logic of the decisions themselves, they would apply to civil proceedings, but that logic is subject to attack.

V. REFRESHING RECOLLECTION

Still another avenue is yet to be explored in our survey of the expert work product landscape. Specifically, there remains the question of whether a witness must reveal work-product materials used to refresh recollection during or prior to deposition or trial. A fair amount of litigation has been generated on this point within the federal system, yielding a number of divergent approaches.⁹⁶ The Florida rule, found at section 90.613, *Florida Statutes*, states in pertinent part:

When a witness uses a writing or other item to refresh memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce it, or, in the case of a writing, to introduce those portions which relate to the testimony of the witness, in evidence.

The trial judge retains discretion to omit portions of the writing not related to the subject matter of the testimony. The Florida rule, as written, pertains only to writings or other items used to refresh recollection “while testifying,” and appears on its face to grant an adverse party review and cross-examination of the document as a matter of right.⁹⁷

The unqualified right to review and cross-examination under the Evidence Code suggests that, at least as to materials referred to “while testifying,” both fact and opinion work-product are subject to disclosure if relied upon to refresh recollection. Section 90.613 does not include any work-product exception, which might easily have been incorporated if deemed desirable. And where the witness is an expert, we may again turn to section 90.705 which contemplates thorough cross-examination subject only to the constraints of section 90.403.⁹⁸ The two sections taken together strongly suggest entitle-

96. See generally Alfreda Robinson, *Duet or Duel: Federal Rule of Evidence 612 and the Work-Product Doctrine Codified in Civil Procedure Rule 26(b)(3)*, 69 U. CIN. L. REV. 197, 197-98 (2000) (collecting and analyzing federal cases).

97. The trial judge enjoys broad discretion to permit or deny review and cross-examination with respect to materials used to refresh recollection *prior to* testifying during deposition or at trial. See, e.g., *Merlin v. Boca Raton Comm. Hosp., Inc.*, 479 So. 2d 236, 239 (Fla. 4th DCA 1985); *Francis v. State*, 343 So. 2d 932, 933 (Fla. 3d DCA 1977). See generally EHRHARDT, *supra* note 50, § 613.1.

98. The section 90.403 balancing analysis may afford some flexibility that is otherwise lacking in the letter of section 90.613 with respect to matters used to refresh recollection while testifying at trial or during deposition. Disclosure of fact work-product would seldom prove prejudicial given that all expert testimony is in some sense fact work-product, i.e., it

ment to disclosure of any matter, including fact and opinion work-product, relied upon by an expert to refresh recollection *while testifying*.⁹⁹

The issue commonly arises during discovery depositions, which was the situation in the Fourth District Court of Appeal case of *Merlin v. Boca Raton Community Hospital*.¹⁰⁰ The case involved a dispute whether a defense attorney in a malpractice action was entitled to review the plaintiff's handwritten notes, which were written when the plaintiff knew he would hire a lawyer.¹⁰¹ The plaintiff read the notes during his wife's deposition, but claimed they did not refresh his recollection.¹⁰² The trial judge granted the defendant's motion to compel production of the notes for redeposition. The Fourth District took the occasion to broadly observe that "notes used to refresh a witness' [sic] or a party's memory other than while actually being deposed or testifying may or may not be disclosed to the adverse party, according to the trial court's discretion."¹⁰³ The court added cryptically that "[s]uch notes are not discoverable, however, if they are otherwise privileged."¹⁰⁴

constitutes facts and professional opinions acquired in anticipation of litigation. However, the sensitive nature of an attorney's mental impressions, trial strategies, and the like might militate against ready disclosure of opinion work-product. One likely reason for the dearth of law on this issue is that an expert would rarely if ever rely upon opinion work-product to refresh recollection while testifying. Nevertheless, discussions or document reviews carried on during breaks in testimony might be worth exploring on cross-examination.

99. An expert seldom refreshes recollection during trial by reference to opinion work-product. The issue apparently has not arisen often enough to reach the reported decisions. The Third Circuit offered a bit of dictum on the issue: "Even assuming that [Federal Rule of Evidence 612] applies to documents shown before trial to an outside expert, the purposes of Rule 612 are generally fully served without disclosure of core work product." *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 595 n.3 (3d Cir. 1984).

100. 479 So. 2d 236 (Fla. 4th DCA 1985).

101. *Id.* at 237.

102. *Id.*

103. *Id.* at 239. Also relevant is the case of *Scotchel Enterprises v. Velez*, 455 So. 2d 1129 (Fla. 4th DCA 1984), where an attorney sought during deposition an incident report read by the deponent at the time he gave it to the defendant's insurance adjuster. The court held that the document was not used to refresh recollection due to lengthy interim between the time it was read and the deposition. The court went on to analyze discoverability under the fact work-product doctrine and remanded for a determination in this regard. The case does *not* hold that fact work-product is immune from review and examination under section 90.613 because the court clearly held that 90.613 did not apply. Rather, it analyzed the request to review as a discovery request for fact work-product independent of the 90.613 issue.

104. *Merlin*, 479 So. 2d at 239. As with the *Reaves* decision, discussed *supra* in the text accompanying notes 28-32, it is not clear what was meant by the term "privileged" in the *Merlin* decision. The *Merlin* court went on to discuss the attorney-client privilege and quash the discovery order based on that privilege. The true privilege between attorney and client apparently is what the court had in mind. *See id.* Although work-product protection is often referred to as a privilege, it is in fact a qualified immunity from disclosure rather than a statutory privilege such as the attorney-client privilege. *See Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947):

The Fifth District Court of Appeal subsequently rendered a decision containing dicta that could be seen either as conflicting with or explaining the Fourth District's opinion in *Merlin*. In *Watkins v. Wilkinson*,¹⁰⁵ the court held that the materials used to refresh recollection did not constitute work product. The court noted nevertheless that had the documents constituted fact work-product, those documents would be discoverable pursuant to section 90.613 should the cross-examining party overcome the work-product burden by showing need and the inability to obtain the equivalent without undue hardship.¹⁰⁶ Note here that *Watkins* involved a lay witness to whom the fact work-product provision in 1.280(b)(3) would have applied had the documents relied upon been deemed work product, hence the demand for proof of need and undue hardship. An expert relying upon fact work-product materials would not enjoy the protections of Rule 1.280(b)(3) given that Rule 1.280(b)(4) permits discovery of fact work-product without any additional showing.¹⁰⁷

The footnote observation in *Watkins* comports with the general rules governing discovery of fact work-product materials. Though dictum, the language in *Watkins* offers more than the cryptic comment in *Merlin* that "otherwise privileged" documents would not be discoverable.¹⁰⁸ The *Merlin* court apparently used the term "privileged" not in reference to a work-product immunity, but in its narrow sense, referring directly to the attorney-client privilege upon which its ultimate holding was based.¹⁰⁹ Viewed in this way, *Merlin* and *Watkins* are not inconsistent and would not protect an expert from having to disclose all fact work-product relied upon to refresh recol-

[N]either Rule 26 nor any other rule dealing with discovery contemplates production [of work-product] under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these rules . . . Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims.

Id.; see also *id.* at 516 (Jackson, J., concurring) ("[D]iscovery should not nullify the privilege of confidential communication between attorney and client. But those principles give us no real assistance here because what is being sought is neither evidence nor is it a privileged communication between attorney and client."). Likewise, Rules 1.280(b)(3) and 1.280(b)(5) never refer to a work-product "privilege." Indeed, Rule 1.280(b)(5) expressly distinguishes between material that "is privileged" and that which is "subject to protection as trial preparation material." It is probably too late in the day to draw such distinctions, but the failure to do so has exacerbated the otherwise unnecessary confusion occasioned by haphazard use of the term *privilege*.

105. 724 So. 2d 717 (Fla. 5th DCA 1999).

106. See *id.* at 718 n.1 (citing *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1385 (Fla. 1994)).

107. See *supra* text accompanying notes 27-49.

108. *Merlin*, 479 So. 2d at 239.

109. See *supra* text accompanying note 104.

lection *while testifying* at deposition or, within the trial court's discretion, relied upon to refresh recollection *prior to* deposition.¹¹⁰

Neither *Merlin* nor *Watkins* second-guessed the applicability of section 90.613 to deposition testimony. If anything, the discovery provisions of the civil procedural rules might broaden the opportunities for eliciting work product, because the preceding textual argument with respect to discovery of fact and opinion work-product materials in civil actions applies here. Specifically, the provisions of Rule 1.280(b)(3) are subordinate to those of Rule 1.280(b)(4), which clearly precludes any assertion of fact work-product immunity¹¹¹ and arguably precludes resort to the opinion work-product doctrine.¹¹² Likewise, the *stepping stone* analysis permitting thorough cross-examination at deposition pursuant to section 90.705 might apply depending upon whether the materials used to refresh recollection constitute facts or data known to or relied upon by the expert in forming her opinions.¹¹³ It is not implausible to suggest that any document relied upon by an expert to refresh recollection before or during deposition becomes a fact "known" to the expert for civil discovery purposes under Rule 1.280(b)(4), which would render it discoverable independent of section 90.613 (assuming the accuracy of our assessment that opinion work-product supplied to an expert is discoverable during deposition). Moreover, the provisions of section 90.403 do not apply during deposition so that revelation of opinion work-product is not hampered by any special danger of unfair prejudice.

To the extent that policy arguments are lodged against disclosure of opinion work-product, we should bear in mind that the cross-examining attorney is engaged in a valid search for matters underlying an opposing expert's potentially decisive opinions as opposed to merely fishing randomly or seeking to bootstrap the fruit of opposing counsel's labors.¹¹⁴ There is a stronger argument in the discovery con-

110. Again, it appears that *Merlin* addressed materials protected by the attorney-client privilege, not work-product materials. If so, *Merlin* and *Watkins* are not at odds because *Merlin* simply did not address or contemplate revelation of work-product materials used to refresh recollection.

111. See *supra* text accompanying notes 27-49. Even if a court required a showing of need and undue hardship pursuant to Rule 1.280(b)(3)—which would be in error—one can predict that the qualified fact work-product immunity would ordinarily be overcome where the document was used to refresh recollection, particularly given the statutory preference for review and cross-examination as a matter of right.

112. See *supra* text accompanying notes 70-91.

113. Section 90.705 permits cross-examination on facts or data *underlying* the expert's opinion while Rule 1.280(b)(4) permits discovery of facts *known* and opinions held by an expert.

114. The tone of modern pleadings and decisions often conveys a sense that the work-product doctrine bestows upon litigants a cloak of confidentiality as a means to its own end. It is worth reiterating that the doctrine was conceived as a prudential limitation against *unwarranted* intrusions by lackadaisical or overly sharp adversaries. In this re-

text than at trial that disclosure of opinion work-product infringes upon the *Hickman* policy of unfettered preparation, but we must decide to what extent this actually occurs and remember that this is one among many considerations that must ultimately be factored into the analysis (if indeed the 1.280(b)(3) opinion work-product protections apply to experts at all). Additionally, using opinion work-product to “refresh” arguably is tantamount to hiring an expert as a mere conduit for the attorney’s opinions. To the extent this is a consideration, the policy foundations disfavoring disclosure of opinion work-product are weakened considerably.

We may readily conclude that section 90.613 requires disclosure of fact work-product relied upon by an expert *while testifying* during deposition (or at the court’s discretion where relied upon prior to testifying) in a civil proceeding. Revelation of opinion work-product is more problematic. If one accepts the textual argument that the opinion work-product provisions of 1.280(b)(3) do not apply to discovery of experts, then opinion work-product would be treated just like fact work-product. If one rejects the textual argument and deems the opinion work-product language of 1.280(b)(3) applicable to expert discovery, then the *stepping stone* analysis must be overcome and relevant policy considerations entertained. For the same reasons that we would deem opinion work-product discoverable of an expert as a general matter, we would treat opinion work-product just as fact work-product should be treated under section 90.613 in the civil deposition context.¹¹⁵

The result may differ in criminal discovery, however, where the irresistible force of section 90.613 meets the immovable object of Rule 3.220(g)(1). As noted, section 90.613 permits review of the document used to refresh recollection and permits cross-examination upon its contents as a matter of right. But Rule 3.220(g)(1) imposes a blanket prohibition against the disclosure of opinion work-product during discovery in criminal proceedings.

It is not clear how to resolve this dilemma. The case of *Geralds v. State*¹¹⁶ may help. *Geralds* upheld an application of section 90.613 to require disclosure of a portion of otherwise nondiscoverable field notes of a law enforcement analyst relied upon to refresh her recollection during deposition.¹¹⁷ The *Geralds* decision is instructive be-

spect, practitioners and judges alike might treat themselves to a fresh reading of *Hickman v. Taylor*, 329 U.S. 495 (1947).

115. It is worth reiterating here that although the *Watkins* court would have applied the substantial need and undue hardship test, that requirement does not apply to experts under any reasonable reading of the first sentence in 1.280(b)(3).

116. 601 So. 2d 1157 (Fla. 1992).

117. *Id.* at 1160-61. The *Geralds* court addressed arguments concerning the scope of disclosure, but the court upheld the trial court’s determination that section 90.613 over-

cause it dealt with materials immune from discovery, much like fact work-product. It did not, however, involve work product as such and thus fails to squarely resolve the tension between section 90.613 and the opinion work-product provisions found in Rule 3.220(g)(1).

This question also requires consideration of section 90.705, which contemplates vigorous pretrial cross-examination on all facts and data underlying an expert's opinions including, in the civil context, opinion work-product.¹¹⁸ Revelation of opinion work-product supplied to defense experts could conceivably raise constitutional concerns.¹¹⁹ We may add to this mix that a court rule ordinarily takes precedence over a statute that is procedural in nature.¹²⁰ But to the extent that section 90.613 is procedural, it has been adopted by the supreme court as has all of the Evidence Code.¹²¹ Absent any guiding authority on point in Florida, this rather thorny question remains open. Given the modern affinity for a broad work-product doctrine, it is likely, but not inevitable, that the courts will extend the protections of Rule 3.220(g)(1) to discovery directed toward opinion work-product relied upon by experts in criminal proceedings. The immunity conferred by Rule 3.220(g)(1) extends only to opinion work-product, however, so that fact work-product relied upon by an expert to refresh recollection during deposition in a criminal proceeding should remain subject to disclosure as a matter of right pursuant to section 90.613.

In sum, although fact and opinion work-product limitations apply to lay witnesses in civil discovery, an expert who, while testifying in a civil deposition or at trial, relies upon fact work-product to refresh recollection is subject to review and cross-examination. If she does so prior to testifying, the court enjoys discretion to order review and

rode the exemption from disclosure that would otherwise have shielded the notes from discovery.

118. FLA. STAT. ANN. § 90.705 (1999) (Law Revision Council Note, 1976) ("The cross-examiner has the opportunity to bring out the supporting data, if he should so desire. It is assumed that the cross-examiner has the advance knowledge that is essential for effective cross-examination. The judge also has the discretionary power to require preliminary disclosure."); *see also supra* Part III.B (regarding discovery of fact work-product) and Part IV.B (regarding discovery of opinion work-product).

119. If so, such concerns would exceed the scope of this Article. It is far from clear that a successful constitutional argument could be lodged. *See, e.g.*, *United States v. Nobles*, 422 U.S. 225, 233-34 (1975) (rejecting argument that the Fifth Amendment prohibits disclosure at trial of work-product from defendant's investigator); *see also id.* at 254 n.15 (brushing aside Sixth Amendment concerns attendant to waiver of work-product immunity in criminal cases).

120. *See, e.g.*, *R.J.A. v. Foster*, 603 So. 2d 1167, 1171 (Fla. 1992) ("Because the time period [in the statute] . . . is procedural in nature . . . our rule of procedure takes precedence over the legislative enactment.").

121. *See In re Fla. Evid. Code*, 372 So. 2d 1369 (Fla. 1979) (provisionally adopting the entire Evidence Code to the extent it is procedural in nature); *In re Fla. Evid. Code*, 376 So. 2d 1161 (Fla. 1979) (reaffirming earlier adoption of Evidence Code to the extent it is procedural in nature and clarifying its applicability to all criminal proceedings related to crimes committed on or after July 1, 1979).

cross-examination with no additional showing of need and undue hardship. Where the expert has refreshed recollection with opinion rather than fact work-product, we would suggest that it be treated just as if she had reviewed fact work-product, though stronger policy counterarguments exist, particularly in the discovery context.

Likewise, the expert who refreshes recollection during a criminal *trial* may expect cross-examination upon the document. Cross-examination during trial is subject to the constraints of section 90.403, but section 90.613 by its plain language grants review and cross-examination as a matter of right. Only in rare circumstances might section 90.403 outweigh the provisions of 90.613 and those of 90.705 encouraging thorough cross-examination of experts.

Discovery in criminal prosecutions presents a different question. While fact work-product should be disclosed, opinion work-product relied upon to refresh recollection may find shelter within the provisions of Rule 3.220(g)(1). The right to demand such materials remains an argument to be pressed in the courts.

VI. CONCLUSION

We may return now to Dr. Caligari who has obliged us for the duration of this Article, awaiting your objection. Might you make one? It would be difficult to let this sort of questioning pass without a fight. Yet ultimately the Evidence Code and procedural rules apply both at trial and during deposition to facilitate the broadest possible cross-examination of experts. Our conclusions may be summarily plotted in this way:

FLORIDA CIVIL CASE

	Disclosable at Trial?	Discoverable?
Fact WP Relied Upon by Expert	Y	Y
Opinion WP Relied Upon by Expert	Y	Y (authors); N (courts)
Fact WP to Refresh Recollection	Y	Y
Opinion WP to Refresh Recollection	Y	Y

FLORIDA CRIMINAL CASE

	Disclosable at Trial?	Discoverable?
Fact WP Relied Upon by Expert	Y	Y*
Opinion WP Relied Upon by Expert	Y	N**
Fact WP to Refresh Recollection	Y	Y
Opinion WP to Refresh Recollection	Y	??

There may be play in the joints of this analysis, of course, and federal courts have reached divergent conclusions (including conclusions contrary to ours) on a number of these issues. This is particularly true with respect to opinion work-product and specifically in the discovery context to which Florida courts afford some protection—at least until *Reaves* and *Gore* receive the hard look they deserve. A dispassionate reading of the relevant statutes and rules—free particularly from the visceral reaction against production of opinion work-product—reveals at the very least that some difficult questions remain to be answered. Your safest bet as a practitioner, it seems, is to design a defense predicated on a good offense. That is, learn all you are entitled to learn from your opponent's experts; and let your future relations with expert witnesses be guided accordingly.

* Subject to any specific limitations set out in the criminal procedural rules. *See supra* text accompanying note 46.

** Though a judge conceivably could order discovery of any matters, including opinion work-product, pursuant to Rule 3.220(f).

APPENDIX OF RELEVANT RULES & STATUTES

Fla. R. Civ. P. 1.280. General Provisions Governing Discovery.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

.....

(3) 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 party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the 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. Without the required showing a party may obtain a copy of a statement concerning the action or its subject matter previously made by that party. Upon request without the required showing a person not a party may obtain a copy of a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for an order to obtain a copy. The provisions of rule 1.380(a)(4) apply to the award of expenses incurred as a result of making the motion. For purposes of this paragraph, a statement previously made is a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording or transcription of it that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(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) By interrogatories a party may require any other party to identify each person whom the other party expects to call as an expert witness at trial and 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) Any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial may be de-

posed in accordance with rule 1.390 without motion or order of court.

(iii) A party may obtain the following discovery regarding any person disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial:

1. The scope of employment in the pending case and the compensation for such service.
2. The expert's general litigation experience, including the percentage of work performed for plaintiffs and defendants.
3. The identity of other cases, within a reasonable time period, in which the expert has testified by deposition or at trial.
4. An approximation of the portion of the expert's involvement as an expert witness, which may be based on the number of hours, percentage of hours, or percentage of earned income derived from serving as an expert witness; however, the expert shall not be required to disclose his or her earnings as an expert witness or income derived from other services.

An expert may be required to produce financial and business records only under the most unusual or compelling circumstances and may not be compelled to compile or produce nonexistent documents. Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and other 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 1.360(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.

Fla. R. Civ. P. 1.310. Depositions Upon Oral Examination.

(c) Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness, except that when a deposition is being taken by telephone, the witness shall be sworn by a person present with the witness who is qualified to administer an oath in that location. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed at the initial cost of the requesting party and prompt notice of the request shall be given to all other parties. All objections made at time of the examination to the qualifications of the officer taking

the deposition, the manner of taking it, the evidence presented, or the conduct of any party, and any other objection to the proceedings shall be noted by the officer upon the deposition. Any objection during a deposition shall be stated concisely and in a nonargumentative and nonsuggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under subdivision (d). Otherwise, evidence objected to shall be taken subject to the objections. Instead of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and that party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

Fla. R. Civ. P. 1.390. Depositions of Expert Witnesses.

(a) Definition. The term “expert witness” as used herein applies exclusively to a person duly and regularly engaged in the practice of a profession who holds a professional degree from a university or college and has had special professional training and experience, or one possessed of special knowledge or skill about the subject upon which called to testify.

(b) Procedure. The testimony of an expert or skilled witness may be taken at any time before the trial in accordance with the rules for taking depositions and may be used at trial, regardless of the place of residence of the witness or whether the witness is within the distance prescribed by rule 1.330(a)(3). No special form of notice need be given that the deposition will be used for trial.

....

(d) Applicability. Nothing in this rule shall prevent the taking of any deposition as otherwise provided by law.

Fla. R. Crim. P. 3.220. Discovery.

(f) Additional Discovery. On a showing of materiality, the court may require such other discovery to the parties as justice may require.

(g) Matters Not Subject to Disclosure.

(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney or members of their legal staffs.

....

(h) Discovery Depositions.

(1) Generally. At any time after the filing of the charging document any party may take the deposition upon oral examination of any person authorized by this rule. A party taking a deposition shall give reasonable written notice to each other party and shall make a good faith effort to coordinate the date, time, and location

of the deposition to accommodate the schedules of other parties and the witness to be deposed. The notice shall state the time and the location where the deposition is to be taken, the name of each person to be examined, and a certificate of counsel that a good faith effort was made to coordinate the deposition schedule. After notice to the parties the court may, for good cause shown, extend or shorten the time and may change the location of the deposition. Except as provided herein, the procedure for taking the deposition, including the scope of the examination, and the issuance of a subpoena (except a subpoena duces tecum) for deposition by an attorney of record in the action, shall be the same as that provided in the Florida Rules of Civil Procedure.

Section 90.613, Fla. Stat. (2002). Refreshing the memory of a witness.

When a witness uses a writing or other item to refresh memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce it, or, in the case of a writing, to introduce those portions which relate to the testimony of the witness, in evidence. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing or other item is not produced or delivered pursuant to order under this section, the testimony of the witness concerning those matters shall be stricken.

Section 90.704, Fla. Stat. (2002). Basis of opinion testimony by experts.

The facts or data upon which an expert bases an opinion or inference may be those perceived by, or made known to, the expert at or before the trial. If the facts or data are of a type reasonably relied upon by experts in the subject to support the opinion expressed, the facts or data need not be admissible in evidence.

Section 90.705, Fla. Stat. (2002). Disclosure of facts or data underlying expert opinion.

(1) Unless otherwise required by the court, an expert may testify in terms of opinion or inferences and give reasons without prior disclosure of the underlying facts or data. On cross-examination the expert shall be required to specify the facts or data.