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**THE INTERPLAY BETWEEN WORK PRODUCT PROTECTION  
AND THE DUTY OF DISCLOSURE CONCERNING EXPERT TESTIMONY**

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**I. Federal Law**

The Applicable Federal Rules:

Under Fed.R.Civ.P. 26(a)(2)(B), a party is required to disclose the anticipated testimony of its experts as well as “the data or other information **considered by the witness in forming the opinions...**” (emphasis added). The advisory committee notes for the 1993 amendment adding this provision to the Federal Rules provide, “[g]iven this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions- whether or not ultimately relied upon by the expert- are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.”

Fed.R.Civ.P. 26(b)(3), which provides work product protection, states, in pertinent part:

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of 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 (including the other party’s attorney, consultant...) 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.

(Emphasis added).

Finally, Fed.R.Civ.P. 26(b)(4)(A) provides, in relevant part, “A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

#### Relevant Federal Cases: The Courts are Divided

Although the federal courts remain divided on this issue, the emerging trend appears to require full disclosure of all materials provided to a testifying expert, including those prepared by the attorney who retained the expert, which the expert received and reviewed in connection with the case.

For example, in Suskind v. Home Depot Corp., No. 99-10575-NG, 2001 U.S. Dist. LEXIS 1349, at \*3 (D. Mass. Jan. 2, 2001), the United States District Court for the District of Massachusetts followed this emerging trend to require full disclosure. Upon examination of the federal rules listed above as well as the Advisory Committee Notes to the 1993 amendments to Rule 26, the court held:

[A]s part of the required disclosure, counsel must disclose, *inter alia*, not only ‘...a complete statement of all opinions to be expressed and the basis and reasons therefore; [but also] the data or other information considered by the witness in forming the opinions...’ Rule 26(a)(2)(B). And ‘the data or other information considered by the witness’ includes any material which was furnished to the witness by the attorney who retained him even though that material in other contexts must be considered core attorney work product.

Id. at \*10-11.

In reaching this conclusion, the court reasoned that “if the authors of the 1993 Amendments to Rule 26 intended the required expert disclosure pursuant to Rule 26(a)(2)(B) to be subject to either the attorney-client privilege and/or work product protection, they could have

said so as they did with the required disclosure under Rule 26(a)(1)(C).” Id. at \*11.

Furthermore:

Even if there are questions as to what those who originally promulgated Rules 26(b)(3) and 26(b)(4) intended the interplay between the two rules to be, there can be no doubt that by 1993, the authors of the Rules and the Notes were aware of the issue of whether Rule 26(b)(4) trumped Rule 26(b)(3) with respect to the materials discoverable concerning expert testimony. I submit that in so doing they rejected the interpretation...that discovery pursuant to Rule 26(b)(4) is subject to the limitations of the second sentence of Rule 26(b)(3) concerning core attorney work product.

Id. at \*9-10.

Additionally, the court explained, “it is improper to restrict disclosure to only those materials relied upon by the expert witness. The word is ‘considered’ and encompasses those materials which the witness was furnished and read but which the witness rejected.” Id. at \*12.

Other cases embodying this trend include the following: B.C.F. Oil Ref. v. Consol. Edison Co. of N.Y., 171 F.R.D. 57, 66 (S.D.N.Y. 1997) (“The [1993 Advisory Committee] Note evinces an intent to require parties to produce attorney opinions given to the expert and considered by the expert in forming his or her opinion...the drafters of the rule understood the policies behind expert disclosure and the work product doctrine and have decided that disclosure of material generated or consulted by the expert is more important.”); Karn v. Rand, 168 F.R.D. 633, 639 (N.D. Ind. 1996) (providing, “new rule 26 and its supporting commentary reveal that the drafters considered the imperfect alignment between 26(b)(3) and 26(b)(4) under the old Rule, and clearly resolved it by providing that the requirements of (a)(2) ‘trump’ any assertion of work product or privilege”); and Musselman v. Phillips, 176 F.R.D. 194, 198 (D. Md. 1997) (stating, “when an attorney communicates otherwise protected work product to an expert witness retained for the purposes of providing opinion testimony at trial--whether factual in nature or

containing the attorney's opinions or impressions--that information is discoverable if it is considered by the expert.”).

However, there is case law that supports the premise that at least opinion work product is not discoverable. One such case is Nexxus Prod. Co. v. CVS New York, Inc., 188 F.R.D. 7 (D. Mass. 1999). In Nexxus, the court concluded, based upon its reading of relevant cases, the text of the rule and the accompanying Advisory Committee comment, “the required disclosure under 26(a)(2)(B) & (b)(4)(A) does not include core attorney work product considered by the expert.” Id. at 15. In reaching its conclusion, the court reasoned, “through continued protection of core attorney work product, communication between expert and attorney will remain unconstrained, and will thus better serve both the ultimate truth seeking function of the trial process and the goal of assisting the trier of fact pursuant to F.R.E. 702, 703, and 704 within the framework of our adversarial system.” Id.

This position was also accepted by the court in Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627 (E.D.N.Y. 1997). Specifically, the court held:

The data or other information considered by [an expert] witness in forming [his] opinions required to be disclosed in the expert’s report mandated under Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney Work product considered by an expert. In so holding, the Court agrees with the...view that Rule 26(a) should not be construed as vitiating the attorney work product privilege, and the laudable policies behind it, in the absence of clear and unambiguous authority under the Federal Rules of Civil Procedure.

Id. at 642-43 (internal citations omitted). See Haworth, Inc. v. Miller, Inc., 162 F.R.D. 289, 294-95 (W.D. Mich. 1995) (“this Court concludes that the protection accorded an attorney’s mental impressions and opinions by the Supreme Court in Hickman v. Taylor, (citations omitted), and substantially codified in 1970 in Rule 26(b)(3), was intended to apply to discovery from

experts...For the high privilege accorded attorney opinion work product not to apply would require clear and unambiguous language in a statute...No such language appears here.”).

## II. State Law Inquiry:

### The Applicable State Rule:

Pursuant to N.H. Superior Court Rule 35 governing discovery:

Subject to the provisions of subdivision (b)(3) of this rule, a party may obtain discovery of documents and tangible things...prepared in anticipation of litigation for trial by or for another party or by or for that other party’s representative (including his attorney, consultant...) 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 impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Rule 35(b)(2). (Emphasis added). Subdivision (b)(3), pertaining to expert testimony, requires a party to disclose “the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify, and [provide] a summary of the grounds for each opinion” (emphasis added). Further, “[u]pon motion, the Court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision b(3)(c) of this rule, concerning fees and expenses as the Court may deem appropriate.” Id.

### Relevant State Cases: The Court has Discretion

It does not appear that the New Hampshire Supreme Court has addressed the discrete issue under consideration: whether under Superior Court Rule 35, a party is required to disclose privileged materials, including an attorney’s mental impressions, opinions, and legal theories, provided to an expert witness in preparation for his or her testimony. However, the court has

defined the parameters of attorney work product under New Hampshire law in a more general sense in Riddle Spring Realty Co. v. State, 107 N.H. 271 (1966). In Riddle, the court stated, “unlike communications covered by the attorney-client privilege, the work product...is not beyond the pale of pre-trial discovery.” Id. at 275. In support of this statement, the court reasoned, “[s]uch matters might be facts admissible in evidence at the trial or might give clues to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. If such relevant facts are unobtainable any other means, or are obtainable only under such conditions of hardship as would tend unfairly to prejudice the party seeking discovery, disclosure of work product may be compelled.” Id. “This becomes a matter for determination for the Trial Court in its discretion by considering the reasons which motivate the protection of the work product of the lawyer together with the desirability of giving every plaintiff and defendant an adequate opportunity to properly prepare his case before trial.” Id. at 275-76. (Emphasis added).