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Discovery of Attorney-Expert Communications: Current State of, and Suggestions for, Federal and Missouri Practice

I. INTRODUCTION

In a products liability action the plaintiff’s attorney engages an expert witness to testify at trial on behalf of the attorney’s client. The defense attorney for the product manufacturer also plans to call an expert witness at trial.

During discovery the plaintiff’s attorney suspects that the defense expert’s opinions are wholly the creation of the defense attorney. The plaintiff’s attorney, expecting that the expert’s opinions are not her own, attempts discovery of several letters from the defense attorney to the defense expert.

The defense attorney sincerely believes that the complex nature of the expert testimony in this case renders interrogatory and oral deposition testimony insufficient to determine the facts. He wishes to obtain written reports of the plaintiff’s expert without which the defense attorney feels he will be unable to effectively cross-examine plaintiff’s expert witness. As a result, the defense attorney seeks discovery of the report written by plaintiff’s expert for the plaintiff’s attorney.

Two competing interests must be weighed in both of these situations. The cross-examining attorney requires sufficient information to effectively cross-examine an expert witness on often complex, technical matters. The proponent of the expert, on the other hand, possesses a legitimate right to protect the litigation team’s trial strategy from pre-trial disclosure under the work product rule.

This Comment surveys the current trends in protection and discovery of attorney work product, both factual and opinion, when the party’s attorney or other representative conveys that information to an expert witness who has been called or retained by the party to testify at trial. This Comment also examines the federal and Missouri standards for discovery of testifying expert-attorney communications. Section II briefly summarizes the history of the work product doctrine and Federal Rule of Civil Procedure 26(b)(3), examines the conflict between Rule 26(b)(3)’s strong protection of core work product and the more liberal discovery provisions of Rule 26(b)(4)(A), and proposes that attorney-expert communications deserve a high degree of protection when they rise to the level of work product. Contrary to the holding of several courts, however, the degree of protection given to attorney-expert communications should not rise to the level of absolute immunity. Section III examines
the protection of core work product in Missouri when that work product is transmitted by an attorney to a testifying expert. This Comment argues that Missouri should soften the absolute immunity of core work product that is currently mandated by the Missouri courts. Section IV examines the standard for discovery of expert to attorney communications at the federal level. Section V looks at the Missouri provisions for discovery of expert to attorney communications and advocates that the Missouri practice be altered to reflect the more liberal federal standards and procedures.

The information that the attorney communicates to the expert generally falls into one of two "work product" categories. It may be factual work product—the relevant factual information possessed by the attorney; or core work product—the "mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."3

The primary issue centers on protection of core work product. An expert witness must base her opinion testimony on facts and information gleaned second-hand; the expert will normally not be a witness to the events at issue. While core work product deserves strong protection, effective cross-examination of an expert witness hinges on the cross-examiner's ability to fully understand the foundation for the expert's conclusions. Most attorneys would relish the opportunity to examine core work product given to the expert and the expert's reports and notes. This discovery must, however, be balanced against the strong protection given core work product.

A. Federal Treatment

Federal Rule of Civil Procedure 26(b)(1) governs the scope of discovery in civil litigation in the federal courts.4 Generally, any matter relevant to the pending litigation is discoverable.5 If, however, the materials sought by the discovering party constitute factual or core work product, Rule 26(b)(3) limits

1. Broadly defined as documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative. See CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2024, at 197 (1970); Fed. R. Civ. P. 26(b)(3).
3. Id.; See WRIGHT & MILLER, supra note 1, § 2026.
4. Fed. R. Civ. P. 26(b)(1) states in pertinent part: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party. . . ."
5. Id.
the scope of permissible discovery. This work product limitation restricts
discovery of factual work product to situations where the "party seeking
discovery has substantial need of the materials . . . [and] is unable to obtain
the substantial equivalent of the materials by other means." Even when
discovery of factual work product is allowed, the "court shall protect against
disclosure" of core work product.

Rule 26(b)(4) specifically pertains to discovery of "facts known and
opinions held by experts." Factual work product communicated to the expert
is routinely discoverable as "facts known" to the expert. It is unclear
whether core work product conveyed from the attorney to her testifying expert
is discoverable. Rule 26(b)(4)(A)(i) allows the discovering party to request
"a summary of the grounds for each [testifying expert's] opinion." This
summary may include opinion work product communicated to the expert.
Additionally, a court may use its discretion to allow discovery of core work

6. Fed. R. Civ. P. 26(b)(3) states in pertinent part:
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.

7. Id.

8. Id.

Trial Preparation: Experts. Discovery of facts known and opinions held
by experts, otherwise discoverable under [26(b)(1)] . . . and acquired or
developed in anticipation of litigation or for trial, may be obtained only as
follows:

(A)(i) A party may through interrogatories require any other party to
identify each person whom the other party expects to call as an expert
witness at trial . . . and to state the substance of the facts and opinions to
which the expert is expected to testify and a summary of the grounds for
each opinion. (ii) Upon motion, the court may order further discovery by
other means, subject to such restrictions as to scope . . . as the court may
deem appropriate.

10. Id.

11. Id.
product, though this discovery is still subject to the limitations of Rule 26(b)(4)(A)(ii). Rule 26(b)(3), however, requires protection of core work product even when factual work product discovery is allowed.

Federal Rule of Evidence 612
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Federal Rule of Evidence 612 may provide an alternative justification for discovery of core work product. While not a discovery rule per se, Federal Rule of Evidence 612 may be utilized during the deposition of an expert witness. Federal Rule of Evidence 612 allows a party to discover and examine any writing used by witnesses to refresh their memory. A party seeking to discover core work product could therefore assert that Federal Rule of Evidence 612 allows the party to discover writings reviewed by the expert.

Discovery of opinion work product reviewed by the expert might also be required to further the objectives of Federal Rule of Evidence 705. The Advisory Committee on the Federal Rules of Evidence notes that Federal Rule of Evidence 705's cross-examination provision is only effective if "the cross-examiner has the advance notice which is essential for effective cross-

12. Id.
13. FED. R. CIV. P. 26(b)(3).
14. FED. R. EVID. 612 states in pertinent part:
   if a witness uses a writing to refresh memory for the purpose of testifying, either-
   (1) while testifying, or
   (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon . . . .
15. Id.
17. FED. R. EVID. 705 states in pertinent part:
   Disclosure of Facts or Data Underlying Expert Opinion
   The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.
This "advance knowledge" can only mean pre-trial discovery and might include core work product reviewed by the expert.

The federal standard for discovery of opinion work product communicated to a testifying expert remains unclear. As evidenced by the array of material written, the current law regarding the discovery of attorney to expert communications is not settled. The aforementioned rules illustrate competing policies, and it is this conflict that leads to differing results in factually similar cases.

**B. Missouri Treatment**

Although similar to the relevant federal rule, Missouri Rule of Civil Procedure 56.01 contains substantial differences, which have led to different treatment for both factual and opinion work product protection. Missouri Rule 56.01(b)(3) utilizes wording identical to Rule 26(b)(3). As with Rule

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18. *Fed. R. Evid.* 705 advisory committee's note. It is not unfair to require the cross-examiner to bring out the underlying facts, assuming that the cross-examiner has the advance knowledge which is essential for effective cross-examination. . . . Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even identity of experts.

*Id.*


20. *Mo. R. Civ. P.* 56.01(b)(3) states in pertinent part:

*Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this Rule 56.01, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivisions (b)(1) of this Rule 56.01 and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative, including his attorney . . . , only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental
26(b)(3), Missouri Rule 56.01(b)(3) allows discovery of factual work product 
apon a showing of "substantial need" and "undue hardship."21 Both rules 
require the court to protect core work product when allowing factual work 
product discovery.22 Unlike the federal standard for discovery of opinion 
work product, the Missouri standard is clear. Missouri courts hold opinion 
work product immune from discovery under all circumstances.23

Missouri Rule of Civil Procedure 56.01(b)(4)24 serves a purpose 
identical to that of Rule 26(b)(4). Both rules seek to facilitate discovery of 
the identity of expert witnesses and the facts known by such expert witness-
ese.25 Missouri Rule 56.01(b)(4), however, fails to provide discovery as 
liberal as Rule 26(b)(4). While Rule 26(b)(4) allows for discovery of "a 
summary of the grounds for each [testifying expert’s] opinion,"26 Missouri 
Rule 56.01(b)(4) does not contain similar language.27 Additionally, some 
courts hold that the Missouri rule restricts the allowable methods of discovery 
by disallowing document production under any circumstances.28

Both Rule 26(b)(4) and Missouri Rule 56.01(b)(4) allow discovery of 
information transmitted from the expert to the attorney.29 The federal rule,
however, gives the court discretion to require document production. Missouri Rule 56.01(b)(4), as interpreted by the Missouri Supreme Court, does not allow for the production of documents (such as the expert's written report) under any circumstances.

II. ATTORNEY TO TESTIFYING EXPERT COMMUNICATIONS: THE FEDERAL STANDARD

A. Rule 26(b)(3): The History of Work Product Protection

Although questions regarding the discovery of materials prepared by a party's representative have long engendered debate, the history of the work product doctrine begins with the Supreme Court's 1947 decision in Hickman v. Taylor. In Hickman, the defendant's attorney, anticipating litigation, interviewed several survivors and other witnesses of a tugboat accident. Responding to plaintiff's interrogatory, the defendant's attorney refused to "summarize or set forth" the contents of those statements. The Court summarized the pertinent issue as whether interrogatories, depositions, or document production pursuant to a subpoena duces tecum "may be used to inquire into materials collected by an adverse party's counsel in the course of preparation for possible litigation." The Court held as a general matter that "either party may compel the other to disgorge whatever facts he has in his possession," but the Court specifically denied the requested discovery of work product. The Court determined that protection of "work product of the lawyer" furthered the goal of "proper preparation of a client's case."

31. See Anderson, 735 S.W.2d at 356; Mo. R. Civ. P. 56.01(b)(4).
32. See Wright & Miller, supra note 1, § 2021.
33. 329 U.S. 495 (1947).
34. Id. at 496-97.
35. Id. at 505.
36. Id. at 507.
37. Id. at 509.
38. Id. at 511.
39. Id. The Court stated that the lawyer should be allowed to assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and
While work product would not be absolutely immune, the party seeking production would shoulder the burden of establishing "adequate reasons to justify production."

The Court's decision in Hickman served as the basis for the 1970 amendment to Federal Rule of Civil Procedure 26, which recast Federal Rule of Civil Procedure 26(b)(3). This rule adopted the Hickman prerequisites for work product protection: only materials developed "in anticipation of litigation" are protected. Materials prepared "in the normal course of business" deserve no work product protection, apparently because protecting these materials would not further the goal of effective trial preparation. Rule 26(b)(3), in accord with Hickman, protects only "documents and intangible ways . . . . 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 . . . . And the interests of the clients and the cause of justice would be poorly served.

Id.

40. Id. at 511-12.

41. Id. at 512. Where interrogatories, document production, and interviews with the witnesses would reveal the requested information, counsel's desire to have the oral statements requested in order to "help prepare himself to examine the witnesses and to make sure that he has overlooked nothing" was, under the circumstances, an insufficient reason. Id. at 513.


43. See FED. R. CIV. P. 26(b)(3); Hickman, 329 U.S. at 511; WRIGHT & MILLER, supra note 1, § 2024.

44. See, e.g., FED. R. CIV. P. 26(b)(3) advisory committee's note ("materials assembled in ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other non-litigation purposes" are not protected); In re Murphy, 560 F.2d 326 (8th Cir. 1977) (work product privilege does apply to documents prepared in anticipation of prior, terminated litigation); The St. Paul Fire & Marine Ins. Co. v. Continental Cameras Co., Inc., No. 85 Civ. 8984, 1986 WL 6497, at *1 n.1 (S.D.N.Y. June 5, 1986) (documents prepared by parties' experts during "normal course of business" are not protected); WRIGHT & MILLER, supra note 1, § 2024 (proposes test "whether . . . . the document can fairly be said to have been prepared or obtained because of the prospect of litigation . . . . [T]here is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.").

45. Hickman, 329 U.S. at 504 (party "cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney."); WRIGHT & MILLER, supra note 1, § 2023 ("There is a distinction, noted in the Hickman case itself, between documents that a party has assembled and the facts
tangible things." The Hickman holding only addressed the issue of work product prepared by party's counsel. Rule 26(b)(3) protects not only the attorney's work product, but also that of a party representative, including his "consultant, surety, indemnitor, insurer, or agent." Following the Hickman guidelines, Rule 26(b)(3) also differentiates between factual and opinion work product. The Rule 26(b)(3) "substantial need and undue hardship" test spells out the requirements for discovery of factual work product. The Hickman standard for discovery of opinion work product, however, is ambiguous. According to Rule 26(b)(3), opinion work product receives a higher degree of protection than factual work product, but the rule expresses no exact standard. Courts disagree on the extent of opinion work product immunity. Some courts focus on the Hickman Court's belief that no "showing of necessity can be made under the circumstances of this case so as to justify production" of the statements memorialized by the attorney. Courts following this theory would accord opinion work product a degree of protection akin to absolute immunity.

he has learned from those documents.

47. See Hickman, 329 U.S. at 511.
49. Hickman clearly differentiated between discovery of facts ("where relevant 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 proper had") and opinion work product (the attorney's thoughts, impressions, strategies and beliefs, "heretofore inviolate" should be protected from "undue and needless interference . . . ."). Hickman, 329 U.S. at 511. Fed. R. Civ. P. 26(b)(3) requires the discovering party to meet a "substantial need and undue hardship" test for production of factual work product. The second sentence of Fed. R. Civ. P. 26(b)(3) states that even when factual discovery is allowed, opinion work product should be protected. Fed R. Civ. P. 26(b)(3).
50. In re Murphy, 560 F.2d 326, 334 (8th Cir. 1977) (while Hickman did not clearly state the relevant "quantum of proof," the 1970 amendment to Rule 26(b)(3) establishes a "qualified immunity" for factual or "ordinary" work product, subject to the discussed test); see also Wright & Miller, supra note 1, § 2025.
51. Compare the statement that opinion work product should be protected from "undue and needless interference" with the Hickman Court's statement that "[a]n attorney's thoughts, heretofore inviolate, would not be his own." Hickman, 329 U.S. at 511 (emphasis added).
52. Unlike the clear standard delineated for factual work product, Fed. R. Civ. P. 26(b)(3) states only that the court shall protect opinion work product when allowing discovery of factual work product pursuant to the substantial need and hardship test.
53. Hickman, 329 U.S. at 512; see also In re Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973) (opinion work product is absolutely protected).
The better interpretation of the protection requirement affords core work product a high degree of protection, but not absolute immunity.\textsuperscript{54} While later Supreme Court decisions refuse to accord absolute immunity, they clearly express a continued stand in favor of strong core work product protection.\textsuperscript{55}

B. The Liberal Discovery Provisions of Rule 26(b)(4)

In 1970, a new section was added to Rule 26 of the Federal Rules of Civil Procedure.\textsuperscript{56} The new section, 26(b)(4), delineated the scope of discovery of expert witnesses.\textsuperscript{57} Unlike the amendment to Rule 26(b)(3), this new section did not codify Hickman, but rather responded to "problems suggested by a relatively recent line of authorities."\textsuperscript{58} These recent cases presented complex situations in which expert testimony would "likely be determinative."\textsuperscript{59} The Advisory Committee, realizing that expert testimony could be determinative even in a situation in which only one expert testified, declined to draw a "line between complex and simple cases, or between cases with many experts and those with but one."\textsuperscript{60}

The new section allowed the discovering party to obtain three things: identity of the testifying experts, summary of the anticipated subject matter of the expert's testimony, and the substance of the facts and opinions upon which the expert is expected to testify, along with a summary of the grounds for each opinion.\textsuperscript{61} Procedurally, Rule 26(b)(4) allows for discovery as a matter of right only by interrogatory.\textsuperscript{62} Further discovery is allowed only upon motion and court order.\textsuperscript{63}

\textsuperscript{54} See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 401-02 (1981); Bogosian v. Gulf Oil Co., 738 F.2d 587, 593 (3d Cir. 1984); Murphy, 560 F.2d at 326 (opinion work product "enjoys nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances").

\textsuperscript{55} See, e.g., Upjohn, 449 U.S. at 401-02.

\textsuperscript{56} Fed. R. Civ. P. 26(b)(4) advisory committee's note ("This is a new provision dealing with discovery of information (including facts and opinions) obtained by a party from an expert retained by that party . . . . ").

\textsuperscript{57} See Fed. R. Civ. P. 26(b)(4).

\textsuperscript{58} Id. advisory committee's note.

\textsuperscript{59} Fed. R. Civ. P. 26(b)(4) advisory committee's note (drug, patent, and condemnation cases were specifically cited as examples). For a general discussion of the reasons behind the adoption of Rule 26(b)(4), see WRIGHT & MILLER, supra note 1, § 2029.

\textsuperscript{60} Fed. R. Civ. P. 26(b)(4) advisory committee's note.

\textsuperscript{61} Id.; WRIGHT & MILLER, supra note 1, § 2030.


\textsuperscript{63} Id. The advisory committee's note to subdivision (b)(4) states that it substantially mirrors the procedure set forth in Knighton v. Villian & Fassio e
The fundamental purpose behind Rule 26(b)(4) lies in the need for
counsel to cross-examine expert witnesses effectively. Prohibiting an
attorney's use of Rule 26(b)(4)(A) to acquire relevant information "produces
the very evils that discovery has been created to prevent." As the Advisory
Committee states, "[e]ffective cross-examination of an expert witness requires
advance preparation. The lawyer, even with the help of his own experts,
frequently cannot anticipate the particular approach his adversary's expert will
take or the data on which he will base his judgment on the stand."

C. The Conflict Between Rule 26(b)(3) and 26(b)(4)(A)

Rule 26(b)(4)(A)(i) governs discovery of factual data known to a
testifying expert or upon which the testifying expert bases an opinion. Rule 26(b)(4)(A)(i) expressly states that factual information known to the
expert is discoverable by interrogatory. Therefore, the discovering party may
obtain this information as a matter of right. Further, discovery at the
discretion of the court is routinely granted. Because the need and hardship

64. See, e.g., Fed. R. Civ. P. 26(b)(4) advisory committee's note; Bogosian v.
Gulf Oil Co., 738 F.2d 587, 595 (3d Cir. 1984); Occulto v. Admar of N.J., Inc., 125
F.R.D. 611, 615 (D.N.J. 1989) ("[m]eaningful discovery of an expert's opinions is
necessary to foster effective cross-examination . . . ."); Boring v. Keller, 97 F.R.D.
404, 407-08 (D. Colo. 1983) (26(b)(4) allows discovery of experts "so that a party
may prepare for cross-examination and impeachment of any prospective witness").


66. Id.

67. See Note, supra note 61, and accompanying text.

68. See, e.g., Bogosian, 738 F.2d at 595 (attorney entitled to discover facts
contained in documents containing both fact and opinion after redaction of opinion
work product); Elco Industries, Inc. v. Hogg, No. 86 C 6947, 1989 WL 58203 (N.D.
Ill. May 26, 1988) ("substantially factual" documents given to expert which may
influence testimony must be produced); Carter-Wallace, Inc. v. Hartz Mountain Indus.,
test of Rule 26(b)(3) is expressly made subject to Rule 26(b)(4),69 most
courts grant further discovery of factual information without requiring the
discovering party to meet the Rule 26(b)(3) burden.70

1. Bogosian v. Gulf Oil & the Standard for Core Work Product

Protection

Bogosian v. Gulf Oil Corp.71 addresses the applicable standard for
discovery of opinion work product communicated from the attorney to
testifying experts. In Bogosian, the documents sought consisted solely of the
attorneys' "mental impressions and thought processes relating to the legal
theories of a complex case."72 The district court acknowledged that the
materials sought were core work product,73 but ordered production of the
documents because 26(b)(3), by its own terms, is subject to the provisions of
26(b)(4).74 The Third Circuit Court of Appeals reversed, holding that the
district court had misread 26(b)(3). A proper reading of 26(b)(3), the panel
stated, led to the realization that the limiting effect of 26(b)(4) only applied
to the first sentence of 26(b)(3).75 While factual work product discovery in
this situation was governed by 26(b)(4),76 Rule 26(b)(4) afforded no
alteration of the strong protection accorded opinion work product by 26(b)(3).77


70. See, e.g., Packard, supra note 19, at 574-78; c.f. Hamel v. General Motors
of factual work product. "One must consider whether there has been a showing of
substantial need and undue hardship in obtaining the material or the substantial
equivalent of the materials."). This requirement seems odd in light of the fact that,
assuming that interrogatories failed to produce the information necessary for effective
cross-examination of the witness as to facts known, one faces great difficulty in
obtaining those facts communicated to the expert from any source other than the expert
or the party retaining the expert.

71. 738 F.2d 587 (3d Cir. 1984).

72. Id. at 593.

73. Id. at 594.

74. Id.

75. Id.

be discretionary with the court).

77. Bogosian, 738 F.2d at 594 (quoting Dist. Ct.’s. Tr. at 36) ("proviso does not
limit the second sentence of Rule 26(b)(4) . . . . Thus it does not support the district
court's conclusion that Rule 26(b)(3) . . . 'must give way' to Rule 26(b)(4)").
Additionally, the district court concluded that a party's entitlement under 26(b)(4) to a summary of the grounds for each expert opinion allowed for further discovery of opinion work product where "the attorney's thoughts and opinions given to an expert witness can constitute part of the grounds for the expert witness' opinion." The appellate court rejected this conclusion. Noting that Rule 26(b)(4) aims to facilitate effective cross-examination by allowing discovery of "facts known or opinions held" by the expert, the court held the discovery of core work product unnecessary. The court concluded that even when the lawyer's role in expert preparation is in issue, the "marginal value in the revelation on cross-examination that the expert's view may have originated with an attorney's opinion or theory" fails to override the immunity of core work product. In dictum, the court stated that Federal Rule of Evidence 612 provides no firmer foundation upon which to allow core work product discovery.


79. Bogosian, 738 F.2d at 595 (quoting Dist. Ct.'s. Tr. at 36, 37).

80. Id.

81. Id.

82. Id. ("[E]xamination and cross-examination of the expert can be comprehensive and effective on the relevant issue of the basis for an expert's opinion without an inquiry into the lawyer's role in assisting with the formulation of the theory.").

83. The court felt that this was not an issue here. Id.

84. Id.

85. See supra note 14 for the text of Fed. R. Evid. 612.

While not explicitly stating a standard for discovery of core work product communicated to an expert, the Bogosian panel's holding clearly implies that opinion work product should enjoy virtually absolute protection regardless of its transmission to a testifying expert. The Bogosian panel expresses a clear willingness to protect core work product at the expense of effective cross-examination.

Many commentators support the majority holding in Bogosian; however, the dissenting opinion of Judge Becker has also drawn praise. The difference between the majority and the dissent is primarily one of degree. In dissent, Judge Becker criticizes the majority's standard for discovery of work product, implying that it appears to afford absolute immunity in substance, if not in name. The dissent would maintain a high degree of work product immunity, but allow for a balancing test. This balancing approach would weigh the extremely high degree of protection accorded core work product against the needs of the would be cross-examiner. Only under exceptional circumstances would the discovery be allowed. Realizing that the fundamental goal of Rule 26(b)(4)(A) is providing for effective cross-examination of experts at trial, the dissent criticizes the absolutist approach of the majority.

87. See Bogosian, 738 F.2d at 595 (examination of lawyer's role in shaping expert testimony is of marginal value and does not override the need for core work product protection).

88. See, e.g., Lewis, supra note 19 at 1172; Staton, supra note 19, at 821.

89. Bogosian, 738 F.2d at 596 (Becker, J., dissenting).

90. See, e.g., Packard, supra note 19, at 573.

91. Bogosian, 738 F.2d at 596 (Becker, J., dissenting) ("Under the majority's approach, core work product is subject to an extremely high degree of protection that can be overcome only by a kind of showing that has yet to be made in any reported case but that may yet be made on some extraordinary, as yet unforeseeable record.").

92. Id. at 598 ("Were we in an ordinary discovery situation, I might go as far as the majority does in protecting work product.").

93. Id. ("This balance would test whether the defendants' interest in having this material available for cross examination ... 'at trial' outweighs the plaintiffs' interest in protecting this core work product."). Id. at 597. Judge Becker's dissent may indicate the relevant standard by stating that opinion work product could, in some cases, "critically" affect the expert's credibility. Id. at 598.

94. Id. (materials value here for impeachment purposes); accord Fed. R. Civ. P. 26(b)(4) advisory committee's note.

95. Bogosian, 738 F.2d at 598 (Dissent disagrees with majority's characterization of the materials having a "marginal value." Judge Becker maintains that the revelation that an expert's theory is not his own may "critically alter the finder of fact's assessment of the expert's testimony.").
Judge Becker's dissenting opinion cites Federal Rule of Evidence 705\textsuperscript{96} as providing additional support for his position.\textsuperscript{97} Unlike lay witnesses, expert witnesses are allowed by Rule 705 to give opinion testimony without testifying as to their underlying data.\textsuperscript{98} The Advisory Committee's note to Rule 705 supports the dissent's conclusion that the Committee considered effective discovery of the foundational data for the expert's opinion a prerequisite to effective application of Rule 705.\textsuperscript{99} While the dissent does not radically alter the standard under which core work product would be discoverable, it avoids the absolute approach implied by the majority holding. The dissent strikes a better balance between the traditional immunity afforded opinion work product by Hickman and the liberal expert discovery and evidence rules necessitated by the increased reliance on expert testimony.

Procedurally, Judge Becker advocates an in camera inspection of any contested documents when discovery of expert information is at issue.\textsuperscript{100} If, in the court's opinion, the impeachment value of the document "would significantly outweigh the chill on development of legitimate attorney work product that would admittedly accompany disclosure,"\textsuperscript{101} then discovery should be allowed.\textsuperscript{102} Because the impeachment value of core work product, which is the key to effective cross-examination, can only be determined on a case-by-case basis, the procedural device found in Judge Becker's dissent offers the best approach.

2. Cases Allowing Liberal Discovery of Core Work Product

Several courts reject the high immunity standard afforded core work product represented by the Bogosian majority and dissent.\textsuperscript{103} These decisions hold that when attorneys communicate core work product to their testifying expert, the communicating party waives the Rule 26(b)(3) immunity.\textsuperscript{104}

\textsuperscript{96} See supra note 17 for the text of this rule.
\textsuperscript{97} Bogosian, 738 F.2d at 598 (Becker, J., dissenting).
\textsuperscript{98} Fed. R. Evid. 705.
\textsuperscript{99} Bogosian, 738 F.2d at 598 advisory committee's note.
\textsuperscript{100} Id. Bogosian, 738 F.2d at 598 (Becker, J., dissenting).
\textsuperscript{101} Id. The dissent is careful to emphasize that core work product deserves a high degree of immunity. Id.
\textsuperscript{102} Id.
\textsuperscript{104} See, e.g., United States v. Nobles, 422 U.S. 225, 239 (1975); Boring, 97 F.R.D. at 407.
Boring v. Keller, a leading waiver case, employed a two-step process in finding waiver of immunity. First, the panel stated that waiver of core work product protection could occur. The court relied on the decision in United States v. Nobles, where the Supreme Court stated that "[t]he privilege derived from the work product doctrine is not absolute. Like other qualified privileges, it can be waived." Second, the Boring court stated that the foundational facts and data of a testifying expert's opinion traditionally enjoyed no work product protection. The court cited two pre-1970 decisions, United States v. McKay and United States v. Meyer for the proposition that "the underlying facts and opinions supporting the [expert's] opinion have traditionally constituted an exception to the work product rule." In contrast to Bogosian, this approach mechanically promotes the interests of the cross-examiner to the detriment of core work product protection.

Several courts criticize the Boring holding. First, the Boring panel's reliance on Nobles is misplaced. In Nobles, a waiver of work product protection occurred when an investigator for the producing party (considered by the Court to be an expert) testified at trial. The Court stated that work product immunity was waived with respect to matters covered in the investigator's testimony. While waiver of work product immunity at trial for matters testified to is not seriously controverted by any court, waiver during pre-trial discovery represents a much greater intrusion on the attorney-client relationship.

105. 97 F.R.D. 404.
106. Id. at 407.
107. Id.
108. 422 U.S. 225 (1945).
110. Id.
111. 372 F.2d 174 (5th Cir. 1967).
112. 398 F.2d 66 (9th Cir. 1968).
114. See, e.g., Bogosian v. Gulf Oil Corp. 738 F.2d 587, 593 (3d Cir. 1984) ("The district court concluded that showing the material to the witnesses did not waive the protection for attorney work product, a view we accept as supported by persuasive authority.").
115. See id. at 593-94 n.1.
116. See Nobles, 422 U.S. at 237.
117. Id. ("Respondent can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-examination on matters reasonably related to those brought out in direct examination.").
Boring also incorrectly relies on McKay and Meyer, the two pre-1970 Supreme Court cases. The 1970 Federal Rules of Civil Procedure amendment, which added Rule 26(b)(4)(A), specifically attempted to address the pre-1970 conflicts as to the discovery standard of expert facts and opinions.\textsuperscript{118} As discussed previously,\textsuperscript{119} information communicated to an expert witness is clearly eligible for work product protection. To the extent that these pre-amendment cases hold otherwise, Rule 26(b)(4) should prevail.

Several courts utilize a broad interpretation of Federal Rule of Evidence 612 as an avenue for discovery of core work product.\textsuperscript{120} The court's opinion in Berkey Photo, Inc. v. Eastman Kodak Co.\textsuperscript{121} exemplifies the reasoning process used by courts subscribing to the Federal Rule of Evidence 612 discovery theory.\textsuperscript{122} In Berkey, the plaintiff sought production of four notebooks reviewed by defendant's experts several months before their depositions.\textsuperscript{123} These notebooks contained various core work product materials\textsuperscript{124} used by the experts as "background."\textsuperscript{125} The court noted that the present liberal discovery rules designed to favor effective cross-examination made it "disquieting to posit that a party's lawyer may 'aid' a witness with . . . work product and then prevent totally the access that might reveal and counteract the effects of such assistance."\textsuperscript{126} The panel stated that the Hickman Court never faced the issue of work product used to prepare and "very possibly, to influence and shape testimony, with the anticipation that these efforts should remain forever unknowable and undiscoverable."\textsuperscript{127} While the Berkey court believed that there was "room for allowing discovery, either on a theory of waiver or of qualified privilege" the materials previously produced in the instant case obviated the necessity of producing the requested materials.\textsuperscript{128}

\textsuperscript{118} See Fed. R. Civ. P. 26(b)(4) advisory committee's note.
\textsuperscript{119} See supra note 56 and accompanying text.
\textsuperscript{121} 4 F.R.D. 613 (S.D.N.Y. 1977).
\textsuperscript{122} Id. at 615-17.
\textsuperscript{123} Id. at 614.
\textsuperscript{124} Id. at 614 (The notebooks consisted of attorney's "synthesis of the facts and factual issues" and represented the attorney's "legal analysis, mental impressions . . . legal judgments as to what facts were needed to be understood, mastered, and possibly presented in the trial of the Berkey case.").
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 616.
\textsuperscript{127} Id.
\textsuperscript{128} Id. at 617.
Courts allowing liberal discovery of opinion work product, where that work product was reviewed by the expert, may fail to adequately differentiate between material witness and expert witness review of documents prepared by an attorney. Liberal discovery of documents reviewed by a material witness makes good sense. If a material witness, testifying to facts observed, must review or rely on documentary evidence, then the material witness’s credibility becomes a relevant topic for cross-examination. The opposing attorney should receive full access to those materials reviewed or relied upon to more effectively examine the witness’s credibility. Expert witnesses, on the other hand, generally always review some form of documentation to obtain the information necessary to form a valid opinion. To state that the review necessary to adequately prepare the testifying expert automatically triggers examination under Rule 612 ignores the fundamental difference between material witness and expert witness testimony. When a material witness reviews documents prior to testimony, one may safely presume that the witness’s memory or perception of the events testified to might have been colored by the documentary review. Therefore, review of those documents by the opposing party should be allowed. In contrast, however, an expert witness must generally obtain relevant information from second hand sources rather than from first-hand observations. To claim that this expert review of documents automatically triggers the identical concerns as material witness review requires one to disregard the purpose of Rule 612.

Additionally, courts following the Rule 612 doctrine fail to consider the necessity for a high degree of opinion work product protection. The Supreme Court, and Rule 26(b)(3), and arguably Rule 26(b)(4), express the importance of maintaining a high degree of core work product protection in all circumstances. To hold that the communication of information from the attorney to the testifying expert automatically allows opposing counsel to obtain the documents disregards the important concerns underlying the opinion work product rule.

In a situation where the written communication of core work product has actually been referred to by the expert during his deposition, courts following the Rule 612 approach have held that only those portions of the writing actually utilized by the expert are subject to discovery. The document should be produced for an in camera inspection, with disclosure of only those portions of the document actually used to refresh memory. This approach

132. Id. Courts favoring high immunity for core work product criticize the liberal
offers a reasonable compromise between the competing policies of effective
cross-examination and strong work-product protection.

The best solution is to continue the high degree of opinion work product
immunity favored by the Bogosian dissent. An expert’s review of, and
reliance on, a particular document should be a relevant circumstance
considered during an in camera review of the document. Where effective
cross-examination can occur from non-opinion portions of the document, the
tradition of high immunity for core work product should prevail. The
protection of core work product should give way to the needs of the cross-
examiner only under exceptional circumstances.

III. DISCOVERY OF WORK PRODUCT COMMUNICATED TO AN EXPERT
EXPECTED TO TESTIFY AT TRIAL: THE MISSOURI STANDARD

While some controversy exists at the federal level concerning the
standard for core work product immunity, the Missouri standard is clear.
Opinion work product in Missouri is immune from discovery.

Missouri courts clearly state that an attorney’s core work product is
immune from discovery. Prior to the adoption of the current version of
Missouri Rule 56.01, all attorney work product was undiscoverable.
Subsequent to the revision of Rule 56.01, several Missouri cases indicate that
core work product remains inviolate.

In Papin Builders, Inc. v. Litz, the panel stated that "[a]n attorney’s
‘work product’ of mental impressions, conclusions, opinions or legal theories
is immune from discovery." Similarly, in State ex rel Missouri Highway
& Transportation Commission v. Anderson, the Missouri Supreme Court,
in dicta, stated that Rule 56.01(b)(3) protects core work product and that this

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use of Fed. R. Evid. 612 to afford discovery of core work product. See, e.g., Schlitz

133. See supra section II.C. of this Comment.

134. See, e.g., State ex rel. Missouri Highway & Transp. Comm’n v. Anderson
735 S.W.2d 350, 356 (Mo. 1987) (en banc); State ex rel. Board for the Healing Arts
v. Spinden, 798 S.W.2d 472 (Mo. Ct. App. 1990) (Opinion work product absolutely
immune); Papin Builders, Inc. v. Litz, 734 S.W.2d 853, 857 (Mo. Ct. App. 1987) (An
attorney’s ‘work product’ of mental impressions, conclusions, opinions, or legal
theories is immune from discovery).

135. See, e.g., State ex rel. State Highway Comm’n v. Dalton, 498 S.W.2d 801
(Mo. 1973) (en banc); State ex rel. State Highway Comm’n v. Jensen, 362 S.W.2d
568 (Mo. 1962) (en banc).


137. Id. at 857 (citing Mo. R. Civ. P. 56.01).

138. 735 S.W.2d 350 (Mo. 1987) (en banc) [hereinafter Anderson I].
protection "is afforded even if the [party] made the 'required showing' of 'substantial need' and 'hardship,' . . . ."\textsuperscript{139}

This approach, similar to the holding of the Bogosian majority, fails to allow any consideration of the needs of the cross-examiner. As discussed previously, discovery must furnish sufficient information for effective cross-examination of the expert witness. The Missouri approach does not allow for those exceptional circumstances where core work product communicated to the expert is vital to effective cross-examination.

Because the United States Supreme Court has declined to give core work product absolute immunity, the Missouri standard is simply too high. Core work product certainly deserves a high degree of protection,\textsuperscript{140} but as previously discussed,\textsuperscript{141} situations may arise where the need to ensure attorneys a "zone of privacy" in which to prepare their cases are outweighed by a competing need to produce the opinion work product.\textsuperscript{142} Missouri courts should protect core work product, but deny it an absolute immunity.

IV. DISCOVERY OF EXPERT OPINIONS AND REPORTS TRANSMITTED TO ATTORNEY: THE FEDERAL STANDARD

Federal Rule of Civil Procedure 26(b)(4) provides not only the means for production of attorney-expert communications, but also for production of expert opinions and reports transmitted to the attorney.\textsuperscript{143} Although some early opinions held that an expert's opinions and reports were privileged work product,\textsuperscript{144} this view has been repudiated by the federal rules of civil procedure advisory committee.\textsuperscript{145} The current practice allows for initial interrogatories\textsuperscript{146} and further discovery at the discretion of the court.\textsuperscript{147}

The federal approach for discovery of expert opinions demonstrates a realistic view of the increasing importance of expert testimony in litigation. While an expert is part of a party's litigation "team," the expert, unlike the party's attorney, will testify at trial. Effective cross-examination may often require more background information than can be obtained by interrogatory

\textsuperscript{139} Id. at 356. See supra notes 68-99 and accompanying text.
\textsuperscript{140} See supra sections II.B. and II.C. of this Comment.
\textsuperscript{141} See supra notes 71-102 and accompanying text.
\textsuperscript{142} Id.
\textsuperscript{143} FED. R. CIV. P. 26(b)(4).
\textsuperscript{144} See United States v. Meyer, 398 F.2d 66 (9th Cir. 1968); United States v. McKay, 372 F.2d 174 (5th Cir. 1967).
\textsuperscript{145} See Fed. R. Civ. P. 26(b)(4) advisory committee's note (rejecting as ill-considered those decisions that protect expert opinion as work-product).
\textsuperscript{146} FED. R. CIV. P. 26(b)(4)(A)(i).
\textsuperscript{147} FED. R. CIV. P. 26(b)(4)(A)(ii).
and oral deposition testimony. The federal standard provides for additional
discovery where needed.

In Quadrini v. Sikorsky Aircraft Division, United Aircraft Corp.,148 for
example, the court allowed discovery of the reports of a testifying expert. The
court noted that, although deposition is the normal discretionary method for
discovery, no reason existed to forbid production of the document itself.149
The court stated that "[d]iscovery of the reports of experts, including reports
embodying preliminary conclusions, can guard against the possibility of a
sanitized presentation at trial, purged of less favorable opinions expressed at
an earlier date."150

At least one court has placed some restrictions on the discretionary
discovery allowed by Rule 26(b)(4). In Baise v. Alewel's, Inc.,151 the court
denied discovery of the expert's report, stating that the discovering party had
not established any "genuine need" for the document.152 The court felt that
the party's desire for "searching cross-examination" could be satisfied by
allowing discovery of the factual and scholarly basis for the expert's opinions,
as well as other, unspecified discovery.153 The court additionally stated that
a principle of mutuality might come into play if discovery were allowed. The
court believed that the discovering party, to discover the report of the
opponent's expert, may be required to reciprocate by giving the opponent
similar discovery of their expert.154 This reciprocity requires an attorney to
consider whether the benefit gained from obtaining the other side's expert
report is worth the cost of disclosing the reports of the attorney's own experts.

Although courts possess some discretion as to discovery of expert reports,
Rule 26(b)(4) does not extend "work product" type protection to expert created
materials. Expert communications that contain the expert's opinions or
grounds for opinions are discoverable at the court's discretion under Rule
26(b)(4).

V. DISCOVERY OF EXPERT-ATTORNEY COMMUNICATIONS: THE
MISSOURI STANDARD

Similar to Federal Rule 26(b)(4), Missouri Rule 56.01(b)(4) allows
discovery of both attorney-expert communications and expert opinions and

149. Id. at 595.
150. Id.
152. Id. at 98.
153. Id.
154. Id.
Missouri Rule of Civil Procedure 56.01(3) and (4) is patterned after the matching Federal Rule of Civil Procedure 26. While the (b)(3) provisions of the Federal and Missouri rules are identical with respect to the pertinent language, Missouri Rule 56.01(b)(4) is not identical to Federal Rule of Civil Procedure 26(b)(4) and lacks some of the language that has troubled federal courts in the communicated core work product situation. The federal rule, which entitles the discovering party to a "summary" of the grounds for each expert opinion, potentially allows for broader discovery than the Missouri rule, which provides discovery only of facts known by the testifying expert. Missouri restricts discovery of opinion work product by omitting the Federal Rules "summary" requirement. Additionally, the Missouri rule expressly limits discovery of the expert witness to interrogatories and depositions. The Missouri Supreme Court held in State ex rel. Missouri Highway & Transportation Commission v. Anderson that Rule 56.01(b)(3) is inapplicable to discovery of experts and that Rule 56.01(b)(4) does not authorize the use of a subpoena duces tecum in expert discovery. The holding in Anderson implies that

155. See Mo. R. Civ. P. 56.01(b)(4).
156. Mo. R. Civ. P. 56.01(b)(3). See supra note 20 for the text of this rule.
158. Mo. R. Civ. P. 56.01 Committee Note-1974 states: "Paragraph (b)(3) is the same as Rule 26(b)(3) of the Federal Rules of Civil Procedure with the following deleted . . . " (deletion of material not relevant to the present discussion). The committee note further states "[t]he source of paragraph (b)(4) is Rule 26(b)(4) of the Federal Rules of Civil Procedure."
161. See Fed. R. Civ. P. 26(b)(4); Mo. R. Civ. P. 56.01(b)(3).
162. See Fed. R. Civ. P. 26(b)(4); Mo. R. Civ. P. 56.01(b)(3).
163. Mo. R. Civ. P. 56.01(b)(4)(a).
164. Mo. R. Civ. P. 56.01(b)(4)(b).
165. 735 S.W.2d 350, 356 (Mo. 1987) (en banc); accord State ex rel. Missouri Highway and Transp. Comm’n v. Anderson, 759 S.W.2d 102, 107-08 (Mo. Ct. App. 1988) (Flanigan, J., dissenting) [hereinafter Anderson II] ("I construe the quoted language from Anderson [735 S.W.2d 350] to preclude the discovery of . . . [a work product] written report at the taking of the deposition of [an expert] appraiser . . . "). Contra Anderson II, 759 S.W.2d at 105-06 (discovery of "comparable sales reports," factual in nature, allowed by subpoena duces tecum concurrent to deposition of expert); State ex rel. Seitrich v. Franklin, 761 S.W.2d 756 (Mo. Ct. App. 1988) (factual survey prepared by party’s agent and to be used as aid to expert’s testimony at trial discoverable by subpoena duces tecum).
discovery by "deposition" allows for the issuance of a subpoena to the expert, but does not allow the issuance of a subpoena duces tecum. Because Rule 56.01(b)(4) is silent on this issue, the court's rationale must be based on precedent that pre-dates the discovery rules' revision.\textsuperscript{166} The court's reliance on these older decisions mirrors several federal court decisions holding that the expert's work product is somehow protected.\textsuperscript{167} Realizing that effective cross-examination of experts is increasingly important, modern federal practice rejects the theory that expert "work product" should be protected as strongly as attorney work product.

A majority of Missouri courts have strictly upheld the limitations on discovery engendered by this difference between expert and attorney work product.\textsuperscript{168} The Court of Appeals for the Southern District of Missouri, however, narrowed the scope of the protection afforded expert materials.\textsuperscript{169} In \textit{State ex rel. Missouri Highway & Transportation Commission v. Anderson},\textsuperscript{170} the Southern District addressed the issue of whether Rule 56.01(b)(4) protected all materials utilized or prepared by an expert. In \textit{Anderson II}, the plaintiff did not seek any materials prepared by the expert, but rather the comparable sales reports upon which the expert relied in drawing his conclusions.\textsuperscript{171} The court noted that these reports were comparable to "X-rays supplied to a physician or metal samples gathered by a metallurgist."\textsuperscript{172}

Noting that "the purpose of the deposition is to discover and test the opinion of the expert,"\textsuperscript{173} the court held the sales reports to be discoverable by subpoena duces tecum. The \textit{Anderson II} panel clearly views the "deposition" language of Rule 56.01(b)(4) differently than does the court in \textit{Anderson I}. \textit{Anderson II} implies that the "deposition may be had by way of subpoena duces tecum."\textsuperscript{174} The \textit{Anderson II} court stated that discovery was mandated by concerns that the withholding of relevant material would "defeat" the purpose of the expert deposition by not allowing full disclosure and testing of

\textsuperscript{166} \textit{Anderson}, 735 S.W.2d at 356-57.
\textsuperscript{167} See supra notes 143-54 and accompanying text.
\textsuperscript{168} See, e.g., \textit{Anderson I}, 735 S.W.2d at 356 ("If the matter sought to be discovered constitutes 'facts known and opinions held by experts,' Rule 56.01(b)(3) does not come into play at all and the exclusive methods of discovery of that matter are set forth in and limited by rule 56.01(b)(4). Those methods are interrogatories and depositions. They do not include the issuance of subpoenas duces tecum in connection with a hearing.").
\textsuperscript{169} \textit{Anderson II}, 759 S.W.2d at 105-06.
\textsuperscript{170} 759 S.W.2d 102 (Mo. Ct. App. 1988).
\textsuperscript{171} \textit{Id.} at 105-06.
\textsuperscript{172} \textit{Id.} at 106.
\textsuperscript{173} \textit{Id.} at 106 (citing United States v. Meyer, 398 F.2d 66, 71 (9th Cir. 1968)).
\textsuperscript{174} \textit{Id.} at 105-06.
the expert’s conclusions. While the court, in dictum, seemed to imply that the expert’s reports were also discoverable, this result clearly contradicts the Missouri Supreme Court’s holding in Anderson I.

While in Anderson II the Southern District implied that expert reports were discoverable, the court clearly challenged the holding of Anderson I in State ex rel. Sietrich v. Franklin. In Sietrich, the plaintiffs sought by subpoena duces tecum to obtain “survey plats, survey notes, field reports and affidavits” in possession of the defendant’s expert. Included within the requested material was matter clearly prepared by the expert. The panel held that the defendant must produce all of the requested material. While the panel acknowledged the existence of Anderson I and cited that case for a collateral proposition, the Sietrich opinion ignored the holding of the Anderson I court.

The Sietrich panel’s holding, although clearly inconsistent with Anderson I, is compelling. As the Sietrich opinion states,

[i]o say that the attorney for [plaintiff] on deposition, under the authority of Rule 56.01(b)(4)(b), could question expert witness Krehbiel concerning the facts and opinions to which he was expected to testify, but that he could not as an adjunct to such questioning, through the issuance of a subpoena duces tecum as authorized by Rule 57.09(b), have access to material relevant to the issue in the possession of the expert in order that the attorney could intelligently cross-examine the expert concerning what facts he used to formulate his opinion, is contrary to common sense.

The Sietrich panel clearly acknowledged Rule 56.01(b)(4), the same rule that the Missouri Supreme Court held forbade the use of an expert subpoena duces tecum. While the Supreme Court must have reasoned that the word "deposition" contained in Rule 56.01(b)(4) limited the available discovery, the Sietrich court held that "deposition" includes not only a deposition pursuant to a subpoena, but also pursuant to a subpoena duces tecum.

As discussed earlier, effective cross-examination of expert witnesses is a difficult task under the best of circumstances. Little effective policy is accomplished by hiding expert opinions from scrutiny. While the Sietrich holding clearly contradicts the Missouri Supreme Court’s holding in Anderson I, the Sietrich panel realizes the importance of effective expert cross-examination.

175. Id. at 106.
176. 761 S.W.2d 756 (Mo. Ct. App. 1988).
177. Id. at 757.
178. Id. at 758.
179. Id.
Missouri should amend Rule 56.01(b)(4) to allow a "summary of grounds" inquiry to allow for further discovery at the court's discretion. The increased use of experts requires Missouri to bring modern discovery practices in line with federal practice. Effective cross-examination of experts requires adequate access to the information upon which the experts' opinions are based. Missouri's refusal to allow access to the expert's "summary of grounds" and its refusal to allow further discretionary discovery hinder the efficient operation of a modern civil litigation system in which expert witness testimony plays an ever-increasing role. The Missouri Supreme Court holding in Anderson I clarifies the Missouri procedure for discovery of expert opinions. Discovery is available as a matter of right through interrogatories and as a discretionary matter through deposition of the expert. According to Anderson I, production of the expert's report is not authorized by the Missouri rule.

VI. CONCLUSION

Hickman v. Taylor and later Supreme Court cases clearly established a high standard for production of factual work product and a higher standard for discovery of core work product. Because the trend towards extensive use of testifying experts necessitates liberal discovery of the basis for their opinions, the discovery needed for effective cross-examination should, in the vast majority of cases, not necessitate invasion of the high privilege accorded work product. Instances will exist where the impeachment value of core work product that is shown to an expert will so substantially outweigh the protection of core work product that discovery should be allowed. Hence, Judge Becker's dissent in Bogosian seems to strike the proper balance between Hickman and Rules 26(b)(3) and 26(b)(4).

Although core work product in Missouri is immune to discovery, Missouri should adopt a similar standard to that advocated in the federal courts. Arguments in favor of an absolute protection of core work product are no more persuasive at the state level than they are in the federal system. Where the federal and state rules recognize the necessity of effective expert discovery, a balancing of cross-examination needs with the high immunity accorded core work product should exist.

182. See supra note 98.
183. See Anderson I, 735 S.W.2d at 356.
The federal procedures for discovery of expert opinions and reports are well settled. The federal standard furthers the important policy of facilitating effective cross-examination. While the federal rule allowing production of the expert’s report furthers the goals of effective discovery, the arbitrary Missouri rule forbidding document production does not. As demonstrated by the Southern District of Missouri, total prohibition on documentary discovery of experts is contrary to both the needs of the modern litigator and common sense. Missouri should amend its rule to reflect the federal procedure.

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