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Whether Disclosure of Work Product to a Witness in Preparation for Testifying Waives the Protection of Federal Rule of Civil Procedure 26(b)(3)

Gene Lynn Humphreys
University of Kentucky

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INTRODUCTION

Federal courts are divided on the question of whether work product protection[1] is waived by disclosing work product to a witness to prepare him for testifying.[2] This Comment will analyze the issue and suggest a resolution. First, a general discussion of work product protection since *Hickman v Taylor*[3] will be presented.[4] A discussion of the various means of waiving the protection by disclosure to a witness in preparation for testifying

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[1] Rule 26(b)(3) provides in part:

> 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.

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

[2] *Compare* James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D. Del. 1982) *and* Bailey v. Meister Brau, Inc., 57 F.R.D. 11 (N.D. Ill. 1972) (protection waived) *with* United States v. American Tel. and Tel. Co., 642 F.2d 1285 (D.C. Cir. 1980) *and* Bloch v. Smithkline Beckman Corp., No. 82-510 (E.D. Pa. Apr. 9, 1987) (protection not waived).

[3] 329 U.S. 495 (1947). For a "classic" academic discussion of the work product protection see *Developments in the Law-Discovery*, 74 HARV L. REV. 940 (1961).

[4] *See infra* notes 7-32 and accompanying text.

will follow [5] Finally, a resolution of the conflict among the courts will be addressed.[6]

I. BACKGROUND: THE WORK PRODUCT PROTECTION

The Supreme Court first recognized the work product doctrine in *Hickman v Taylor* [7] The case involved an attorney, Fortenbaugh, who was hired in anticipation of litigation by the owners of a sunken tug. Fortenbaugh interviewed the survivors of the accident. Nearly a year later litigation ensued, and the plaintiff sought discovery of Fortenbaugh's notes from the interviews. In rejecting the plaintiff's request, the Court described "work product" and the reason it should be protected:

> This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[8]

More than twenty years after the landmark *Hickman* decision, the Supreme Court incorporated the work product doctrine into Federal Rule of Civil Procedure 26(b)(3).[9] A brief analysis of the rule provides a foundation from which to build a discussion concerning waiver of work product protection. First, Rule 26(b)(3) is subject to the provisions of 26(b)(1), which allows discovery of unprivileged matter relevant to the pending action,[10]

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[5] *See infra* notes 33-107 and accompanying text.

[6] *See infra* notes 108-26 and accompanying text.

[7] 329 U.S. 495 (1947).

[8] *Id.* at 511.

[9] FED. R. CIV. P 26(b)(3).

[10] "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. " *Id.* at 26(b)(1).

and 26(b)(4), which authorizes the discovery of "facts known and opinions held by experts."[11] Second, work product includes "documents and *tangible* things."[12] Third, the documents must be "prepared in anticipation of litigation."[13] Fourth, the party seeking discovery must show "substantial need" for the material sought to be discovered,[14] and "undue hardship" in obtaining the material by other means.[15] Fifth, the rule provides special

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[11] (A)(i) 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 a summary of the grounds for each opinion.

(B) A party may discover facts known or opinions held by an expert who has been retained and is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Id. at 26(b)(4).

Rule 26(b)(3) begins: "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. " *Id.* at 26(b)(3).

[12] *Id.* (emphasis added); *cf. Hickman*, 329 U.S. at 511 (emphasis added) ("countless other tangible and *intangible* ways").

[13] FED. R. CIV P 26(b)(3). Thus, documents prepared in the "normal course of business" are not protected. United States v. 22.80 Acres of Land, 107 F.R.D. 20, 24 (N.D. Cal. 1985). "Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision." FED. R. CIV. P 26(b)(3) advisory committee's note (citing Goosman v. Duie Pyle, Inc., 320 F.2d 45 (4th Cir. 1963)). But, if the documents were prepared in anticipation of litigation and the litigation has since terminated, the documents are still protected. *In re* Murphy, 560 F.2d 326, 334 (8th Cir. 1977). There is "a perpetual protection for work product, one that extends beyond the termination of the litigation for which the documents were prepared." *Id. Contra* Levingston v. Allis-Chalmers Corp., 109 F.R.D. 546, 552 (S.D. Miss. 1985) (work product protection should not extend to subsequent litigation if the prior litigation is "wholly unrelated").

[14] FED. R. CIV P 26(b)(3). "Some cases have found substantial need by emphasizing the importance of the documents themselves." *In re* Int'l Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1241 (5th Cir. 1982). Another "common justification for discovery is the claim which relates to the opposite party's knowledge that can only be shown by the documents themselves." *Id.* (citing Bird v. Penn Cent. Co., 61 F.R.D. 43 (E.D. Pa. 1973); Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F Supp. 979, 983 (E.D. Wis. 1969)).

[15] FED. R. CIV. P 26(b)(3). A party is expected to attempt to "obtain the information he seeks by deposition." *Int'l Sys.*, 693 F.2d at 1240. That party, however, may "demonstrate undue hardship if the witness cannot recall the events in question, or is unavailable." *Id.* (citing Xerox v. I.B.M. Corp., 64 F.R.D. 367, 382 (S.D.N.Y.

protection "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[16] Sixth, and finally, the requirements of "substantial need."[17] and "undue hardship"[18] have an exception: a party or a person not a party is relieved of the requisite showing if he is requesting a copy of his own statement.[19]

Given this analysis, a "flowchart" can be constructed to clarify the discussion of work product cases.[20] The first question is whether the material sought to be discovered falls within the definition of "work product" under Rule 26(b)(3).[21] If the material falls outside the definition of work product, the material is not protected and may be discovered pursuant to the discovery rules.[22] If the material is considered work product, the second question is whether the party seeking discovery falls within the "own statement" exception.[23] If the exception applies, the party may obtain the desired material.[24] If the exception does not

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1974)). Unusual expense is another factor that a "court may consider in determining undue hardship." *Id.* at 1241 (citing Allen v. Denver-Chicago Trucking Co., 32 F.R.D. 616, 617 (W.D. Mo. 1963)).

[16] FED. R. CIV P 26(b)(3); *see* J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 7.5 (1985) ("Mental impressions of the attorney enjoy the highest level of protection under the work product doctrine, but even they may be revealed, at least in part, upon a sufficient showing."); *see also Hickman*, 329 U.S. at 510 ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."); *Murphy*, 560 F.2d at 334 ("The rule establishes a qualified immunity for ordinary work product—that which does not contain the mental impressions of the attorney. Rule 26(b)(3) provides special protection for an attorney's opinion work product.").

[17] *See supra* note 14 and accompanying text.

[18] *See supra* note 15 and accompanying text.

[19] FED. R. CIV P 26(b)(3). The exception which allows a party to obtain his own statement is "justified by the fact that a party's statement always may be used as direct evidence at trial by an opposing party, whether or not the party who made the statement is called to the witness stand." J. FRIEDENTHAL, M. KANE, & A. MILLER, *supra* note 16, at 389. The reason for the exception regarding a non-party witness "is to allow the witness to avoid embarrassment at trial by being confronted with statements inconsistent with the testimony given." *Id.*

[20] This "flowchart" is somewhat oversimplified but suitable for the purposes of this Comment.

[21] *See supra* notes 12-13 and accompanying text.

[22] *See* FED. R. CIV. P 26-37.

[23] *See supra* note 19 and accompanying text.

[24] FED. R. CIV P 26(b)(3).

apply, the next question is whether the material is "ordinary" work product or "opinion" work product.[25] If the material reveals "opinion" work product, the party seeking discovery will have considerable difficulty making the required showings under the rule.[26] If the material is "ordinary" work product, the fourth question is whether the party seeking discovery can make the required showings of substantial need and undue hardship.[27] If the requisite showings can be made, then the material is discoverable.[28] If the party seeking discovery cannot make the requisite showings, the materials may still be discoverable if the other party has waived work product protection.[29]

The rationale behind work product protection provides a foundation for the discussion of waiver. "Preserving the privacy of preparation that is essential to the attorney's *adversary* role is the central justification for the work product doctrine."[30] The *Hickman* Court recognized the importance of this privacy: "In performing his various duties, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel."[31] Commentators agree that the purpose of the work product doctrine is to preserve the adversary system by permitting attorneys to prepare their cases without fear of interference by opposing counsel.[32]

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[25] *See supra* note 16 and accompanying text.

[26] *See supra* note 16; *see also* Upjohn Co. v. United States, 449 U.S. 383, 401-02 (1980). Opinion work product "cannot be disclosed simply on a showing of substantial need and undue hardship." *Id.* The Court refused to say that opinion work product enjoys absolute protection. Nevertheless, the Court thought that a "far stronger showing of necessity and unavailability by other means" was required for disclosing materials that reveal an attorney's mental processes. *Id.*

[27] *See supra* notes 14-15.

[28] FED. R. CIV P 26(b)(3).

[29] *See infra* notes 33-45 and accompanying text.

[30] Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985), *cert. denied,* 106 S. Ct. 232 (1985) (emphasis added).

[31] *Hickman*, 329 U.S. at 510-11. "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. Inefficiency, unfairness, and sharp practices would inevitably develop." *Id.* at 511.

[32] *See* J. FRIEDENTHAL, M. KANE, & A. MILLER, *supra* note 16, at 386-87 (Work product doctrine is "based on the idea that every attorney should feel free to investigate all aspects of a case without fear that the opposing party simply could obtain unfavorable matters and put them to use."); 4 J. MOORE, J. LUCAS, & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 26.64[4] (2d ed. 1987) ("[T]he primary purpose of work product protection is to safeguard the adversary process. ").

II. WAIVER OF WORK PRODUCT PROTECTION

Although work product protection is not a true privilege,[33] many courts still refer to it as a privilege.[34] Whether it is viewed as a privilege or a protection, the protection it affords is not absolute and may be waived by disclosing the work product to a witness in preparation for trial.[35]

A. Waiver Generally

Work product protection is distinct from the attorney-client privilege,[36] which protects the confidential communications between attorneys and their clients.[37] Therefore, waiver of the latter does not entail waiver of the former.[38] Nevertheless, work prod-

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[33] One commentator stated:

> [T]he difference between the work-product exception to discovery, and the exception for privileged matter should be kept in mind. Privileged information is immune totally from discovery, no matter how compelling the need for the information seems to be. Information that is collected in anticipation of litigation or trial is protected from discovery, but that protection may yield to a showing of need on the part of the requesting party.

J. FRIEDENTHAL, M. KANE, & A. MILLER, *supra* note 16, at 387. For a good discussion of the work product protection generally and of its "non-privileged" character, see Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917 (1983).

[34] *See* United States v. Nobles, 422 U.S. 225, 237-38 (1975) (Court characterizes the *Hickman* opinion as establishing a "qualified privilege" or a "privileged area" for the attorney); United States v. Gulf Oil Corp., 760 F.2d 292, 295 (Temp. Emer. Ct. App. 1985); *In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984); Western Fuels Ass'n v. Burlington N. R.R., 102 F.R.D. 201, 203 (D. Wyo. 1984).

[35] *Nobles*, 422 U.S. at 239. Although *Nobles* is a criminal case, it has been cited often in civil actions for the proposition that the protection of 26(b)(3) is not absolute and can be waived. *See* Boring v. Keller, 97 F.R.D. 404, 407 (D. Colo. 1983) ("[T]he protection is not absolute, and it can be waived."); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 446 (W.D. Mo. 1976) ("It is true that the immunity for the work product doctrine can be waived.").

[36] *See generally* E. CLEARY, MCCORMICK ON EVIDENCE (3d ed. 1984) (a comprehensive discussion of attorney-client privilege).

[37] *Id.*

[38] *In re* Grand Jury, 106 F.R.D. 255, 257 (D.N.H. 1985). The court, in a criminal action, was faced with an unusual situation regarding the requested material. The client had waived his attorney-client privilege but his attorney asserted work product protection to avoid turning over the client's file. The court said:

> Although only confidential communications between the attorney and client are protected by the attorney-client privilege, the work product doctrine may encompass any document prepared in anticipation of litigation by or

uct protection clearly "*may* be waived by disclosure."[39] Although a majority of the courts do not follow a "*per se* waiver" rule,[40] some courts have gone so far as to suggest that *any* disclosure of work product which is not "between counsel on the same side of litigation"[41] is a waiver.[42]

All courts agree, however, that disclosure to an adversary clearly waives work product protection.[43] Even when disclosure is inadvertent, the policy behind work product immunity[44] "would not be harmed in the least by permitting the immunity to be

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> for the attorney. Further, the attorney-client privilege belongs to the client alone while the work product doctrine may be asserted by either the client or the attorney.

Id. at 256 (citing *In Re* Grand Jury Proceedings, 604 F.2d 798 (3d Cir. 1979)). The differences between the attorney-client privilege and the work product protection led the court to conclude that the "defendant's waiver of the attorney-client privilege does not necessarily mean that the protection afforded by the work product doctrine is also breached." *Id.* at 257 (citing Handgards, Inc. v. Johnson & Johnson, 413 F Supp. 926, 929 (N.D. Cal. 1976)).

[39] Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84, 89 (E.D.N.Y. 1981) (emphasis added). The court also noted that "there appears to be no *per se* waiver rule." *Id.*

[40] *See, e.g.*, GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 51 (S.D.N.Y. 1979) (the rule that voluntary disclosure constitutes a *per se* waiver of the work product protection "is inconsistent with the rule accepted by the majority of courts."). Significantly, *D'Ippolito*, *Philadelphia Electric Co.*, and *B & C Trucking Co.* were all decided before the 1970 enactment of Rule 26(b)(3). *See infra* notes 41-42. Prior to 1970, the standard for discoverability of work product was "good cause" under Rule 34. *See, e.g., Philadelphia Elec. Co.*, 275 F Supp. at 148.

[41] D'Ippolito v. Cities Serv. Co., 39 F.R.D. 610 (S.D.N.Y. 1965). The plaintiff had "voluntarily disclosed" an exhibit to attorneys from the Justice Department and the defendant sought discovery. The court said: "The government is not a party to this lawsuit, and the disclosure of the document cannot be termed as an interchange of information between counsel on the same side of the litigation." *Id.* The court then concluded: "Any privilege that may have attached was destroyed by the voluntary act of disclosure." *Id; see* Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 275 F Supp. 146, 148 (E.D. Pa. 1967) (citing *D'Ippolito* for the proposition that "disclosure to third parties destroys the privilege"); B & C Trucking Co. v. Holmes & Narver, Inc., 39 F.R.D. 317, 319 (D. Haw. 1966) (disclosure to the Atomic Energy Commission, a third party not a party in the litigation, waived the "work product privilege").

[42] *Id.*

[43] *See In re Subpoenas Duces Tecum*, 738 F.2d at 1372 (disclosure to an adversary waives the protection of the materials disclosed regarding the adversaries in the same action as well as those in subsequent litigation on the "very same matters disclosed"); *see also infra* notes 111-14 and accompanying text.

[44] *See supra* notes 30-32 and accompanying text.

waived where the attorney fails to take any of the available steps to preserve the confidentiality of the work product."[45]

B. Waiver Through Witness Preparation: Experts

In general, work product protection may be waived. A more specific issue is whether the protection may be waived through the preparation of expert witnesses. Work product protection is subject to Rule 26(b)(4) regarding discovery of expert opinions.[46] The court in *Boring v Keller*[47] held that disclosure of work product to an expert waives the protection of Rule 26(b)(3).[48] The defendant's attorney, Pryor, had prepared a summary of the plaintiff's depositions which contained Pryor's impressions and evaluations of the plaintiff as a witness. Pryor provided this summary to the defendant's second expert witness. The court concluded that this disclosure was sufficient to allow discovery because, without the documents, the plaintiff's attorney would "not have the opportunity to impeach the expert witnesses at cross-examination."[49] This reason was sufficient to compel discovery even of *opinion* work product.[50] Although a stronger showing of "substantial need" and "undue hardship" is required for discovery of opinion work product,[51] the court made no explicit reference to such a showing in this case. The court suggested that mere disclosure of opinion work product to an expert witness is sufficient to compel discovery [52] The logic of the *Boring* court has been criticized,[53] and was implicitly rejected in *Bogosian v Gulf Oil Corp.*[54]

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[45] Hartford Fire Ins. Co. v. Garvey, 109 F.R.D. 323, 331 (N.D. Cal. 1985).

[46] FED. R. CIV P 26(b)(3). Work product protection is "subject to the provisions of subdivision (b)(4) of this rule." *Id; see supra* note 1. See *supra* note 11 for a discussion of discovery of expert opinions under Rule 26(b)(4).

[47] 97 F.R.D. 404 (D. Col. 1983).

[48] *Id.* at 407-08.

[49] *Id.* at 408.

[50] *See supra* notes 16, 26 and accompanying text.

[51] *Id.*

[52] *Boring*, 97 F.R.D. at 407.

[53] *See, e.g.*, Note, *Discovery Under the Federal Rules of Civil Procedure of Attorney Opinion Work Product Provided to an Expert Witness*, 53 FORDHAM L. REV. 1159, 1165 (1985) (arguing that "opinion work product utilized by an expert witness in preparation for trial should be absolutely immune from discovery under Rule 26(b)(4)").

[54] 738 F.2d 587 (3d Cir. 1984).

The *Bogosian* court rejected the notion that the language at the beginning of Rule 26(b)(3) which subjects work product protection to the provisions of 26(b)(4)[55] applies to opinion work product.[56] The court held that the language in question only applies to "the *first* sentence of Rule 26(b)(3)."[57] The court then concluded that the language:

> does not limit the *second* sentence of Rule 26(b)(3) restricting disclosure of work product containing "mental impressions" and "legal theories." Thus, it does not support the district court's conclusion that Rule 26(b)(3), protecting this category of attorney's work product, "must give way" to Rule 26(b)(4), authorizing discovery relating to expert witnesses.[58]

Between *Boring* and *Bogosian*, *Bogosian* appears to be the more logical view [59] "A rule prohibiting disclosure of *opinion* work product sought under Rule 26(b)(4) better effectuates the policies underlying the work product doctrine."[60] Of course, "*facts* that the expert used in reaching his findings are readily discoverable."[61]

C. Waiver Through Witness Preparation: "Memory Refreshment"

Just as there is debate over whether work product protection is waived through disclosure to an expert witness,[62] there is also debate over whether disclosure to a witness to "refresh" his memory should waive work product protection.[63] Federal Rule

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[55] *See supra* note 11.

[56] *Bogosian*, 738 F.2d at 594.

[57] *Id.* (emphasis added).

[58] *Id.* (emphasis added).

[59] See Note, *supra* note 53, at 1168-74 for a forceful argument against the waiver notion expounded by the *Boring* court.

[60] *Id.* at 1180 (emphasis added).

[61] *Id.* (emphasis added); *see Bogosian*, 738 F.2d at 595 (when same document contains both facts and legal theories, adversary may discover the facts); *supra* note 11 (facts known by expert are discoverable under 26(b)(4)).

[62] *See supra* notes 46-61.

[63] *See* Note, *Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules*, 88 YALE L.J. 390 (1978). Most of the significant cases addressing this issue, however, have been decided since the note was published. *See infra* notes 69-107.

of Evidence 612, the "memory refreshment" doctrine, embodies an adversary's rights with respect to a writing used to refresh the memory of a witness "for the purpose of testifying."[64] The danger of concluding that memory refreshment *does* waive work product protection is that "Rule 612 becomes a rule of discovery"[65] rather than a rule of evidence.[66] The purpose of Rule 612 is to "promote the search of credibility and memory,"[67] not to be used as a device for "wholesale exploration of an opposing party's files."[68] On the other hand, the danger of concluding that waiver *does not* result is that "an attorney could obtain an unfair advantage over a cross-examining attorney at a deposition by the simple expedient of using privileged documents prior to the deposition to refresh the witness' recollection, especially where the documents might improperly shade the witness' testimony "[69]

Before discussing the views on both sides of the waiver issue, it should be noted that a neutral approach may be taken. It has been suggested that the court review the disputed materials *in camera* to determine whether they should be disclosed.[70] In *S &*

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[64] [I]f a witness uses a writing to refresh his 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.

FED. R. EVID. 612. *See generally* 3 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 612[01] (1987) (a general discussion of the development of memory refreshment doctrine).

[65] Note, *supra* note 63, at 400; *see* Sporck v. Peil, 759 F.2d 312, 317-18 (3d Cir.), *cert. denied*, 106 S. Ct. 232 (1985); S & A Painting Co., Inc. v. O.W.B. Corp., 103 F.R.D. 407, 409 (W.D. Pa. 1984). Rule 612 might then be used to discover "everything shown to a witness prior to his testimony, whether used to refresh memory or not." Note, *supra* note 63, at 400.

[66] *Id.*

[67] FED. R. EVID. 612 advisory committee's note.

[68] *Id.*

[69] Bloch v. Smithkline Beckman Corp., No. 82-510 (E.D. Pa. Apr. 9, 1987), slip op. at 5-6.

[70] J. WEINSTEIN & M. BERGER, *supra* note 64, at ¶ 612[04].

Until such time as the Supreme Court decides these issues, the following approach is suggested. If the adverse party demands material which the

A Painting Co. v O.W.B. Corp.,[71] the court ordered the plaintiff to deliver a copy of the notes used by the witness during testimony for *in camera* inspection. Following such inspection, the court may "then order disclosure of all portions of the notes to which [the witness] referred during the deposition as established by the transcript."[72] The *Bogosian* court, however, succinctly noted the real problem with *in camera* inspections. Although there are a "few situations where . . . *in camera* inspection . . . is unavoidable,"[73] the court pointed out that "district courts are overburdened with discovery matters, and most disputed issues are capable of resolution between attorneys if a serious attempt is made to do so."[74] Thus, *in camera* inspection of every "work product-memory refreshment" dispute would not be an effective solution.

One of the first cases to address the issue of memory refreshment and work product protection was *Berkey Photo, Inc. v Eastman Kodak Co.*[75] The court stated that because "counsel were not vividly aware of the potential for a stark choice between withholding the notebooks from the experts or turning them over to opposing counsel,"[76] the request for discovery would be denied.[77] But, the court warned that similar disclosure in the future likely would be considered a waiver.[78]

> party producing the witness claims reflects solely the attorney's thought processes, the judge should examine the material *in camera*. Unless the judge finds that the adverse party would be hampered in testing the accuracy of the witness' testimony, he should not order production of any writings which reflect solely the attorney's mental processes.

Id.

[71] 103 F.R.D. 407 (W.D. Pa. 1984).

[72] *Id.* at 410. The magistrate in Barrer v. Women's Nat'l Bank, 96 F.R.D. 202 (D.D.C. 1982), *rev'd on other grounds*, 761 F.2d 752 (D.C. Cir. 1985), made a similar order so as to "strike a balance between plaintiff's interest in discovering any evidence favorable to him and the defendant's interest in protecting the attorney-client relationship [and attorney work product]." *Id.* at 205.

[73] *Bogosian*, 738 F.2d at 596.

[74] *Id.* at 595-96.

[75] 74 F.R.D. 613 (S.D.N.Y. 1977). For a comprehensive analysis of this case, see Note, *supra* note 63.

[76] *Berkey Photo, Inc.*, 74 F.R.D. at 617.

[77] *Id.*

[78] *Id.*

The court's warning in *Berkey*, in time, came true. The court in *James Julian, Inc. v Raytheon Co.*[79] held that disclosing work product to prepare a witness for deposition constituted a waiver of the protection.[80] Reasoning that waiver would be in the "interests of justice"[81] pursuant to Rule 612,[82] the court concluded: "Without reviewing those binders defendants' counsel cannot know or inquire into the extent to which the witness' testimony has been shaded by counsel's presentation of the factual background."[83]

However, the warning of *Berkey*[84] and the holding in *James Julian*[85] have not been the trend in recent cases.[86] The court in *Sporck v Peil*[87] refused to order disclosure of the document allegedly used to prepare a witness for deposition.[88] Because the party seeking disclosure had "failed to establish either that petitioner relied on any documents in giving his testimony, or that those documents influenced his testimony,"[89] the court concluded that "counsel failed to lay a proper foundation under Rule 612 for production of the documents."[90] Thus, because there was no conflict between Rule 612 and Rule 26(b)(3), no waiver resulted.[91]

In one of the most recent cases involving memory refreshment and waiver of work product protection, *Bloch v Smithkline Beckman Corp.*,[92] the court refused to permit discovery of a witness' statement, which was reviewed by the witness prior to testifying at a deposition.[93] The court said:

> The work product doctrine need not be viewed as conflicting with Federal Rule of Evidence 612, and courts need not choose

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[79] 93 F.R.D. 138 (D. Del. 1982).
[80] *Id.* at 146.
[81] *See supra* note 64.
[82] *See James Julian, Inc.*, 93 F.R.D. at 146.
[83] *Id.*
[84] *See supra* note 78 and accompanying text.
[85] *See supra* note 80 and accompanying text.
[86] *See Sporck*, 759 F.2d at 318; *Bloch*, No. 82-510, slip op. at 5-6.
[87] 759 F.2d 312 (3d Cir. 1985).
[88] *Id.* at 318-19.
[89] *Id.* at 318.
[90] *Id.*
[91] *Id.*
[92] No. 82-510 (E.D. Pa. Apr. 9, 1987).
[93] *Id.*, slip op. at 1-2, 10.

> one over the other. Before a document may be disclosed under Rule 612(2), [the] provision which focuses upon use of documents before testifying, the court in its discretion must determine that disclosure is necessary in the interest of justice.[94]

The court then found that although the witness' "memory may have been aided by his reading of the document, the document had not been given to him for the *purpose* of preparing him for the deposition."[95]

For both the *Sporck* and the *Bloch* courts, there was no conflict between Rule 612 and Rule 26(b)(3) because the prerequisites of Rule 612 were not met.[96] For this reason, neither court permitted disclosure of the documents in question.[97] The court in *In re Comair Air Disaster Litigation*,[98] however, took a somewhat different approach. The court noted that Rule 612 and Rule 26(b)(3) could be "read in harmony with each other."[99] After suggesting that work product should be discoverable only when the party seeking discovery makes the required showings of "substantial need"[100] and "undue hardship,"[101] the court stated:

> When, however, a witness has used such materials to refresh his recollection prior to testifying, [Rule] 612 weights the balance in favor of findings that the "substantial need" exists, because of the policy in favor of effective cross-examination.[102]

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[94] *Id.*, slip op. at 4.

[95] *Id.*, slip op. at 7 (emphasis added).

[96] *Sporck*, 759 F.2d at 318; *Bloch*, No. 82-510, slip op. at 4. The prerequisites of Rule 612 have been set forth: "1) the witness must use the writing to refresh his memory; 2) the witness must use the writing for the purpose of testifying; and 3) the court must determine that production is necessary in the interest of justice." *Sporck*, 759 F.2d at 317.

[97] *Id.* at 312; *Bloch*, No. 82-510, slip op. at 10.

[98] 100 F.R.D. 350 (E.D. Ky. 1983).

[99] *Id.* at 353; *cf. Sporck*, 759 F.2d at 318 ("Rule 612, therefore, when properly applied, does not conflict with the protection of attorney work product of the type involved in this case."); *Bloch*, No. 82-510, slip op. at 4 ("The work-product doctrine need not be viewed as conflicting with Federal Rule of Evidence 612. ").

[100] *See supra* note 14.

[101] *See supra* note 15.

[102] *In re Comair Air Disaster Litig.*, 100 F.R.D. at 353.

The court also allowed discovery on the basis of the "interests of justice" language of Rule 612.[103]

The most important point made by the *Comair* court is that the invocation of Rule 612 does not imply a waiver of the work product protection, but merely "weights the balance in favor of finding" that the required showings of Rule 26(b)(3) have been met.[104] Theoretically, this approach is much more logical than the notion of waiver, because Rule 612 is not converted into a rule of discovery [105] Rather, a party seeking disclosure of materials under Rule 612 must first make the required showings under Rule 26(b)(3)[106] before discovery will be allowed.[107]

III. RESOLVING THE ISSUE

Disclosing work product to a witness in preparation for testifying may waive the protection of Rule 26(b)(3).[108] In this way, work product protection is similar to the attorney-client privilege.[109] The reason for the attorney-client privilege, however, is "to secure a more general privacy for confidential communications. Therefore, when the privileged communication is made sufficiently public, for example by disclosure to a third person,

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[103] *Id; see supra* note 64 (according to Rule 612, adverse party is entitled to writing used by witness to refresh his memory before testifying if the court "determines it is necessary in the interests of justice").

[104] *In re Comair Air Disaster Litig.*, 100 F.R.D. at 353.

[105] See *supra* note 65-68 and accompanying text.

[106] *See supra* notes 14-15. This is assuming that the materials in question are deemed to be work product.

[107] *In re Comair Air Disaster Litig.*, 100 F.R.D. at 353; *see S & A Painting Co.*, 103 F.R.D. at 409 ("Allowing disclosure under Rule 612 of documents protected by the work product doctrine circumvents the requirement of 'substantial need' and 'undue hardship' prior to discovery under Rule 26(b)(3)."); J. WEINSTEIN & M. BERGER, *supra* note 64, at ¶ 612[04] ("Given the liberality of disclosure and the work-product exception in the discovery rules, the opponent should be required to make some *showing of need* in order to obtain materials which a witness reviewed before a deposition *instead* of achieving wholesale disclosure." (emphasis added)).

[108] *See* United States v. Nobles, 422 U.S. 225, 239 (1975); *see also* Boring v. Keller, 97 F.R.D. 404, 407 (D. Col. 1983) ("[T]he protection is not absolute, and can be waived."); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443, 446 (W.D. Mo. 1976) ("It is true that the immunity of the work product doctrine can be waived."); J. MOORE, J. LUCAS, & G. GROTHEER, *supra* note 32, at ¶ 26.64[4] ("Work product immunity can be waived.").

[109] J. MOORE, J. LUCAS, & G. GROTHEER, *supra* note 32, at ¶ 26.64[4].

the privilege may justifiably be considered waived."[110] On the other hand, the rationale of work product protection is to "promote the effectiveness of the lawyer's trial preparations."[111] In other words, "[p]reserving the privacy of preparation that is essential to the attorney's adversary role is the central justification for the work product doctrine."[112] Thus:

> The policies supporting the concept do not seem to require general secrecy, but merely secrecy from possible adversaries. In so far as trial preparations may be communicated to third persons without substantially increasing the opportunities for potential adversaries to obtain the information, it seems that the work product protection should continue. Therefore, disclosure of work product materials to people with a general common interest, such as business advisers of a client, does not warrant the conclusion that the protection has been waived.[113]

For these reasons, there is little doubt that disclosure to an adversary waives the work product protection.

Most courts follow the rule that "disclosure of a document to third persons does not waive the work product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information."[114] Along with this

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[110] *Developments in the Law-Discovery, supra* note 3, at 1045.

[111] *Id.*

[112] Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 232 (1985).

[113] *Developments in the Law-Discovery, supra* note 3, at 1045 (citations omitted).

[114] Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 886 (1983) (quoting 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024 (1970)); *see* Western Fuels Ass'n v. Burlington N. R.R., 102 F.R.D. 201, 203 (D. Wyo. 1984) (waiver may result from disclosure of work product "to third parties in such a manner as is inconsistent with the purpose of maintaining the secrecy of such information from current or potential adversaries."); *In re* Grand Jury Subpoenas Dated December 18, 1981 and January 4, 1982, 561 F Supp. 1247, 1257 (E.D.N.Y. 1982) ("Disclosure of work product to a third party does not waive its protection unless it substantially increases the opportunity for potential adversaries to obtain the information."); GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46, 52 (S.D.N.Y. 1979) ("[O]nly if such disclosure substantially increases the possibility that an opposing party could obtain the information disclosed will the disclosing party's work product privilege be deemed waived."); *American Standard, Inc.*, 71 F.R.D. at 446 (quoting C. WRIGHT & A. MILLER, *supra* this note, at § 2024); Stix Prods., Inc. v. United Merchants & Mfg., Inc., 47 F.R.D. 334, 338 (S.D.N.Y. 1969) ("The work product privilege should not be deemed waived unless the disclosure is inconsistent with maintaining secrecy from possible adversaries.").

view a "common interests" corollary has arisen.[115] This majority view and its corollary may provide an acceptable solution to the problem of waiver.

The leading case addressing the "common interests" corollary is *United States v American Telephone and Telegraph Co.*[116] MCI had given documents prepared in anticipation of litigation to the government. AT&T sought discovery of these documents. Because MCI was not a party to the case, it could not assert work product protection.[117] In addition, because the United States had not prepared the documents, it also could not assert work product protection.[118] This initial problem was avoided by allowing MCI to intervene, at which time it asserted work product protection to prevent discovery of the documents.[119] The court was then faced with the question of whether MCI's disclosure of the documents to the United States prior to intervention would constitute a waiver of the protection.[120] The court traced the development of the "common interests" corollary[121] and criticized the narrowness of some holdings.[122] The court then concluded that when a person ("transferor") transfers work product to another ("transferee"), it is the:

> existence of "common interests" between transferor and transferee [that] is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. But "common interests" should not be construed as narrowly limited to co-parties. So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common

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[115] Special Project, *supra* note 114, at 887-88.

[116] 642 F.2d 1285 (D.C. Cir. 1980).

[117] *Id.* at 1297.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 1298.

[121] *Id.* at 1298-99.

[122] *Id.* at 1299. The court felt that limiting the concept of "common interests" to co-parties, "parallels the strict standard applied for waiver of the attorney-client privilege," which is based on different reasons from the work product privilege. *Id.* at 1298-99; *see supra* note 38 (differences between the attorney-client privilege and the work product protection); *see also Stix Prods., Inc.*, 47 F.R.D. at 338 (in which the "presence of a community of interest" obviated the claim of waiver).

> interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary [123]

The court noted that upon remand, it would be "open to the district court to consider the substantial need[124] argument."[125] Thus, even when there is no waiver of work product protection, discovery may still be possible.[126]

CONCLUSION

The obvious practical conclusion is that *not* disclosing work product to witnesses will prevent questions of waiver from arising. Nevertheless, in situations in which work product must be disclosed or has already been disclosed, strong arguments can be advanced against waiver of work product protection. Clearly, mere disclosure to a witness should not be a *per se* waiver.[127] Even when disclosure is to refresh the memory of a witness, the policy of preventing Rule 612 from becoming a rule of discovery suggests that no waiver results.[128] Nevertheless, the party seeking discovery may find it easier to make the required showings under Rule 26(b)(3) such that discovery could be ordered.[129] Finally, the vast majority of courts will find a waiver only when work product is disclosed to an adversary or to a third party who is *likely* to transmit the work product to an adversary [130] Because

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[123] *American Tel. & Tel. Co.*, 642 F.2d at 1299. Also:

> The majority rule, and its common interest corollary, comport well with the work product doctrine's purpose of preventing disclosure to adversaries in litigation but not to the world in general. The majority rule encourages an attorney to prepare more fully for trial without fear of access by adversaries, even when circumstances necessitate disclosure of work product materials to third parties.

Special Project, *supra* note 114, at 888.

[124] *See supra* note 14.

[125] *American Tel. & Tel. Co.*, 642 F.2d at 1302.

[126] *See supra* notes 106-07 and accompanying text; *see also* Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 45 (D. Md. 1974) (when there is a "mutual interest," work product protection is not waived; but "proper showing of the need-hardship" requirements would allow discovery).

[127] *See supra* notes 33-61 and accompanying text.

[128] *See supra* notes 65-68 and accompanying text.

[129] *See supra* notes 62-107 and accompanying text.

[130] *See supra* notes 111-15 and accompanying text.

disclosure to a witness, or to anyone with a "common interest," is generally not likely to wind up in the hands of one's adversary, the protection should not be considered waived.[131] The requisite showing under Rule 26(b)(3) should always be made before discovery is permitted.

Gene Lynn Humphreys

[131] *See supra* notes 116-26 and accompanying text.