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WORK PRODUCT PRIVILEGE AND DISCOVERY OF EXPERT TESTIMONY: RESOLVING THE CONFLICT BETWEEN FEDERAL RULES OF CIVIL PROCEDURE 26(b)(3) AND 26(b)(4)

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When an attorney furnishes documents containing work product to an expert witness, a potential conflict arises between the work product immunity of Rule 26(b)(3) and the expert discovery provisions of Rule 26(b)(4). In this Article, Professors Henkel and Reed examine the approaches federal courts have taken to this conflict. They argue that any approach which either allows for the discovery of documents containing work product or allows for the discovery of documents from which work product has been expunged is contrary to the purposes of the federal rules. The authors then propose a solution to this conflict which protects both the work product immunity of Rule 26(b)(3) and the expert discovery provisions of Rule 26(b)(4).

WHILE courts generally permit a very broad scope of discovery in federal cases, this liberal construction is not without several important exceptions. One such exception, Federal Rule of Civil Procedure 26(b)(3), protects an attorney’s “wits,” opinions, mental impressions, conclusions, theories, and other work product from disclosure to adversaries. Federal Rule of Civil Procedure 26(b)(4), on the other hand, encourages liberal discovery of experts’ opinions and the facts upon which those opinions are based. Courts occasionally require experts to disclose documents relied upon in formulating their expert opinions. A potential conflict between these two federal rules arises when attorney work product, which is generally protected from discovery by Rule 26(b)(3), is shown to an expert witness in preparation for a trial. As attorney work product, such material is protected from discovery by Rule 26(b)(3), but insofar as such material was re-
lied upon by an expert in formulating an opinion, it seems discoverable under Rule 26(b)(4).

During the past decade, the testimony of expert witnesses has become an integral part of most types of complex litigation. Expert witnesses typically draw upon their knowledge and experience in a given field to render an opinion concerning the facts of a particular case. Counsel for a party involved in the litigation may then use this opinion to establish or reinforce the client's position. In order to facilitate the formulation of an expert opinion, counsel often furnishes documents and other evidentiary materials to the expert witness which detail the facts of the litigation in question. Counsel may also provide an expert with memoranda which outline legal issues and relevant law for the case.

Documents and memoranda which are prepared by an attorney in anticipation of litigation and which contain the mental impressions and legal theories of that attorney have traditionally been protected by the work product immunity of Rule 26(b)(3) of the Federal Rules of Civil Procedure.1 Attorneys who frequently retain expert witnesses must be aware, however, that under Rule 26(b)(4),2 they may inadvertently forfeit this work product immunity if they furnish work product material to an expert witness to aid that expert in formulating an opinion.

Currently, a conflict exists in the federal courts over whether the discovery provisions of Rule 26(b)(4) supercede the work product pro-

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1. Rule 26(b)(3) states:
   Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney . . .) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials . . . 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.
   FED. R. CIV. P. 26(b)(3) (emphasis added).

2. Rule 26(b)(4) states:
   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) A party may through interrogatories require any other party to identify each person whom the other expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
   FED. R. CIV. P. 26(b)(4) (emphasis added).
tection of Rule 26(b)(3) when material containing attorney work product has been used by an expert witness in the formulation of an opinion. Until the federal judiciary reaches a firm conclusion regarding the primacy of these two rules, attorneys who retain expert witnesses should realize the possibility that any information given to an expert witness, regardless of its work product nature, might be exposed to the opposing counsel under discovery sanctioned by Rule 26(b)(4).

This Article will review the basis and scope of both Rule 26(b)(3) and Rule 26(b)(4) of the Federal Rules of Civil Procedure. It will then present an overview of federal decisions which have dealt with the conflict between the provisions of these two rules. Finally, the authors will propose a judicial standard which will allow attorneys to retain and prepare expert witnesses and remain substantially certain as to which materials will ultimately become discoverable under Rule 26(b)(4) as a result of their use in expert preparation.

I. WORK PRODUCT IMMUNITY

The work product doctrine severely limits an opposing counsel's discovery of certain material which has been prepared by attorneys in anticipation of litigation. Although the current work product doctrine is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, the doctrine has its roots in the 1947 Supreme Court decision of Hickman v. Taylor.3

The Hickman decision involved a wrongful death action which arose when five crewmembers died as a result of the sinking of a tugboat.4 The defendant tugboat owner's lead counsel interviewed the surviving crew members in preparation for possible litigation.5 The interviewing attorney sought to protect the notes and memoranda taken during these interviews from discovery by the plaintiff on the ground that they contained his thoughts and mental impressions.6 The Supreme Court upheld the attorney's refusal to answer plaintiff's interrogatories and release the interview memoranda.7 The Court noted that an attorney must have a degree of privacy to assemble, delineate and prepare adequately his client's case, reasoning that if the thoughts and mental impressions of an attorney were subject to discovery, the

4. Id. at 498.
5. Id.
6. Id. at 499.
7. Id. at 514.
legal profession would be demoralized, and the ends of justice would not be adequately served.8

The Hickman decision also made it clear that the discovery immunity created by the work product doctrine was not absolute.9 An attorney's files may be so essential to the other party's preparation that discovery of material containing work product may be ordered.10 However, the party seeking to discover work product must provide adequate reasons to justify removing the protection of work product immunity.11

The work product doctrine set forward by Hickman was applied inconsistently by the federal judiciary in subsequent decisions.12 As a result, the 1970 Advisory Committee on the Rules of Civil Procedure proposed and the Supreme Court adopted an amendment to the Federal Rules of Civil Procedure that codified the work product doctrine and helped specify exactly which materials constitute work product.13

As currently codified, Rule 26(b)(3) provides a qualified immunity from discovery to materials which meet each of three basic requirements. First, the work product immunity extends only to "documents and tangible things."14 While the facts contained in an attorney's work product may be discoverable,15 the actual work documents are generally protected under the Rule 26(b)(3) immunity.16

8. Id. at 511.
9. Id.
10. Id.
11. The Court stated:
[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.

Id. at 512.

12. For instance, courts have differed on whether the work product immunity extended to work performed by nonlawyers. Compare Allmont v. United States, 177 F.2d 971 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950) (work product immunity applied to statements obtained by FBI agents) with Southern Ry. v. Campbell, 309 F.2d 569 (5th Cir. 1962) (work product immunity not applicable to statements obtained by claim agent). See also Fed. R. Civ. P. 26(b)(3) advisory committee's note (1970 amendment); Annotation, Development, Since Hickman v. Taylor, of Attorney's "Work Product" Doctrine, 35 A.L.R. 3d 412 (1971).

15. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2023, at 194 (1970) [hereinafter Wright & Miller].

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

Id. (footnote omitted).
Second, in order to be protected by work product immunity a document must have been "prepared in anticipation of litigation or for trial." Thus, when documents are prepared after a potential cause of action arises, they are considered work product, even if actual litigation has not yet commenced. Documents which are prepared in the normal course of business, however, are not accorded work product immunity.

Finally, work product immunity extends only to materials prepared "by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent)." The advisory committee notes for the 1970 amendment to Rule 26(b)(3) recognize that the rule should be interpreted to continue the judicial trend of extending work product immunity to materials prepared "by or for a party or any representative acting on [the party's] behalf."

Rule 26(b)(3) sets forth a qualified immunity; parties seeking discovery may overcome the work product protection and obtain discovery of work product materials upon meeting two requirements. First, parties seeking discovery must demonstrate a substantial need for the documents. Case precedent construing this requirement indicates that parties seeking discovery must show that the material is "essential" to the preparation of the party's case or a "necessity" for adequate trial preparation.

Second, parties seeking discovery of work product must show that they are "unable without undue hardship to obtain the substantial equivalent of the materials by other means." The advisory committee notes for Rule 26(b)(3) direct trial courts to consider the facts and holdings of prior case law when determining whether a party seeking discovery has adequately demonstrated "undue hardship."

Even though Rule 26(b)(3) allows limited discovery of work product, the thoughts and mental impressions of an attorney are to be

17. FED. R. CIV. P. 26(b)(3).
20. Id. advisory committee's note (1970 amendment) (emphasis added).
22. In re Murphy, 560 F.2d 326, 336 n.19 (8th Cir. 1977); Natta v. Hogan, 392 F.2d 686, 693 (10th Cir. 1968); LSB Indus., Inc. v. Commissioner, 556 F. Supp. 40, 45 (W.D. Okla. 1982); Annotation, supra note 12, at 465-69. See also WRIGHT & MILLER, supra note 15, at § 2025 n.66.
23. FED. R. CIV. P. 26(b)(3).
24. Id. advisory committee's note (1970 amendment).
given an exceptional level of protection.\textsuperscript{25} Decisions subsequent to the 1970 amendment of Rule 26(b)(3) indicate that a party seeking to discover material which contains an attorney’s thoughts and mental impressions must meet a higher standard of justification than a party who merely seeks to discover facts contained within an attorney’s work product.\textsuperscript{26} Indeed, some courts have held that the thoughts and mental impressions of an attorney are to be held inviolate, and an opposing party cannot offer evidence of circumstances which would be sufficient to compel discovery of work product containing such impressions.\textsuperscript{27}

Rule 26(b)(3) seems to offer almost total protection to interoffice memoranda and organized material evidence which would tend to reflect an attorney’s legal theories or potential arguments regarding a given case.\textsuperscript{28} Rule 26(b)(4), however, sanctions the discovery of the grounds for an expert witness’ opinion. When the grounds for an expert’s opinion include memoranda containing an attorney’s thoughts, mental impressions and legal theories, Rule 26(b)(4) discovery comes into direct conflict with Rule 26(b)(3) protection.

II. DISCOVERY OF THE INFORMATION UNDERLYING AN EXPERT WITNESS’ OPINION

Rule 26(b)(4) codifies specific provisions regarding the discovery of facts known and opinions held by experts retained by a party to a specific case.\textsuperscript{29} The rule provides a much broader scope of discovery against experts who a party expects to call as trial witnesses than against experts who have been formally retained in anticipation of litigation but will not be called as trial witnesses.\textsuperscript{30}

If a party expects to call an expert for trial testimony (or for deposition testimony which will be admissible at trial), Rule 26(b)(4) allows

\begin{itemize}
  \item \textsuperscript{29} See Fed. R. Civ. P. 26(b)(4).
  \item \textsuperscript{30} See Eliasen v. Hamilton, 111 F.R.D. 396, 398-403 (N.D. Ill. 1986); Heitmann v. Concrete Pipe Mach., 98 F.R.D. 740 (E.D. Mo. 1983). See \textit{also} \textit{Wright & Miller}, supra note 15, § 2032, at 255-56 (citing United States v. Meyer, 398 F.2d 66, 76 (9th Cir. 1968), in which the court stated that “it will rarely be possible to make the required showing” in the case of retained experts who will not testify).
\end{itemize}
the discovery of a well-defined spectrum of information. Under Rule 26(b)(4)(A)(i)

[a] party may through interrogatories require any other party to identify each party whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.\(^{31}\)

Rule 26(b)(4) thus establishes that the party retaining the expert must furnish the names of all experts whom the party intends to call as trial witnesses.\(^{32}\) A failure to answer properly such an interrogatory may cause the court to exclude the testimony of the unidentified expert.\(^{33}\)

On motion of counsel the court may order further discovery by other means.\(^{34}\) Such procedures for further discovery have been used to sanction pretrial depositions of another party's expert witness.\(^{35}\) Courts have allowed these depositions to be used to acquire information for the purposes of cross-examination\(^{36}\) and impeachment.\(^{37}\) These procedures have also been employed to acquire documents containing the grounds for an expert's opinion.\(^{38}\)

If an expert has been formally retained by a party as a consultant but will not be called as a trial witness, discovery of that witness is permitted "only as provided for in Rule 35(b) [regarding examining physicians] 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.\(^{39}\)" The advisory committee notes indicate that Rule 26(b)(4)(B) restricts discovery of


\(^{32}\) WRIGHT & MILLER, supra note 15, § 2030, at 252.

\(^{33}\) See Jenkins v. Whittaker Corp., 785 F.2d 720, 727-28 (9th Cir. 1986) (upholding trial court decision excluding expert testimony); Easley v. Anheuser-Busch, Inc., 758 F.2d 251, 257-58 (8th Cir. 1985).

\(^{34}\) FED. R. CIV. P. 26(b)(4)(A)(ii).


\(^{39}\) FED. R. CIV. P. 26(b)(4)(B). See also WRIGHT & MILLER, supra note 15, § 2032, at 256.
nonwitness experts who have been formally retained and precludes discovery of experts who have been consulted but never formally retained by a party to the litigation. This restriction of the discovery of nonwitness experts implies that the Advisory Committee did not value this type of discovery as highly as the discovery of expert witnesses. Because of this lesser need for the discovery of nonwitness experts and the similar standards between Rule 26(b)(4)(B) and Rule 26(b)(3), it appears that no conflict arises between the discovery of nonwitness experts and the work product immunity.

A party may also submit interrogatories, asking for a summary of the grounds for the opposing expert’s opinions. The case law does not specifically define what constitutes a sufficient summary, but it indicates that a skeletal summary of the grounds relied upon will be sufficient to meet the discovery requirements of Rule 26(b)(4)(A). Moreover, in dealing with the requirement restricting this discovery to “interrogatories,” several cases indicate that Rule 26(b)(4)(A)(i) cannot be used to compel production of the actual documents which comprise the basis of an expert’s opinion testimony.

If the provisions of Rule 26(b)(4)(A) supercede those of Rule 26(b)(3), attorneys may forfeit work product protection for their thoughts, legal theories, and mental impressions when they use such material to prepare expert witnesses. As noted above, attorneys involved in complex litigation may prepare memoranda of law and furnish these memoranda to their expert witnesses to aid the witnesses’ preparation for trial testimony. Such use of attorney work product in the preparation of expert testimony will bring the provisions of Rule 26(b)(4)(A) into direct conflict with the work product immunity provided by Rule 26(b)(3).

III. JUDICIAL RESOLUTION OF THE CONFLICT BETWEEN RULE 26(b)(3) AND RULE 26(b)(4)

Although the federal judiciary has not extensively dealt with the discovery conflict which arises between Rules 26(b)(3) and 26(b)(4), the

41. Under Rule 26(b)(4)(B), the standard for allowing discovery is one of impracticability of obtaining the information elsewhere due to “exceptional circumstances.” This standard closely resembles the “undue hardship” requirement of Rule 26(b)(3). Because of this similarity, once a party has met one standard, they have also met the other standard, and the information becomes discoverable under either rule. Any conflict, therefore, is moot.
43. See Baise v. Alewel’s, Inc., 99 F.R.D. 95, 98 (W.D. Mo. 1983) (holding that a general reference by the deposed expert to books used in forming opinions is not a “sufficient summary” when the opposing party requests a specific list of the books relied upon by the expert).
courts which have addressed this issue have reached different results. At least one court has followed the reasoning of courts addressing the conflict between Federal Rule of Evidence 612 and Rule 26(b)(3), concluding that the expert discovery provisions of Rule 26(b)(4) should prevail over the work product immunity of Rule 26(b)(3). Still other courts have upheld the immunity of opinion work product regardless of its use by or exposure to an expert witness. The approaches taken in these cases will now be examined.

A. The Analogous Discovery Conflict Between Rule 26(b)(4) and FRE 612

Federal Rule of Evidence 612 (FRE 612) resembles Rule 26(b)(4) in that it specifies certain circumstances under which a party is entitled to the production of written material used by a witness in preparation for testifying. Specifically, FRE 612 provides:

[I]f a witness uses a writing to refresh memory for the purpose of testifying, either-
   (1) while testifying, or
   (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,

an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

Such writings often include memoranda prepared by counsel for the opposing party which contain attorney work product and which would theoretically be protected under the work product immunity of Rule 26(b)(3). Any attempt to discover this material under the provisions of FRE 612 would produce a conflict with Rule 26(b)(3)—a conflict procedurally similar to the conflict between Rule 26(b)(4) and Rule 26(b)(3).

47. FED. R. EVID. 612 (emphasis added).
48. However, Judge Weinstein and Professor Berger warn that "[i]n the present state of uncertainty, attorneys should not refresh prospective deponents or witnesses with material containing counsel's theories or thought processes." 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 612-42 (1987).
1. Case Law

The cases considering the conflict between FRE 612 and Rule 26(b)(3) have reached different results concerning whether FRE 612 requires disclosure of documents containing opinion work product protected by Rule 26(b)(3). The leading decision in the area is Berkey Photo, Inc. v. Eastman Kodak Co. The plaintiff photo processor in Berkey brought an antitrust action against Eastman Kodak, and counsel for the defendant assembled four notebooks of empirical corporate data which the defendant's expert witnesses were allowed to review. A magistrate ordered that all expert witnesses be deposed and that all material given to the experts during their preparation be produced to opposing counsel pursuant to FRE 612. The defendant's counsel refused to produce the four notebooks, asserting that the materials were protected by Rule 26(b)(3) work product immunity.

The court in Berkey began its analysis of the scope of work product immunity with Hickman v. Taylor. The court specifically noted that work product immunity is a qualified immunity and indicated in dicta that the immunity could be overcome where counsel "exceeds decent limits" by attempting to conceal damaging material. The court also stated in dicta that when an attorney has a clear choice between materials which do contain work product and materials which do not, "the decision to give the work product to the witness could well be deemed a waiver of the [work product] privilege."

The court in Berkey concluded, again in dicta, that under many circumstances the work product immunity of Rule 26(b)(3) should give way to the discovery provisions of FRE 612. In arriving at this conclusion, the court neglected to follow the advisory committee notes for FRE 612 which clearly state that FRE 612 was not intended to bar the assertion of any privileges applicable to documents used to refresh an expert witness' memory.

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50. Id. at 614.
51. Id.
52. Id.
54. Berkey, 74 F.R.D. at 617.
55. Id. at 616.
56. Id. at 617.
57. FED. R. EVID. 612 advisory committee's note. But see S & A Painting Co. v. O.W.B Corp., 103 F.R.D. 407 (W.D. Pa. 1984) (holding that attorney-client privilege and work product immunity are waived as to information obtained from notes during testimony). However, S & A Painting limited the waiver of protection to the "portions of the notes to which reference was made" during testimony. Id. at 409. See also Note, Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules, 88 YALE L.J. 390, 400 (1978)
The court in *Berkey* reviewed the evidence on the record and determined that counsel for the defendants had not entered into "a calculated plan to exploit the work product in a significant way for preparing the experts while planning to erect the shield of privilege against discovery."58 Thus, despite its apparent belief that the work product immunity of Rule 26(b)(3) may be overcome, the court tentatively held that the defendant’s notebooks should be granted immunity under the rule.59

In 1982, the United States District Court for the District of Delaware adopted the waiver theory suggested by *Berkey* in *James Julian, Inc. v. Raytheon Co.*60 The defendants in this antitrust action sought production of binders of documents compiled by the plaintiff’s counsel and reviewed by the plaintiff’s expert witnesses prior to their depositions.61 The plaintiff’s counsel objected to the discovery on the ground that the organization and selection of specific documents within the binder constituted the attorney’s opinions and thought processes which should be granted protection from discovery under Rule 26 (b)(3).62

Although the court in *James Julian* agreed that the documents contained opinion work product,63 the court relied on the dicta of *Berkey* to support its conclusion that the discovery provisions of FRE 612 should supersede the work product immunity of Rule 26(b)(3).64 The court acknowledged that each case must be decided on its particular facts.65 Its conclusion, however, was clearly buttressed by the dicta of *Berkey*, as the court in *James Julian* stated, "[p]laintiff’s counsel made a decision to educate their witnesses by supplying them with the binders, and the Raytheon defendants are entitled to know the content of that education."66

(“In *Berkey*, Rule 612 becomes a rule of discovery covering everything shown to a witness prior to his testimony, whether used to refresh memory or not. As a result, Rule 612 does not remain a rule of evidence dealing exclusively with memory refreshment.”).

58. *Berkey*, 74 F.R.D. at 617.
59. *Id.* Although the court in *Berkey* reversed the magistrate on this issue, it did so with reservation stating that its holding was "without any sure conviction that this is an ineluctably right course." *Id.*
60. 93 F.R.D. 138 (D. Del. 1982).
61. *Id.* at 144.
62. *Id.*
63. *Id.* See also Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985) (citing *James Julian* for the proposition that the selection and ordering of documents could be indicative of the mental processes of counsel).
64. *James Julian*, 93 F.R.D. at 145.
65. *Id.* at 146.
66. *Id.*
However, two recent decisions from the United States District Court for the Southern District of New York, *Carter-Wallace, Inc. v. Hartz Mountain Industries, Inc.* and *Al-Rowaishan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co.*, have both rejected the notion that Rule 26(b)(3) immunity must give way to FRE 612 discovery. The court concluded in both cases that while the work product material reviewed by the expert witnesses might be of some value to the party seeking discovery, this value did not outweigh the need to uphold the protection afforded by Rule 26(b)(3). Thus, a conflict exists on the question whether FRE 612 should prevail over the work product immunity of Rule 26(b)(3).

Notwithstanding this uncertainty, the United States District Court for the District of Colorado, in *Boring v. Keller*, followed the reasoning of the courts which held that FRE 612 should prevail over Rule 26(b)(3). Thus, the court concluded that opinion work product is discoverable under Rule 26(b)(4). The conflict in *Boring* arose in the context of a 1983 medical malpractice action. The attorney for the defendant retained physicians as expert witnesses and inadvertently sent them an unedited version of a summary of the plaintiff’s deposition. The defendant’s counsel had also sent a letter to the experts advising them on the legal issues under consideration in the case. When plaintiff’s counsel deposed the first of the defendant’s expert witnesses, he asked the witness to identify all documents which had been examined in preparation for the deposition and in the formulation of the witness’ opinion. Defendant’s counsel agreed, and the documents were attached to the deposition. Only afterward did the defendant’s attorney become aware that the summary of the plaintiff’s deposition sent to the physician’s expert witness contained his mental impressions and evaluations of the plaintiff’s appearance and demeanor as a witness. Counsel for the defendant then requested per-
mission to withdraw the part of the exhibit that contained his mental impressions on the ground that they constituted work product and were thus privileged.\textsuperscript{76}

The court in \textit{Boring} held that the opinion work product of an attorney becomes discoverable under Rule 26(b)(4) when an expert witness utilizes it in formulating his or her opinion.\textsuperscript{77} The court relied on \textit{Berkey},\textsuperscript{78} which it interpreted as holding that when an attorney delivers material to an expert which would be "useful to the client," he may not withhold the material from an adversary who seeks to exploit the fact of this assistance in cross-examining the witness.\textsuperscript{79}

The \textit{Berkey} holding itself is contrary to the proposition for which it is cited in \textit{Boring}. The \textit{Boring} court quoted, almost verbatim, a portion of the \textit{Berkey} opinion so clearly recognized by the \textit{Berkey} court itself as dicta that it segregated it from the rest of the opinion under a separate heading and prefaced it with a paragraph that makes the characterization of dicta virtually indisputable.\textsuperscript{80} Although the \textit{Berkey} court expressed a disposition to rule differently in the future, it held that the plaintiff in the instant case did not have to make the disputed documents available to the defendant.\textsuperscript{81} Relying on its misapplication of the \textit{Berkey} decision, the \textit{Boring} court affirmed a magistrate's order compelling the defendant's counsel to produce the deposition summary in question.\textsuperscript{82} The court reinforced its decision by observing that granting the documents the work product protection of Rule 26(b)(3) would frustrate the purpose of Rule 26(b)(4) by leaving the plaintiff's attorneys inadequately prepared to cross-examine the defendant's expert witnesses.\textsuperscript{83}

Later in 1983, the Federal District Court for the Western District of Missouri reached a decision in \textit{Baise v. Alewel's, Inc.}\textsuperscript{84} which sharply

\textsuperscript{76.} \textit{Id.} at 405.
\textsuperscript{77.} \textit{Id.} at 407-08.
\textsuperscript{78.} \textit{Berkey Photo, Inc. v. Eastman Kodak Co.}, 74 F.R.D. 613 (S.D.N.Y. 1977).
\textsuperscript{79.} \textit{Boring}, 97 F.R.D. at 407.
\textsuperscript{80.} The court in \textit{Berkey} prefaced the language cited by the court in \textit{Boring} with the following:

\begin{quote}
A single member of a multi-judge trial bench may verge toward presumptuousness or futility when he or she broadcasts general pronouncements for the future. At the same time, we are all commissioned to judge as best we can, now and for the future, giving fair warning if possible of where the course of decision seems to head. \textit{Berkey}, 74 F.R.D. at 617. See also Note, \textit{Opinion Work Product, Expert Witness Discovery, and the Interaction of Rules 26(b)(3) and 26(b)(4)(A): Bogosian v. Gulf Oil Corporation}, 1985 \textit{B.Y.U. L. Rev.} 573, 587.
\end{quote}

\textsuperscript{81.} \textit{Berkey}, 74 F.R.D. at 617. The plaintiff, Berkey, had requested discovery of notebooks containing empirical data as well as defendant counsel's order and interpretation of the data.
\textsuperscript{82.} \textit{Boring}, 97 F.R.D. at 408.
\textsuperscript{83.} \textit{Id.}
\textsuperscript{84.} 99 F.R.D. 95 (W.D. Mo. 1983).
conflicted with the reasoning of the court in *Boring*. The plaintiff in *Baise* brought a product liability action against the defendant food manufacturer. The defendant filed a motion to compel discovery of correspondence between the plaintiff’s counsel and expert witnesses retained by the plaintiff. The plaintiff’s counsel objected to such discovery on the ground that the correspondence contained mental impressions protected by Rule 26(b)(3) work product immunity. The court in *Baise* recognized the defendant’s right to discover the grounds for the plaintiff’s expert’s opinion under Rule 26(b)(4), but “not at the price of invading the work product of counsel.” “[A]ttorney work product does not lose its special status merely because it is transmitted to an expert.”

2. Criticism of the Analogy

Assuming that FRE 612 prevails over the work product immunity of Rule 26(b)(3), any attempt to analogize between FRE 612 and Rule 26(b)(4) must also recognize that the discovery provisions of Rule 26(b)(4) and FRE 612 were promulgated for different purposes. Rule 26(b)(4) provides for the discovery of facts and opinions so that opposing counsel may logically construct and prepare rebuttal questions for cross-examination, thus aiding economy and efficiency. The advisory committee notes for Rule 26(b)(4) cite a California study in support of this notion. In examining the discovery and pretrial stages of condemnation cases, the study found that “the only substitute for discovery of experts’ valuation materials is ‘lengthy—and often fruitless—cross-examination during trial,’” and it concluded that pretrial discovery of this information represents the most economic and efficient means available to counsel. Echoing this conclusion, the Supreme Court promulgated Rule 26(b)(4) in an effort to streamline the judicial process.

Contrary to the intent behind Rule 26(b)(4), FRE 612 is intended “to promote the search of credibility and memory” of a witness, and it only allows discovery of those documents having “an impact upon

85. *Id.* at 96.
86. *Id*.
87. *Id.* at 97.
88. *Id*.
89. *Contra* Note, supra note 80, at 587 n.71 (“While the Rule 612 cases are not exactly on point with Rule 26(b)(4), the underlying policy and effect are the same.”).
91. FED. R. CIV. P. 26(b)(4) advisory committee’s note (1970 amendment).
92. *Id*.
93. FED. R. EVID. 612 advisory committee’s note.
the testimony of the witness.”¹⁹⁴ These factors, contained in the advisory note to FRE 612, indicate that the sole purpose of FRE 612 is to enable opposing counsel to thoroughly cross-examine the witness with regard to credibility. The purpose of FRE 612, hence, differs from that of Rule 26(b)(4). Even more importantly, unlike Rule 26(b)(4), where in the absence of the rule the opposing counsel still has another means of discovery, FRE 612 provides the only method by which opposing counsel may adequately probe the credibility of an expert witness. At least one court has relied on this factor to conclude that “it would be unfair to deprive opposing counsel of [the] opportunity” provided by FRE 612.¹⁹⁵ Thus, it becomes imperative from the standpoint of judicial fairness that FRE 612 overcome work product immunity,¹⁹⁶ but not so imperative for Rule 26(b)(4) to do so.

The conflict between FRE 612 and Rule 26(b)(3) seems superficially similar to the conflict between Rule 26(b)(4) and Rule 26(b)(3) since FRE 612 and Rule 26(b)(4) both specify certain circumstances under which a party may obtain written material used by a witness in preparation for testifying. However, case precedent considering the conflict between FRE 612 and Rule 26(b)(3) is of little practical value in resolving the tension between Rule 26(b)(3) and 26(b)(4). This is so since FRE 612 and Rule 26(b)(4) serve distinct purposes. Disregarding this generally inapplicable line of authority removes a large portion of theoretical support for the assertion that the work product immunity of Rule 26(b)(3) can be overcome by the discovery provisions of Rule 26(b)(4).¹⁹⁷

B. In Camera Review: Bogosian v. Gulf Oil Corp.

The most in-depth consideration of the discovery conflict between Rules 26(b)(3) and 26(b)(4) was undertaken by the United States Court of Appeals for the Third Circuit in 1984 in Bogosian v. Gulf Oil Corp.⁹⁸ The court’s resolution of the conflict and the procedure the

⁹⁴. Id.
⁹⁶. See generally Note, supra note 57 (the purposes of FRE 612 are accomplished without unnecessarily sacrificing the protection of work product).
⁹⁷. Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y 1977), is often cited as the seminal case to support the contention that the work product immunity of Rule 26(b)(3) must give way to the discovery provisions of Rule 26(b)(4). As will be seen later, the most glaring example of this misreliance appears in the use of Berkey as the foundation for one party’s theory in Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3rd Cir. 1984). This theory, which asserted the primacy of Rule 26(b)(4) discovery, relied heavily on the reasoning set forth in Berkey and James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982).
⁹⁸. 738 F.2d 587 (3d Cir. 1984).
court established for actually implementing its decision will now be examined.

1. The Court's Analysis

The plaintiffs in Bogosian brought an antitrust action against a number of defendant oil companies.99 The plaintiffs' case relied heavily on the testimony of eight expert witnesses regarding the chemical, economic, and marketing aspects of retail gasoline sales.100 The plaintiffs objected to discovery of certain documents which the counsel for the plaintiffs had sent to the plaintiffs' expert witnesses because these documents contained the mental impressions and legal theories of the plaintiffs' counsel protected by the work product immunity of Rule 26(b)(3).101 The district court found the discovery requirements of Rule 26(b)(4) preeminent to the qualified immunity provided in Rule 26(b)(3).102 The trial court reasoned that

because the depositions of the experts could also be used as trial depositions, and because it was important that defendants have the right of thorough and complete examination of the experts, the need of the attorneys to prepare themselves before such depositions entitled them to "all of the information which the expert had and was given to him by counsel or otherwise."103

The district court issued an order compelling the plaintiffs to produce the correspondence, and the plaintiffs filed a mandamus petition with the Third Circuit Court of Appeals.104 The Third Circuit rejected the reasoning, which had been accepted by the Colorado district court in Boring v. Keller,105 that the exposure of work product to an expert witness would constitute a waiver of the work product immunity traditionally afforded such material.106 The court then proceeded to consider the scope and relative strength of the immunity provided by Rule 26(b)(3) and the discovery authorized by Rule 26(b)(4)(A).

99. Id. at 588.
100. Id. at 589.
101. Id. at 588.
102. Id. at 590.
103. Id. (emphasis added).
104. Id. at 588.
106. Bogosian, 738 F.2d at 593. See also Note, supra note 80, at 587 (suggesting that the majority opinion in Bogosian simply ignored Boring).
The court in *Bogosian* reviewed the history of work product immunity from its roots in *Hickman v. Taylor*.[107] The court noted that opinion work product is to be afforded a particularly strong protection under the immunity of Rule 26(b)(3),[108] and emphasized the importance of work product immunity in the litigation process, stating:

> If attorneys are to feel free to commit to writing the mental processes by which they sift and evaluate various possible theories on which they will base their cases, they must feel confident that such material will be protected from disclosure. Otherwise, the freedom of thought essential to carefully reasoned trial preparation would be inhibited.[109]

Thus, the court indicated that it would carefully review any request for discovery or disclosure of work product to determine if the request violated this essential zone of work product protection.

The court in *Bogosian* carefully considered the language, background and emphasis of Rule 26(b)(4) and concluded that the rule was intended to overcome prior decisions which held all information provided to an expert witness to be work product and therefore immune from discovery under the provisions of Rule 26(b)(3).[110] The court recognized that Rule 26(b)(4) sanctions limited discovery of facts known and opinions held by expert witnesses.[111]

The court also noted that "even if interrogatories may permissibly require disclosure that verges on mental impressions, opinions, or conclusions, the documents themselves should be protected."[112] The court supported its conclusion by referring to the advisory committee notes for Rule 26(b)(3), which state:

> Under [the provisions of Rules 33 and 36 of the Federal Rules of Civil Procedure] a party and his attorney . . . may be required to disclose, to some extent, mental impressions, opinions, or conclusions. But documents or parts of documents containing these matters are protected against discovery by this subdivision. Even though a party may ultimately have to disclose in response to interrogatories or requests to admit, he is entitled to keep

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108. *Bogosian*, 738 F.2d at 592-93.
109. *Id.* at 593. The court stated that the protection necessary for an attorney's legal theories must be even greater than the "strong showing" required for the interview notes in *Upjohn v. United States*, 449 U.S. 383 (1980).
110. *Bogosian*, 738 F.2d at 593.
111. *Id.* at 595.
112. *Id.*
confidential documents containing such matters prepared for internal use.\textsuperscript{113}

The court concluded that Rule 26(b)(4) was promulgated to facilitate the discovery of facts known and opinions held by an expert, and not the actual documents containing such information.\textsuperscript{114}

The court in \textit{Bogosian} accepted the stipulation of both parties that the material being sought contained the mental impressions of the plaintiff's counsel relating to legal theories of the case.\textsuperscript{115} The court therefore remanded the discovery process to the district court with the request that the court examine the documents and delete, and thus protect, any core work product of the plaintiffs' attorneys.\textsuperscript{116} The court reasoned that disclosure of such sanitized documents would facilitate the essential disclosure of facts known and opinions held by the expert witness, while preventing exposure of crucial "core" attorney work product protected by Rule 26(b)(3).\textsuperscript{117}

\textbf{2. Criticism of the Court's Compromise in Bogosian}

The court in \textit{Bogosian} concluded that no genuine tension exists between Rule 26(b)(3) and Rule 26(b)(4);\textsuperscript{118} however, the entire decision was an effort to weigh the relative merits of each rule's provisions and reach an equitable resolution of the procedural question. The \textit{Bogosian} court's suggestion that a trial judge should conduct an in camera review of documents containing both fact and opinion work product may appear to be an equitable and efficient compromise. However, even limited discovery of documents which have been sanitized of all opinion work product by an in camera examination may present an unwarranted and potentially dangerous invasion of an attorney's thoughts and mental processes. The selection and ordering of documents given to the expert and the relative emphasis placed on each may reveal the attorney's strategy, even though the documents have been expunged of work product text.\textsuperscript{119} More importantly, however,

\begin{itemize}
  \item \textsuperscript{113} \textit{Id.} (quoting FED. R. CIV. P. 26(b)(3) advisory committee's note (1970 amendment)).
  \item \textsuperscript{114} \textit{Id.}
  \item \textsuperscript{115} \textit{Id.} at 593.
  \item \textsuperscript{116} \textit{Id.} at 595-96. However, the court cautioned that an in camera examination of documents is normally not encouraged because the district courts are already overburdened with discovery requests. \textit{Id.}
  \item \textsuperscript{117} \textit{Id.} at 595.
  \item \textsuperscript{118} \textit{Id.} at 596.
\end{itemize}
there are at least two major considerations which make the compromise reached in Bogosian an unworkable and unwarranted intrusion into the "zone of privacy" given to attorneys under Rule 26(b)(3).

The first consideration is that the Bogosian compromise will present an additional burden for the already overworked federal district courts. The federal district courts have faced a recent "explosion" in litigation which has produced a current outstanding backlog of more than 240,000 pending civil cases. Federal district court judges in 1987 were called upon to process eighty-eight percent more new civil filings on an average than they were in 1960. Both Supreme Court justices and legal scholars acknowledge that this recent litigation explosion is "so serious that it threatens the capacity of the federal system to function as it should." Many observers fear that a continuation of this trend will result in a diminution in the consistency, fairness and stability of the application of federal law. In light of the recent phenomenal increase in complex litigation in the areas of breach of contract and the "securities, commodities and exchange category," which often involve documents comprising hundreds of thousands of pages, the compromise suggested in Bogosian will simply further burden the federal courts.

A second consideration presents a further problem for the in camera review process suggested in Bogosian. A federal district court is improperly equipped to perform the redaction of discovery documents which the Bogosian compromise demands. Competent redaction might not even protect an attorney's privileged understanding of a case. The court in Bogosian sought to ensure the disclosure of facts known by an expert by establishing that "a party [cannot] shield facts from disclosure by the expedient of combining them or interlacing them with core work product." The Third Circuit Court of Appeals remanded the case to the trial court and instructed the judge to "re-

121. There were 221 civil cases filed per judgeship during the fiscal year 1960. 1960 Annual Report of the Director of the Administrative Office of the United States Courts 86. There were 416 civil cases filed per judgeship during 1987. 1987 Annual Report of the Director of the Administrative Office of the United States Courts 6.
125. Id. at 615.
dact [a document containing both facts and attorney work product provided to an expert] so that full disclosure is made of the facts presented to the expert and considered in formulating his or her opinion, while protection is accorded the legal theories and the attorney-expert dialectic. Yet, federal district courts are poorly equipped to perform such editing in a manner which would adequately identify and protect an attorney’s “core” work product. The support staff for a federal district court, almost always unfamiliar with the research methods of a particular attorney, cannot be expected to separate accurately pure factual information from research which attempts to articulate and organize the opinions, theories, and conclusions of counsel involved in complex litigation. Further, as argued in Berkey Photo, Inc. v. Eastman Kodak Co. and James Julian, Inc. v. Raytheon Co., when cases require extensive document discovery the disclosure of the specific documents which an attorney selects to provide to his expert “could not help but reveal important aspects of [the attorney’s] understanding of the case.” Therefore, disclosure of documents edited through the process of in camera review as suggested in Bogosian will still constitute a serious intrusion into the protected opinions, conclusions and legal theories of counsel involved in litigation.

A review of the advisory notes pertaining to the drafting and adoption of Rules 26(b)(3) and 26(b)(4) reveals further evidence that Rule 26(b)(4) discovery will not justify the discovery of documents which are protected by Rule 26(b)(3). The advisory committee notes for the 1970 amendment to Rule 26(b)(3) specifically state that the mental impressions, conclusions, opinions or legal theories of an attorney are subject to special protection. The committee intended that Rule 26(b)(3) should codify post-Hickman decisions which had “steadfastly safeguarded against disclosure of lawyers’ mental impressions and legal theories.” While the committee recognized that the discovery provisions of Rules 26(b)(4), 33 and 36 may force counsel to reveal some of its impressions, conclusions and opinions in interrogatory an-

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127. Id.
129. 93 F.R.D. 138 (D. Del. 1982).
130. Id. at 144. See also Berkey, 74 F.R.D. at 616. Because of this danger, the compromise solution employed in North Carolina Elec. Membership Corp. v. Carolina Power & Light Co., 108 F.R.D. 283 (M.D.N.C. 1985), where the attorney redacted the work product material, is just as unpalatable as the in camera procedure.
swers, the notes provide that "documents or parts of documents containing these matters are protected against discovery." 133

Although the advisory committee notes for Rule 26(b)(3) do state that "[i]n enforcing [the work product immunity of Rule 26(b)(3)], the courts will sometimes find it necessary to order disclosure of a document but with portions deleted," 134 this statement is not dispositive when read in the context of the notes as a whole. It is particularly significant that the advisory committee indicated that the procedure of deleting work product from a document prior to disclosure would be a means not of furthering the discovery provisions of Rule 26(b)(4), but of "enforcing" the work product immunity of Rule 26(b)(3). 135 Where practice and experience indicate that such a process will not adequately protect the work product privilege, this process would no longer be a useful method for enforcing the provisions of Rule 26(b)(3). Thus, this statement in the notes does not necessarily establish that the disclosure of documents purportedly expunged of work product is appropriate.

The advisory notes for Rule 26(b)(4) are in accord with the pronouncements of the advisory committee notes for Rule 26(b)(3). The committee noted that "[s]ubsection (b)(4)(A) deals with discovery of information obtained by or through experts who will be called as witnesses at trial." 136 The notes for Rule 26(b)(4) recognize that:

Effective cross-examination of an expert witness requires advance preparation. The lawyer... frequently cannot anticipate the particular approach his adversary's expert will take.... Effective rebuttal requires advance knowledge of the line of testimony of the other side. If the latter is foreclosed by a rule against discovery, then the narrowing of issues and elimination of surprise which discovery normally produces are frustrated. 137

Despite this explicit recognition of the importance of discovery of facts and opinions held by an expert, the advisory committee notes do not authorize or indicate any intent to expose documents containing opinion work product to Rule 26(b)(4) discovery. A review of the advisory committee notes for both Rule 26(b)(3) and Rule 26(b)(4) clearly indicates that while the drafters did envision some limited discovery of attorneys' mental impressions through routine interrogatory

133. Id.
134. Id.
135. Id. (emphasis added).
137. Id. (emphasis added).
discovery, they did not intend to formulate Rule 26(b)(4) as a tool for overcoming the work product immunity of Rule 26(b)(3).

IV. Conclusion

An examination of the cases dealing with the conflict between Rules 26(b)(3) and 26(b)(4) and the advisory committee notes for each rule suggests that Rule 26(b)(4) does not authorize discovery of documents containing attorney work product. Nonetheless, some courts, analogizing Rule 26(b)(4) to FRE 612, hold otherwise, and the court in Bogosian has proposed that such documents should be discoverable after the trial court has edited all opinion work product from the documents through an in camera review of material. As has been shown, both of these positions are illogical and inequitable.

Cases analogizing the conflict between Rule 26(b)(3) and FRE 612 with the conflict between Rules 26(b)(3) and 26(b)(4) are ill-founded because of the differing purposes of Rule 26(b)(4) and FRE 612. The Supreme Court promulgated the two rules for different reasons. The purpose of Rule 26(b)(4) was to provide opposing counsel with an economic and efficient alternative for gaining information. Federal Rule of Evidence 612, on the other hand, provides opposing counsel with the only route available to obtain information necessary for a thorough cross-examination on the issue of witness credibility. This latter purpose presents a strong argument for resolving the conflict between Rule 26(b)(3) and FRE 612 in favor of FRE 612. The purpose associated with Rule 26(b)(4), however, is much less compelling, thus making an analogy between the two conflicts illogical.

As noted earlier, the court in Bogosian sought to ensure that all parties in a given case would have full and unrestricted access to the facts provided to another party’s expert. If this access is the primary purpose of the court’s decision, the compromise plan of in camera review of documents is unnecessary. Full and fair responses to the interrogatory process already provided for by Rule 26(b)(4) will adequately provide other parties with the necessary factual material without involving the trial court in the burdensome and potentially dangerous task of editing and releasing actual documents.

While the court in Bogosian correctly recognized the importance of the work product immunity provided by Rule 26(b)(3),\textsuperscript{138} the decision,

nonetheless, failed to recognize the full range of ramifications and
dangers encompassed by its suggestion of disclosure of documents
through in camera review. What is currently needed is a clear judicial
statement that the importance of Rule 26(b)(3) work product immu-
nity is so great that any discovery of work product must be strictly
limited to the factual information which is already obtainable through
Rule 26(b)(4) interrogatories. 139 This resolution of the conflict between
Rules 26(b)(3) and 26(b)(4) would fulfill the intent of the rules, and
would provide attorneys with certainty and stability as to which mate-
rials used in preparing experts would be subject to discovery by the
opposing party.

139. Cf. Note, Discovery of Attorney Work Product Reviewed by an Expert Witness, 85 COLUM. L. REV. 812 (1985). Although this Note does not propose that courts restrict discovery under Rule 26(b)(4)(A) to the interrogatory process, it does conclude that "[c]ourts must read Rule 26(b)(3) together with Rule 26(b)(4) and require a showing of substantial need and undue hardship before ordering production of attorney work product shown to an expert witness." Id. at 835 (emphasis added).

Furthermore, the need for such a statement is highlighted when one considers the prevailing attitude toward the Rule 26(b)(4)(A) interrogatory process among practitioners. Professor Gra-
ham sent out questionnaires to practitioners and judges around the country and reached the
following conclusion:

The results of the survey indicate that the actual practice of discovery of expert
witnesses expected to be called at trial varies widely from the two-step procedure of
Rule 26(b)(4)(A). The interrogatory (sic) overwhelmingly is recognized as a totally un-
satisfactory method of providing adequate preparation for cross-examination and re-
buttal. In practice, full discovery is the rule . . . .
