

***Attorney Contact with Experts: Protection of Expert Credibility and
Attorney Work Product***

An Examination of Discoverable Attorney-Expert Contact

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An Examination of Discoverable Attorney-Expert Communication

By Richard L. Voelbel and Matthew J. Gollinger¹

INTRODUCTION

When asking “how much is too much?” in the context of working with an expert to form an opinion and write an expert report, attorneys may fear that the exertion of too much influence would be unethical. Indeed, situations have arisen where attorneys have crossed the line into unethical territory by participating in the proffer of expert testimony known to be inaccurate.² However, these cases are the exception, rather than the norm. Attorneys are expected to work with their hired experts in the development of the expert’s opinions and report.³ Such participation by the attorney is specifically contemplated by the rules.⁴ While an egregious act such as convincing an expert to perjure themselves by giving opinion testimony contrary to their personal belief would

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The analysis, conclusions, and/or opinions expressed in this article are the authors’ own and do not necessarily reflect the positions of Zelle Hofmann or the opinions of their clients.

² See, e.g., *Xanadu Maritime Trust v. Meyer*, 21 F.Supp.2d 1104 (N.D. Cal. 1998).

³ See *Manning v. Crockett*, 1999 WL 342715, at *2 (N.D. Ill. May 18, 1999); *Marek v. Moore*, 171 F.R.D. 298, 301 (D. Kan. 1997).

⁴ Federal Rule of Civil Procedure 26 advisory committee notes (“Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with expert such as automobile mechanics, this assistance may be needed.”)

justify the imposition of serious sanction, the vast majority of attorneys will never approach such an unethical interaction with an expert.⁵

Instead, attorneys are ordinarily faced with the challenge of working with the experts in a fashion that yields the most persuasive trial testimony. This challenge requires constant analysis of how often to meet with an expert, what to say to the expert and how to say it, what materials to provide to the expert, and the amount of influence to exert on the drafting of the expert report. On the one hand, the more time and effort an attorney spends assisting the expert craft an opinion and report, the more likely that the resulting testimony will effectively advocate for his client's position. However, that very time and effort may be counterproductive when the degree of the attorney's influence over the expert is revealed during trial. An expert's credibility can be decimated by an effective cross-examination demonstrating that the expert is merely a "mouthpiece" for the attorney. In addition, an attorney must be cognizant of the fact that

⁵ Even though an attorney may assist in the preparation of the expert report, it is generally recognized that an attorney may not draft the report absent expert input. *Manning*, 1999 WL 342715, at *3. Also, an attorney may not make unauthorized changes to the expert report. *EEOC v. Rockwell Int'l Corp.*, 60 F.Supp.2d 791, 797 (N.D. Ill. 1999) ("It is one thing for lawyers to make authorized revisions to an expert's prepared report. It is quite another for an expert to include calculations upon which he did not rely and he would not rely on simply to appease his client's attorney."). However, even where attorney have impermissibly interfered with the expert's opinion, courts have not found ethical violations, but instead found that the conduct violated Rule 26, which requires that the report be prepared by the expert. *See, e.g., Jackson Nat'l Life Ins. Co. Premium Litigation*, 46 Fed. R. Serv. 3d 201, 203 (W.D. Mich 2000); *Indiana Ins. Co. v. Hussey Seating Co.*, 176 F.R.D. 291, 293 (S.D. Ind. 1997).

In perhaps the most egregious example, the attorney completely drafted the expert report and sent it to the expert with the directive to have the report retyped on the expert's own stationary. *Occulto v. Adamar of New Jersey, Inc.*, 125 F.R.D. 611, 612-13 (D.N.J. 1989). Upon deposition, it was discovered that the expert did not write the report. *Id.* However, the court did not construe the attorney's conduct as unethical, instead characterizing the decision to draft the report as "poor judgment" as this would undermine the expert's credibility before the fact finder. *Id.* at 616. The court was far more concerned with the breach of professional ethics committed when that attorney denied ever having seen documents which he later admitted drafting. *Id.* at 617. Again, this shows that attorneys risk ethics violations by perpetrating a fraud on the court. Conversely, nearly all conduct involving shaping expert reports and testimony does not rise to the level of unethical conduct. *See* Stephen D. Easton, *Dealing with Draft Dodgers: Automatic Production of Drafts of Expert Witness Reports*, 22 REV. LITIG. 355, 401-403 (hereinafter "Easton, *Draft Dodgers*").

any materials provided to the expert, otherwise protected under the work product doctrine,⁶ may be required to be produced. Thus, the attorney must determine whether the extra help that is provided to the expert is worth the risks of opposing counsel obtaining his work product and/or jeopardizing his expert's credibility. Of course, that depends on the case and depends on the expert.

This paper is a modest attempt to digest the progression of the law in the area of discoverability of attorney-expert communication and assistance, including the discovery of attorney work product. Ethically, attorneys have significant latitude in working with their experts to develop opinions and reports. Thus, when deciding how to work with an expert, it is usually not necessary to analyze "what am I allowed to do?" in the context of attorney ethics. Instead, as attorneys set out to retain and prepare an expert for trial, the guiding inquiry must be, "what should I do?" couched in the framework of maximizing expert credibility and protecting attorney work product to the extent possible.

I. Historical Background

Work product protection generally provides that material or information, compiled or produced by attorneys in reasonable anticipation of litigation, is protected from discovery. This protection has been strained when viewed under the lens of the discoverability of materials relating to expert witness testimony. The following is a brief historical examination of the two areas of law.

⁶ Some have questioned whether the Work Product doctrine actually creates a true "privilege." See *United States v. City of Torrence*, 163 F.R.D. 590, 592-93 (C.D. Cal. 1995) citing to *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989) (characterizing work product protection as a qualified immunity). For simplicity, the doctrine shielding attorney work product from disclosure will be referred to as a "protection."

A. Work Product Protection

The work product doctrine was announced in 1947 by the Supreme Court in the seminal case of *Hickman v. Taylor*.⁷ In *Hickman*, the Court was charged with deciding whether an attorney must provide witness interview transcripts to opposing counsel, where the same witnesses remained available for opposing counsel to conduct its own interviews. The Court decided that the transcripts need not be produced, finding for protection of a lawyer's privacy for purposes of preparing his case. The Court described the necessity for the doctrine as an "effort to preserve the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests."⁸ The new "work product doctrine," as announced, operated to allow lawyers the freedom to prepare their cases, record their thoughts and strategies, and compile information without "undue and needless interference" from opposing parties and their counsel.⁹ The Court also recognized the creation of the work product doctrine would obviate the danger of counsel waiting for another attorney to shoulder the bulk of the basic case inquiry, and subsequently demand the fruits of the investigation.¹⁰

⁷ 329 U.S. 495 (1947).

⁸ *Id.* at 511.

⁹ *Id.*

¹⁰ *Id.*; See also *United States v. Adlman*, 68 F.3d 1495, 1501 (2d Cir. 1995) (stating that the work product protection serves "to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary's preparation."); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 116 F.R.D. 533, 537 (N.D. Cal. 1987) ("The *Hickman* Court appreciated that our system of adjudication is at its heart dialectical. If one side relies (for ideas or information or legal research) on the other, half of the dialectic is lost. . . . Thus, the principal purpose of the work product doctrine is to preserve the vigor of the dialectic by creating an environment in which each lawyer feels not only free, but pressured, to do his own work and to make both his investigation and his evaluation of the case as aggressive, as thorough, and as internally frank as possible.").

While the *Hickman* Court recognized the need for attorneys to keep their case preparation and analysis confidential, the Court also noted that the protection was not absolute. The Court stated that “[w]here relevant information and non-privileged facts remain hidden in an attorney’s file and where production of those facts is essential to the preparation of one’s case, discovery may be properly had.”¹¹ This exception to the general protection, as well as intervening judicial decisions, were reflected in the codification of the work product doctrine in Federal Rule of Civil Procedure 26(b)(3).¹² Rule 26 provides that materials prepared in anticipation of trial by an attorney or other party agent may only be discoverable upon a showing that the party seeking discovery has a “substantial need” for the materials *and* that the party would be unable to obtain the substantial equivalent of the materials without “undue hardship.”¹³ The Rule goes on to state that while such work product may be discoverable in such limited circumstances, “the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories” of the attorney or other party agent.¹⁴ This

¹¹ *Hickman*, 329 U.S. at 511.

¹² The text of Federal Rule of Civil Procedure 26(b)(3) states:

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

¹³ Fed. R. Civ. P. 26(b)(3).

¹⁴ *Id.*

protection relates to “core work product”¹⁵ and again recognizes the importance of an attorney’s privacy in developing their theory of the case and corresponding litigation strategy. The text of the Rule indicates that even in the case where factual work product must be disclosed; the privacy of core work product is of such importance that it must remain shielded from production.¹⁶ Despite the Rule’s strong admonition to protect core work product, uncertainty is created where work product is sought in the area of expert witness discovery.

B. Expert Witness Discovery

Federal Rule of Civil Procedure 26 also governs the discovery relating to expert witnesses. In 1970, Rule 26 was amended to include Subdivision (b)(4) to provide for the discovery of information obtained by or through experts who would be called as experts at trial.¹⁷ The amendment provided that an opposing party could discover “the substance of the testimony” that the expert was expected to give.¹⁸ Prior to this amendment, courts would routinely deny discovery relating to experts as it was believed that discovery of an opposing expert’s opinion would work to unfairly benefit the side seeking the disclosure.¹⁹ The 1970 amendments allowed for discovery relating to

¹⁵ “Core work product” is also referred to as “opinion work product.” Both refer to the same body of attorney work product (containing mental impressions, thoughts, analysis, etc...) and are distinguished from “factual work product.”

¹⁶ See also *Upjohn Co. v. United States*, 449 U.S. 383, 401-402 (1981) (holding that while “opinion work product” is not absolutely protected from discovery, a “far stronger showing of necessity and unavailability” must be made to compel disclosure.

¹⁷ See Fed. R. Civ. P. 26 advisory committee notes to the 1970 amendment.

¹⁸ *Id.*

¹⁹ Fed. R. Civ. P. 26 advisory committee notes to the 1970 amendment; See, e.g., *United States v. Certain Parcels of Land*, 25 F.R.D. 192 (N.D. Cal. 1959); See generally *Intermedics, Inc. v. Ventritex, Inc.*, 139 F.R.D. 384, 389-90 (N.D. Cal. 1991) (“We must keep in mind the context in which the Committee was working in the late 1960’s: many courts had refused to permit any discovery of [expert’s] views.”).

testifying experts through interrogatories, however, the experts were not deposed unless a motion for additional discovery was granted at the court's discretion.²⁰

While the 1970 amendments to Rule 26 drastically expanded the scope of discovery related to expert testimony, a great deal of uncertainty remained as to the interaction of the new discovery rules and the protection against the disclosure of attorney work product. Over the next twenty-odd years, courts were wildly inconsistent in their interpretations of the interplay between these competing principles.²¹ Thus, while Congress intended to expand discovery of information relating to expert testimony, the 1970 amendments created more ambiguity than certainty and further amendments to Rule 26 were required.

C. 1993 Amendments to Federal Rule of Civil Procedure 26

On December 1, 1993, Congress' revisions to Rule 26 went into effect, amending the Rule into the version on the books today.²² These revisions changed two crucial points within Rule 26. The most significant change was the addition of Subdivision (a)(2)(B), which made compulsory the disclosure of a large amount of information

²⁰ The relevant version of Fed. R. Civ. P. 26(b)(4) formerly provided that:

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

(ii) Upon motion, the court may order further discovery by other means . . .

²¹ Nationwide, the courts developed six separate standards by which to determine whether work product provided to an expert may be discoverable. *See generally* Michael E. Plunkett, *Discoverability of Attorney Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed Anything?*, 69 *TEMPLE L. REV.* 451, 455-467 (1996).

²² Rule 26 was also amended in 2000; however, those changes are not materially relevant to the substance of this inquiry.

relating to testifying experts.²³ This disclosure has come to be known as the “expert report” and must contain, among other components, both “a complete statement of all opinions to be expressed and the basis and reasons therefor” and “the data or other information *considered* by the witness in forming the opinions.”²⁴ In addition to the mandatory disclosures required by subdivision (a)(2)(B), Rule 26(b)(4) was rewritten to permit attorneys to routinely take the deposition of the opposing party’s testifying experts.²⁵

These amendments to Rule 26 evinced a strong intention to broaden a party’s ability to conduct discovery pertaining to expert witnesses. This intention was made especially clear in the advisory committee’s notes accompanying the amendments, which stated in pertinent part:

Paragraph (2)(B) requires that persons retained or specially employed to provide expert testimony . . . must prepare a detailed and complete written report , stating the testimony the witness is expected to present during direct examination, together with the reasons therefor [sic]. The information disclosed under the former rule in answering interrogatories

²³ Fed. R. Civ. P. 26(a)(2) provides:

(2) Disclosure of Expert Testimony.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor (sic); the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

²⁴ Fed. R. Civ. P. 26(a)(2)(emphasis added). In addition, Rule 37(c)(1) was revised to dictate that failure to disclose any portion of expert testimony in the expert report would almost certainly result in the exclusion of the undisclosed testimony at trial.

²⁵ Fed. R. Civ. P. 26(b)(4).

about the “substance” of expert testimony was frequently so sketchy and vague that it rarely dispensed with the need to depose the expert and often was even of little help in preparing for a deposition of the witness. . . .

The report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert’s opinions. 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.

While the plain language of the rules demonstrated that expert-related discovery was to be vastly broadened, the advisory committee notes made Congress’ intent unmistakable. Experts were to disclose their opinions and the materials and information considered in reaching their conclusions. In addition, experts would be subject to depositions, whereby those opinions might be probed. Moreover, Congress explicitly recognized that some litigants had been attempting to preclude disclosure of materials provided to their experts by claiming privilege or other protection. The advisory committee notes show that Congress specifically intended to put an end to that practice by mandating disclosure of *all* materials and information considered by a testifying expert. Although Rule 26 and the corresponding advisory committee notes seem to remove all uncertainty from the expert discovery process, courts have not reached uniform results in their interpretation of Rule 26.

II. Interpretations of Rule 26 following the 1993 Amendments

While the 1993 amendments to Rule 26 provided for broader expert-related discovery and added automatic disclosure obligations, courts have still disagreed as to the extent attorney work product must be disclosed in the context of expert discovery.

A. Core Work Product Protection Overrides Expert Discovery Concerns

Days after the 1993 revision took effect, a federal court for the district of Kansas had occasion to interpret the new language. In *All West Pet Supply Co. v. Hill's Pet Products*,²⁶ the court had to decide whether two documents, a memorandum and a letter, should be subject to discovery. Both documents were provided to the plaintiff's expert in the course of his preparation to testify, and both specifically related to the testimony that the expert was expected to give.²⁷ The Plaintiff did not dispute that the expert had relied on the documents in formulating his opinion.²⁸ The memorandum and the letter were undisputedly work product.²⁹

In deciding the issue, the court gave great weight to prior decisions balancing the work product protection against discovery requests, despite the fact that the prior decisions did not apply the revised language of Rule 26.³⁰ The court held that there is a strong policy in favor of protecting work product and that that protection was not waived by providing the documents to the expert.³¹ The court further held that the defendant did not meet the "substantial need/undue hardship" burden of Rule 26(b)(3) so as to overcome the work product protection.³² Finally, the *All West* court found that the Advisory Committee's notes to the 1993 amendments only applied to facts and data

²⁶ 152 F.R.D. 634, (D. Kan. 1993)

²⁷ *Id.* at 636.

²⁸ *Id.* at 635 n.2.

²⁹ *Id.* at 637.

³⁰ *Id.* at 637-39.

³¹ *Id.* at 638-39.

³² See Section I.A., *supra*.

provided to an expert, and therefore found that core work product would remain protected from discovery under the revised Rule 26.³³

In 1995 the district court for the Western District of Michigan reached a substantially identical interpretation of Rule 26. In *Haworth Inc. v. Herman Miller Inc.*,³⁴ the court found that the 1993 revisions to Rule 26 did not operate to defeat the protection against disclosing core work product. In *Haworth*, the court had to decide whether oral communications containing attorney work product between an attorney and his testifying expert were discoverable.³⁵ The court first found that although the work product protection in Rule 26(b)(3) was by its own terms “subject to” expert discovery in Rule 26(b)(4); nothing in subdivision (b)(4) could be read to abridge the protection against core work product in (b)(3).³⁶ The court then analyzed the mandatory production of the expert report governed by Rule 26(a)(2) and the corresponding advisory committee notes. Citing the *All West* decision, the court found that the rule’s requirement that “data or other information considered by the expert” be produced should only apply to factual information, and not to core work product.³⁷ The court concluded by noting that the “high privilege accorded attorney opinion work product” would only be abrogated by “clear and unambiguous language in a statute;” a standard

³³ *Id.* at 639 n.9.

³⁴ 162 F.R.D. 289 (W.D. Mich. 1995)

³⁵ *Id.* at 291.

³⁶ *Id.* at 293. (“This Court believes that the drafters intended the terms “subject to” to mean that subdivision (b)(3) applies unless there is a standard to the contrary in subdivision (b)(4). While this Court can find different standards for ordinary work product, there appears to be no differing standard for discovery of opinion work product. The present version of subdivision (b)(4)(A) does little other than provide for the deposing of an expert who will testify at trial. Subdivision (b)(4)(B) regards “facts known or opinions held” by non-testifying witnesses, and contains a very high standard for discovery. Subdivision (b)(4)(C) regards allocation of discovery costs.”)(citation omitted).

³⁷ *Id.* at 294-95.

that revised Rule 26 did not meet.³⁸ Thus, the court held that the attorney's communication of core work product to the expert was not discoverable.³⁹

One final leading case in accord with *Haworth* and *All West* is *Magee v. The Paul Revere Life Ins. Company*.⁴⁰ The *Magee* court had to determine the discoverability of three documents; two letters to the defendant Insurance company's in-house counsel from a claims department employee, and a telephone memorandum written by the defendant's in-house counsel.⁴¹ At his deposition, the defendant's expert testified that he reviewed the defendant's claim file, which included the three documents at issue. The plaintiff alleged that the defense expert's review of the claim file effectuated a waiver of the work product protection pursuant to the operation of Rule 26.⁴² After analyzing the conflicting case law on the topic and reviewing Rule 26(a) and (b) with the advisory committee notes, the court rejected the plaintiff's contention.⁴³ The court held that the disclosure of "data and other information considered by an [expert] witness in forming [his] opinions" must only refer "to factual materials, and not to core attorney work product."⁴⁴ The court explicitly stated its agreement with the reasoning in the *Haworth* decision in that "Rule 26 should not be construed as vitiating the attorney work product privilege, and the laudable policies behind it, in the absence of clear and unambiguous

³⁸ *Id.* at 295.

³⁹ *Id.* at 296-97.

⁴⁰ 172 F.R.D. 627 (E.D.N.Y. 1997).

⁴¹ *Id.* at 637-638.

⁴² *Id.* at 638-644.

⁴³ *Id.* at 642.

⁴⁴ *Id.*

authority under the Federal Rules of Civil Procedure.”⁴⁵ The court went on to find that the plaintiff failed to make the requisite showing of “need” and “undue burden” that could justify disclosure of core work product.⁴⁶

The *All West*, *Haworth*, and *Magee* cases, along with their progeny,⁴⁷ take a strong stand in recognizing and upholding the historic protection of attorney work product and the policy grounds behind it. These cases stand for the proposition that the text of Rule 26 is not sufficiently explicit to permit courts to override the high degree of protection afforded to core work product.⁴⁸ The editors of *Moore’s Federal Practice* have been persuaded by the policy underpinnings of this line of cases, stating in its most recent edition, “[t]he *Haworth* holding is meritorious, because nothing in the advisory committee notes to the 1993 amendments suggests that Rule 26(b)(4)(A) was intended to abrogate the enhanced protection for opinion work product recognized by the Supreme Court in *Upjohn Co.* . . .”⁴⁹

⁴⁵ *Id.* at 642-43.

⁴⁶ *Id.* at 643, citing to *Upjohn*, 449 U.S. at 401-402.

⁴⁷ See, e.g., *Estate of Phillip P. Chopper v. R.J. Reynolds Tobacco Co.*, 195 F.R.D. 648, 651-52 (N.D. Iowa 2000) (holding that core work product has nearly absolute immunity from discovery even where it has been provided to experts); *Krisa v. Equitable Life Assur. Soc’y*, 196 F.R.D. 254, 259 (M.D. Pa. 2000); *Smith v. Transducer Tech., Inc.*, 197 F.R.D. 260, 262 (D.V.I. 2000); *Estate of Carl J. Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 663-64 (S.D. Iowa 2000); *Nexxus Prods. Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 9 (D. Mass 1999); *Ladd Furniture, Inc. v. Ernst & Young*, 1998 WL 1093901, at *12-13, (M.D.N.C. Aug. 27, 1998); *Kennedy v. Baptist Memorial Hospital-Booneville, Inc.*, 179 F.R.D. 520 (N.D. Miss. 1998) (limiting its holding to the specific facts of the case); *New Mexico Tech. Research Found. v. Ciba-Geigy Corp.*, 1997 WL 576389, at *5 (D.R.I. Jan.3, 1997).

⁴⁸ See *Haworth*, 162 F.R.D. at 295 (“For the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute. No such language appears [in Rule 26].”) (citation omitted); See also *Krisa*, 196 F.R.D. at 260.; Gregory P. Joseph, *Emerging Expert Issues under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 105-106 (1996) (arguing that the 1993 amendments were not intended to require disclosure of core work product reviewed by experts).

⁴⁹ 6 James Wm. Moore et al., *MOORE’S FEDERAL PRACTICE*, § 26.80[1][a] (3d ed. 1999).

Moore's also observed three additional policy considerations which are furthered by the *Haworth* interpretation. First, it does not discriminate against a less wealthy party who cannot afford to retain consulting experts in addition to testifying experts.⁵⁰ The rules provide that only testifying experts must disclose "all information considered" and as such, wealthier parties may circumvent disclosure obligations by retaining experts to act exclusively in a consulting capacity.⁵¹ Second, the *Haworth* interpretation eliminates a need for the attorney-expert exchanges of "strained" hypotheticals, aimed at avoiding disclosure.⁵² Finally, it avoids possible conflict with the Rules Enabling Act by interpreting Rule 26 such that it does not "abolish[] or modify[] any evidentiary privilege."⁵³ Despite these policy justifications, this interpretation of Rule 26 remains the minority position. A majority of courts have interpreted Rule 26 in favor of disclosure of core attorney work product furnished to a testifying expert.⁵⁴

B. Work Product Considered by a Testifying Expert Must be Disclosed

Many courts have held that all materials and information considered by a testifying expert are discoverable, regardless of a possible claim of work product

⁵⁰ *Id.*

⁵¹ *But see Trigon Ins. Co. v. United States*, 204 F.R.D. 277 (E.D. Va. 2001) (The Government's attempted end run on disclosure obligations by use of separate consulting and testifying experts was ineffective, as correspondence between the consulting expert and the testifying expert was discoverable.)

⁵² 6 MOORE'S FEDERAL PRACTICE, § 26.80[1][a] at 26-236.1. This is a questionable benefit of the "*Haworth* Rule." Under the opposing rule favoring disclosure, said hypotheticals would have to be disclosed as information considered by the expert. Thus, attorney-expert conversations involving hypotheticals, strained or otherwise, would not be effective to avoid disclosure under the opposing interpretation of Rule 26.

⁵³ *Id.*, citing to *Joseph*, *supra*, 164 F.R.D. at 105-106.

⁵⁴ *Weil v. Long Island Savings Bank FSB*, 206 F.R.D. 38, 40 (E.D.N.Y. 2001) (finding that Rule 26, the advisory committee comments, and "the weight of authority" is in favor disclosure of core work product provided to experts); *Easton, Draft Dodgers* at 380 & n.68 ("The majority of courts confronting the issue have examined the minimal privacy concerns implicated by full disclosure of attorney-expert communications and held that such interests are outweighed by the need for full discovery.").

protection.⁵⁵ In so holding, courts frequently cite to *Karn v. Ingersoll-Rand*⁵⁶ to support their analysis. The *Karn* court had to resolve whether a plaintiff attorney's letter to his testifying expert would be discoverable despite plaintiff's assertion that the letters were protected as core work product.⁵⁷ The court undertook an examination of the inconsistent mosaic of Rule 26 interpretations prior to the 1993 amendments. The court found that against this historical background of haphazard interpretations of Rule 26, "it becomes plainly evident that the text of the new Rule, supported by its accompanying commentary, was designed to mandate full disclosure of those materials reviewed by an expert witness, regardless of whether they constitute opinion work product."⁵⁸

The court was largely persuaded by Rule 26(a)(2)'s requirement that the expert report must disclose all "data or other information considered by the [expert] witness in forming the opinions,"⁵⁹ along with the advisory committee's statement that the amendments were intended to prevent claims of privilege from stifling expert discovery.⁶⁰ The court also noted that the expert report is a mandatory disclosure under 26(a), and therefore not a form of discovery subject to the work product protection of

⁵⁵ See *Kooima v. Zacklift Int'l, Inc.*, 209 F.R.D. 444, 447 (D. S.D. 2002); *In re Air Crash at Dubrovnik*, 2001 WL 777433, *3, (D. Conn. June 4, 2001); *Constr. Indus. Servs. Corp. v. Hanover Ins. Co.*, 206 F.R.D. 43, 50-51 (E.D.N.Y. 2001); *Suskind v. Home Depot Corp.*, 2001 WL 92183, *5, (D. Mass. Jan. 2, 2001); *Johnson v. Gmeinder*, 191 F.R.D. 638, 645 (D. Kan. 2000); *Simon Prop. Group, L.P. v. MySimon, Inc.*, 194 F.R.D. 644, 647 (S.D. Ind. 2000); *TV-3, Inc. v. Royal Ins. Co. of America*, 193 F.R.D. 490, 491, *aff'd*, 194 F.R.D. 585, 589 (S.D. Miss. 2000); *W.R. Grace & Co.-Conn. v. Zotos, Int'l*, 2000 WL 1843258, at *3-4, (W.D.N.Y. Nov. 2, 2000); *Lamonds v. General Motors Corp.*, 180 F.R.D. 302, 305 (W.D. Va. 1998).

⁵⁶ 168 F.R.D. 633 (N.D. Ind. 1996)

⁵⁷ *Id.* at 635.

⁵⁸ *Id.* at 637.

⁵⁹ Fed. R. Civ. P. 26(a)(2)

⁶⁰ *Karn*, 168 F.R.D. at 639.

26(b).⁶¹ The court further determined that policy grounds, discussed *infra*, weighed heavily in favor of the disclosure of any and all work product supplied to testifying experts.⁶²

B.C.F. Oil Refining Inc. v. Consolidated Edison Co. of New York, Inc. is another leading case holding that work product protection will not apply to information considered by experts.⁶³ There the defendant sought to compel 50 documents which the plaintiff refused to produce based on defenses ranging from irrelevance to privilege founded on the work product protection.⁶⁴ Amongst the court's various findings as to the multitude of documents, the court held that documents that contained core attorney work product must be produced because they were considered by a testifying expert.⁶⁵ The court reasoned that a holding to the contrary would ignore the unambiguous intent of the 1993 amendments to prevent claims of privilege in the realm of expert discovery.⁶⁶ The court opined that the *Haworth* interpretation of Rule 26 created a false dichotomy between factual work product and core work product, stating that the interpretation that only factual information "considered" by the expert need be disclosed is not supported by the text or comments to Rule 26.⁶⁷ The court further recognized that under the *Haworth* interpretation, the 1993 amendments would serve

⁶¹ *Id.* at 638, citing to *Plunkett, supra*, at 476-77.

⁶² *Id.* at 639-641.

⁶³ 171 F.R.D. 57 (S.D.N.Y. 1997)

⁶⁴ *Id.*

⁶⁵ *Id.* at 63-67.

⁶⁶ *Id.* at 66.

⁶⁷ *Id.*

no purpose as “the consensus among federal courts since the 1970 amendment had already been in favor of disclosure of factual information.”⁶⁸

The *B.C.F.* court also had occasion to analyze the discoverability of oral communications between attorney and expert.⁶⁹ The court first noted that “there does not seem to be a principled difference between oral and written communications between an expert and an attorney insofar as discoverability is concerned.”⁷⁰ The court further recognized that the mandatory disclosure of data and information considered by the expert under Rule 26(a)(2) was not limited to tangible records of communication.⁷¹ However, the documents sought by the defendant were the plaintiff attorney’s notes from telephone conversations with the expert. The court held that because these documents were never shown to the expert, they were not discoverable.⁷² While the contents of the conversations would be discoverable through the expert’s deposition, the documents would be protected as core work product.⁷³

Another important case is *United States v. City of Torrence*,⁷⁴ in which the court analyzed whether letters to and from the plaintiff’s attorney must be produced. While the letters were admittedly shown to the plaintiff’s testifying expert, the plaintiff claimed that the expert did not rely on the letters in forming his opinion, and therefore no

⁶⁸ *Id.*

⁶⁹ *Id.* at 67.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 163 F.R.D. 590 (C.D. Cal. 1995)

production was required.⁷⁵ Citing authority from federal courts in New York, Illinois, and California, the court held that the plaintiff's contention was without merit, and the core work product had to be produced.⁷⁶ Specifically, the court adopted the reasoning that the scope of discovery must extend to documents considered, but rejected, by the testifying expert.⁷⁷ The court noted that an effective cross-examination of an expert may be just as likely to focus on documents the expert disagreed with, as opposed to documents which the expert relied upon in forming his opinion.⁷⁸

Finally, the only Circuit Court of Appeal, of which we are aware, to consider this issue held that core work product presented to a testifying expert must be produced. In a 2001 case, *In re Pioneer Hi-Bred International*, the U.S. Court of Appeals for the Federal Circuit examined the relationship of expert discovery and the work product doctrine.⁷⁹ After briefly noting adverse authority at the district court level, the court found that the 1993 amendments with the advisory committee notes unambiguously provide that any and all information considered by the expert is discoverable, regardless of privilege.⁸⁰ Rejecting the policy grounds underlying the *Haworth* interpretation, the court mused that the panel was "quite unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then deny

⁷⁵ *Id.* at 593.

⁷⁶ *Id.*

⁷⁷ *Id.* at 593-94, citing to *Suffolk v. Long Island Lighting Co.*, 122 F.R.D. 120, 123 (E.D.N.Y. 1988), and *Intermedics*, 139 F.R.D. at 390 n.6.

⁷⁸ *Id.* at 594.

⁷⁹ 238 F.3d 1370 (Fed. Cir. 2001)

⁸⁰ *Id.* at 1375. The court found that the attorney client privilege was also waived by disclosure of confidential information to a testifying expert. *Id.*; See also *Georgou v. Fritzhall*, 1996 WL 73592 (N.D. Ill. February 20, 1996)

discovery of such material to the opposing party.”⁸¹ The court also found that because any disclosure of relevant information to a testifying expert should be expected to become public, “there is a waiver [of any purported privilege] to the same extent as with any other disclosure.”⁸²

The aforementioned case law supporting the disclosure of work product reviewed by experts finds ample justification on policy grounds. First, and perhaps most important, is the necessity for effective cross-examination of expert witnesses.⁸³ Juries frequently afford expert testimony great weight because it almost always pertains to topics in which a given juror has no personal experience.⁸⁴ As such, an opposing side may only counteract this influence through cross-examination⁸⁵ and by calling their own expert. Given the choice between competing expert opinions, juries must assess the credibility of each. For effective analysis of an expert’s credibility, the jury will need to know what opinions are the expert’s own, and what has been spoon-fed to him by attorneys.⁸⁶ Disclosure of work product provided to experts serves this purpose.

⁸¹ *Id.*

⁸² *Id.* at 1375-76.

⁸³ *Karn*, 168 F.R.D. at 639 (Finding that because attorneys can exert excessive control over their testifying expert’s opinions, “full, effective cross-examination is crucial to the truth-finding process.”).

⁸⁴ See generally *Daubert v. Merrill-Dow Pharmaceuticals, Inc.*, 509 U.S. 595 (1993) (“Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it.”); *Musselman v. Phillips*, 176 F.R.D. 194, 199 (D. Md. 1997) (Noting that an “expert’s testimony takes on added significance because it usually focuses on subjects about which the fact finder has little or no knowledge.”)

⁸⁵ See *Musselman* 176 F.R.D. at 199-200 (“[T]he trial judge depends on the efficacy of cross-examination by the party opposing the expert’s testimony to point out any weaknesses that might affect its admissibility, as does the jury in deciding how much weight to give to the expert’s testimony.”)

⁸⁶ *Barna v. United States of America*, 1997 WL 417847, at *2 (N.D. Ill July 28, 1997) (“[A] jury is entitled to know everything that influenced an expert’s opinion in order to assess his credibility.”); but see *Magee*, 172 F.R.D. at 643 (“The Court notes that should an expert deny being influenced by the attorney who retained him or her for litigation, the burden will on the expert to establish, to the satisfaction of the trier of fact, adequate and independent bases for his or her opinions. Moreover, the expert’s opinion is always subject to the scrutiny of other experts.”).

Cross-examination of witnesses is a hallmark of our adversary system of jurisprudence.⁸⁷ Litigants are afforded the opportunity of cross-examination to expose the flaws in the opposition's theory of the case. This is especially necessary where the expert may testify to ultimate opinions, whereby the expert tells the jury how to decide the case.⁸⁸ This type of expert testimony blurs the line between an expert witness, whose role is to help the jury understand the evidence, and the attorney/advocate, who argues how the evidence should be interpreted.⁸⁹ Where the expert slips into an advocacy role, any reasonable cross-examination must illustrate the extent of the attorney influence over the expert's conclusions.

A related policy consideration is the protection of the expert witness's credibility. Expert witnesses have been denigrated with epithets ranging from "hired gun" to "purchased testimony" and worse.⁹⁰ By requiring the disclosure of all attorney

⁸⁷ *U. S. v. American Tel. & Tel. Co.* 86 F.R.D. 603, 628 (D.D.C.1979) ("More fundamentally, cross-examination is the hallmark of adversary procedure, and adversary procedure is what the work product privilege was designed to protect.")

⁸⁸ *Intermedics*, 139 F.R.D. at 396 ("The trier of fact has a right to know who is testifying. If it is the lawyer who really is testifying surreptitiously through the expert . . . it would be fundamentally unfair to the truth-finding process to lead the jury or court to believe that the background and personal attributes of the expert should be taken into account when the persuasive power of the testimony is assessed."); *Barna*, 1997 WL 417847 at * 2 (finding that if work product considered by experts were protected from disclosure, "expert testimony may become another way in which counsel places his view of the case or the evidence in front of the jury. The real danger is that this view, when espoused by an expert, is presented to the jury with an air of authority and a stamp of scientific validity, and opposing counsel might be left without a solid basis for cross-examination.")

⁸⁹ See *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir. 1986) ("Our point is that the ultimate issue in such cases can too easily become whatever an expert witness says it is, and trial courts must be wary lest the expert become nothing more than an advocate of policy before the jury. Stated more directly, the trial judge ought to insist that a proffered expert bring to the jury more than the lawyers can offer in argument."); *Occulto*, 125 F.R.D. at 616 ("Experts participate in a case because, ultimately, the trier of fact will be assisted by their opinions, pursuant to Rule 702, Fed.R.Ev. They do not participate as the alter-ego of the attorney who will be trying the case.")

⁹⁰ *State ex rel. Lichter v. Clark*, 845 S.W.2d 55, 61 (Mo. Ct. App. 1992) ("Mercenaries"); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 835 (Describing experts as "saxophones" played by attorneys); Stephen Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L. J. 465 (2000); Samuel P.

communications with the expert, an expert who conducts an unbiased independent review of the facts and data will make a stronger showing of credibility than an expert who submits to excessive attorney influence. Indeed, attorneys wary of having to disclose any communication with their experts will be less likely to attempt to mutate an expert's independent conclusions into a polished position of advocacy. Such an expert's credibility should not withstand an effective cross-examination exposing the extent to which his testimony was altered by his employer.

Another justification for the disclosure-oriented interpretation of Rule 26 is that it creates a "bright-line" test, whereby attorneys will know that any information considered by the expert will be disclosed, regardless of privilege.⁹¹ The *Haworth* interpretation draws a distinction between factual work product and core work product whereby only the former must be produced when considered by experts. Such an interpretation will necessarily lead to protracted discovery disputes as to whether given documents should be characterized as factual or core work product. Moreover, where documents contain both factual and core work product, courts will likely be forced to undertake *in camera* reviews of materials considered by experts, so as to determine what must be disclosed and what may be redacted.⁹²

Finally, some courts have opined that the strong protection against disclosure of core work product is not compromised by the interpretation of Rule 26 found in *Karn*

Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1115 (1991) (stating that both lawyers and experts view expert witnesses as "whores.")

⁹¹ *Karn*, 168 F.R.D. at 639 (The rule creates "litigation certainty" because "counsel will know exactly what documents will be subject to disclosure and can react accordingly.")

⁹² Easton, *Draft Dodgers* at 393-95 (favoring disclosure of any and all core work product given to experts and characterizing *in camera* review of such materials as "[a]n incomplete and incorrect response."); See e.g. *North Carolina Elec. Membership Corp. v. Carolina Power & Light Co.*, 108 F.R.D. 283, 286 (M.D.N.C. 1985); *Kennedy*, 179 F.R.D. at 521.

and similar cases.⁹³ Any attorney can avoid disclosure of work product by simply deciding not to communicate it to their expert. While this decision might result in expert testimony which is less valuable to a given party, the expert testimony will likely be more helpful to the jury as it will be focused on the expert's analysis of the relevant facts, and not the attorney's theory of the case. However, the attorney may still choose to provide work product to his expert in the hopes of molding a stronger expert opinion that might fit more snugly into a partisan presentation by an advocate. This decision would necessarily be accompanied by the risk that the disclosure of the attorney's influence would be used to eviscerate the expert's credibility on cross-examination. Regardless, the policy favoring nondisclosure of work product remains uncompromised as lawyers have the choice of retaining or waiving the protection by virtue of the extent and nature of their contacts with testifying expert witnesses.

CONCLUSION AND RECOMMENDATIONS

For practitioners, the positive take away from of this area of law is that one should be prepared for disclosure. The weight of the authority and commentary on the subject favor the disclosure of work product provided to experts.⁹⁴ Indeed, Rule 26 and the advisory committee notes both illustrate and support the general trend towards expanding expert discovery. Lack of guidance on the issue from the Circuit Courts of Appeal should not lull the practitioner into believing core work product is unconditionally protected.

⁹³ *Intermedics*, 139 F.R.D. 384, 392-394; *Weil*, 206 F.R.D. at 42; *Lamonds*, 180 F.R.D at 306; *Musselman*, 176 F.R.D. at 201.

⁹⁴ See n. 55, *supra*; See also *Easton, Draft Dodgers* at 380 & n. 68.

An attorney contemplating the retention of an expert, of course, would be well served to check the authority of the relevant jurisdiction regarding the interpretation of Rule 26. However, even authority protecting core work product will not guarantee sleep at night, as courts have contradicted and criticized the reasoning of other courts within the same circuit.⁹⁵ In fact, some courts have held contrary to prior interpretations in the same federal district.⁹⁶

The trend toward the disclosure of work product demands that attorneys exercise a great deal of caution when communicating with and providing documents to retained testifying experts. In our view, one should assume that any core work product provided to an expert will be discoverable by opposing counsel. Working under that assumption, the attorney will have to balance the benefit of sharing work product with the expert against the possibility of disclosure. The value of advocacy-laced expert testimony must be weighed against the possibility that the expert will look like a “hired gun” upon cross-examination. These concerns should govern an attorney’s decisions regarding all communication with his testifying expert.

⁹⁵ See *TV-3 Inc.*, 193 F.R.D. at 491 (Rejecting approach taken by another district court for Northern Mississippi in *Kennedy v. Baptist Memorial Hospital-Booneville*); *Compare All West*, 152 F.R.D. 634, with *Gall v. Jamison*, 44 P.3d 233 (Colo. 2002).

⁹⁶ *Compare Magee*, 172 F.R.D. 627, with *Weil*, 206 F.R.D. 38 (Opposing interpretations in the Eastern District of New York); *Compare All West*, 152 F.R.D. 634, with *Gmeinder*, 191 F.R.D. 638 (Differing opinions out of Kansas district court); *Compare Nexxus*, 188 F.R.D. 7, with *Suskind*, 2001 WL 92183 (Conflicting results for the federal district court of Massachusetts). However, the disagreements show that more recent judicial interpretations are likely to reject prior decisions holding that the work product protection trumps discovery of work product provided to experts. Though this trend has gained significant momentum, the question remains open as the Circuit Courts of Appeal, excepting the Federal Circuit, have not yet weighed in.