

The Attorney Work Product Doctrine: Approaching Absolute Immunity?—Shelton v. American Motors Corp.

Michael F. Sweeney

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THE ATTORNEY WORK PRODUCT DOCTRINE: APPROACHING ABSOLUTE IMMUNITY?—*SHELTON v. AMERICAN MOTORS CORP.*

The Federal Rules of Civil Procedure (“Federal Rules”) provide for liberal pretrial discovery which contemplates full disclosure of all relevant, non-privileged facts.¹ In accordance with the Federal Rules governing discovery, the work product of an attorney, prepared in anticipation of litigation, is protected against unnecessary intrusion.² Consequently, there have been numerous at-

¹ See FED. R. CIV. P. 26-37. Rule 26(b)(1) provides for “discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things” FED. R. CIV. P. 26(b)(1).

Discovery provisions have been liberally interpreted by the Supreme Court. See, e.g., *Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964) (Rules 26-37 must be broadly interpreted to carry out their intended purpose); *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682-83 (1958) (discovery Rules require disclosure of facts to fullest extent practicable); *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (deposition and discovery rules must be liberally construed). In *Hickman*, Justice Murphy summarized the purposes of the new discovery procedure as follows:

[Rules 26-37] restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues.

Hickman, 329 U.S. at 501.

Under Rule 26(a), “[p]arties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.” FED. R. CIV. P. 26(a).

² See FED. R. CIV. P. 26(b)(3). Rule 26(b)(3) provides in part: “In ordering discovery . . . 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.” *Id.*

Rule 26(b)(3) codifies the work product doctrine first enunciated in *Hickman v. Taylor*, 329 U.S. 495 (1947). See FED. R. CIV. P. 26(b)(3), advisory committee’s note of 1970.

In *Hickman*, the Supreme Court recognized the need to protect an attorney’s work product stating that:

[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to

tempts to apply this work product protection to prevent revelation of crucial information otherwise discoverable under the Federal Rules.³ Notwithstanding these attempts to thwart the discovery process, federal courts confronting the issue have consistently allowed litigants to discover at least the existence of related facts to ensure the most comprehensive judicial review and equitable disposition of the action at bar.⁴ Recently, however, in *Shelton v. American Motors Corp.*,⁵ the Court of Appeals for the Eighth Circuit held that the attorney work product doctrine bars inquiry into an attorney's knowledge of the existence or non-existence of cer-

be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. . . . This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . termed . . . the "work product of the lawyer."

Hickman, 329 U.S. at 510-11.

To be protected, the work product must be prepared in anticipation of litigation. See, e.g., *Hickman*, 329 U.S. at 511 (preparation of case deserves protection); *First Wis. Mortgage Trust v. First Wis. Corp.*, 86 F.R.D. 160, 165 (E.D. Wis. 1980) (work product remains protected for subsequent suits); *SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 515-16 (D. Conn.) (prospect of litigation must be identifiable), *appeal dismissed*, 534 F.2d 1031 (2d Cir. 1976).

The work product doctrine also protects materials prepared for previous or terminated litigation. See *In re Murphy*, 560 F.2d 326, 332-33 (8th Cir. 1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 732 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); see also Wells, *The Attorney Work Product Doctrine and Carry-Over Immunity: An Assessment of Their Justifications*, 47 U. PITT. L. REV. 675, 681-702 (1986) (discussing rationale for carry-over immunity).

³ See, e.g., *United States v. Glaxo Group Ltd.*, 302 F. Supp. 1, 17 (D.D.C. 1969) (work product inapplicable to request for names and addresses of those who supplied privileged information), *rev'd on other grounds*, 410 U.S. 52 (1973); *LaRocca v. State Farm Mut. Auto Ins. Co.*, 47 F.R.D. 278, 282 (W.D. Pa. 1969) (work product doctrine does not protect party from disclosing existence and location of documents); *Cedolia v. C.S. Hill Saw Mills, Inc.*, 41 F.R.D. 524, 526 (M.D.N.C. 1967) (work product doctrine does not protect names and addresses of witnesses or documents relating to the lawsuit); *Lance, Inc. v. Ginsburg*, 32 F.R.D. 51, 52 (E.D. Pa. 1962) (fact upon which allegations in complaint are based not protected by work product doctrine even though solely within attorney's knowledge); *Gaynor v. Atlantic Greyhound Corp.*, 8 F.R.D. 302, 303 (E.D. Pa. 1948) (interrogatory requesting attorney's knowledge of facts obtained from witness interviews not protected by work product rule). Cf. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1302-05 (1978) (modern discovery rules designed to promote sharing of evidentiary information prior to trial, thereby facilitating settlement). Professor Brazil observed that the adversarial nature of litigation apparently was disregarded by proponents of the liberal discovery rules. He concluded that both the adversarial and economic pressures involved in litigation would inevitably lead to the abuse of the discovery system. See *id.*

⁴ See *infra* note 47 and accompanying text.

⁵ 805 F.2d 1323 (8th Cir. 1986).

tain non-privileged documents.⁶

In *Shelton*, the plaintiffs' sixteen-year-old daughter, Colletta Shelton, was killed in a "roll-over" accident while driving a Jeep CJ-5 manufactured by the defendant.⁷ Shelton's parents, as co-administrators of her estate, brought suit in the United States District Court for the Western District of Arkansas alleging negligence, strict liability, and failure to warn as alternate theories of recovery.⁸ Shortly after filing suit, the plaintiffs sought to depose twenty-one individuals employed by American Motors Corporation ("A.M.C.").⁹ In response, A.M.C. moved to quash the depositions but eventually was compelled to produce for examination six of the initially requested deponents.¹⁰ Following a dispute over whether these six individuals possessed the specific knowledge or information sought by plaintiffs, the district court referred the discovery proceedings to the United States Magistrate.¹¹ Ultimately the magistrate allowed plaintiffs to depose additional A.M.C. personnel, including its in-house litigation counsel, Rita Burns ("counsel").¹²

⁶ *Id.* at 1330. After reversing the district court's decision that the information at issue was not protected by the work product doctrine, the *Shelton* majority declined to decide whether the attorney-client privilege was applicable. *Id.* at 1329. See *Shelton v. American Motors Corp.*, 106 F.R.D. 490, 494 (W.D. Ark. 1985) (mem.), *rev'd*, 805 F.2d 1323 (8th Cir. 1986).

⁷ *Shelton*, 805 F.2d at 1324. The defendants, American Motors Corporation, American Motors Sales Corporation and Jeep Corporation [collectively, "A.M.C."] designed, manufactured and marketed the Jeep CJ-5 model involved in this action.

⁸ See *id.*

⁹ *Id.* at 1325. The plaintiffs designated several categories of matters to be examined pursuant to Rule 30(b)(6), which provides in part:

A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents . . . and may set forth, for each person designated, the matters on which the person will testify.

FED. R. CIV. P. 30(b)(6).

¹⁰ See *Shelton*, 805 F.2d at 1325. A.M.C. moved to quash the depositions of the twenty-one individuals specifically named and sought a protective order for several of the categories identified by the plaintiffs under Rule 30(b)(6). *Id.* The district court required A.M.C. to produce only six individuals who A.M.C. claimed possessed knowledge of the ten categories described by the plaintiffs. *Id.*

¹¹ See *id.* At the deposition of the six individuals, who A.M.C. originally provided under court order, several of the deponents refused to answer certain questions at the direction of A.M.C.'s trial counsel, claiming that the information sought was protected either by a privilege or the work product doctrine. See *Shelton*, 106 F.R.D. at 491. Following the deponents' refusals to answer, plaintiffs filed a motion for default judgment and the district court referred the discovery proceedings to the United States Magistrate. *Id.*

¹² *Id.* at 491-92. The magistrate denied the plaintiffs' motion for default judgment, but

Throughout two depositions, counsel, claiming work product protection, repeatedly refused to answer questions concerning the existence or non-existence of certain documents.¹³ Counsel's refusal to answer those questions prompted the district court to grant plaintiffs' motion for default judgment on the issue of liability.¹⁴

On appeal, the Eighth Circuit, expressing its displeasure with the growing practice of deposing attorneys,¹⁵ reversed the district

ordered A.M.C. to produce additional deponents, including Rita Burns. *Id.* at 492.

¹³ *Id.* at 492-93. During Burns' first deposition on October 24, 1984, she refused to acknowledge the existence or non-existence of certain documents, including a list of all lawsuits filed against A.M.C. that involved a Jeep CJ-5. Burns also would not comment on the existence of roll-over propensity tests other than those previously disclosed or whether she knew of any documents, films, prints or memoranda which had been suppressed for the purposes of Jeep overturn cases. *Id.* Similarly, Burns refused to acknowledge the existence of documents and video tapes of the Jeep Celebrity Challenge Races, computer modeling data, the intentional destruction of the "McCord" test film, and several other items. *Id.*

Based on Burns' refusals, plaintiffs again moved for a default judgment. *Shelton*, 805 F.2d at 1325. The magistrate denied plaintiffs' second motion and directed Burns to appear for a second deposition at which the magistrate could expeditiously resolve any claims of privilege or work product that Burns might raise. *Id.*

During her second deposition, despite being ordered to respond by the magistrate, counsel continued to refuse to answer questions about the existence or non-existence of various documents. *Id.* at 1325-26.

¹⁴ *Id.* at 1326. On the recommendation of the magistrate, the district court issued an order directing Burns to answer the questions and show cause why her contemptuous conduct should not be subject to sanctions, including default judgment. *Id.* Notwithstanding the court's directive, Burns and A.M.C. responded that they would "stand on [their] position" and not answer the questions. *Id.* Judge Waters, in a memorandum opinion, concluded that neither the attorney client privilege nor the work product doctrine protected Burns' refusal to answer questions seeking to establish merely the existence of documents. *Shelton*, 106 F.R.D. at 494-95.

The district court relied on the Arkansas Supreme Court's decision in *Arkansas National Bank v. Cleburne County Bank*, 258 Ark. 329, 331, 525 S.W.2d 82, 84-85 (1975), to dispense with defendant's claim of work product protection. *See Shelton*, 106 F.R.D. at 493-94. After determining that the work product doctrine and attorney-client privilege did not prohibit inquiry into Burns' knowledge of the existence of documents, the district court found that the defendant's conduct during the depositions constituted willful contempt and entered a default judgment in favor of plaintiffs pursuant to Rule 37(b)(2). *See id.* at 495-98; FED. R. CIV. P. 37(b)(2).

¹⁵ *See Shelton*, 805 F.2d at 1327. Referring to the practice of deposing opposing counsel, the *Shelton* court stated:

In recent years, . . . the practice of taking the deposition of opposing counsel has become . . . increasingly popular We view . . . [this] as a negative development in the area of litigation

Undoubtedly, counsel's task in preparing for trial would be much easier if he could dispense with interrogatories, document requests, and depositions of lay persons, and simply depose opposing counsel in an attempt to identify the information that opposing counsel has decided is relevant and important to his legal theories and strategy. The practice . . . , however, [is] . . . disrupting [to] the adversarial nature of our judicial system.

court's holding with respect to the work product doctrine.¹⁶ The majority held that the work product doctrine did indeed protect counsel from acknowledging whether or not certain documents existed.¹⁷

Writing for the Eighth Circuit, Judge Gibson concluded that the information sought by plaintiffs deserved work product protection, as counsel's recollection of a specific document's existence would be reflective of her mental impressions.¹⁸ The court determined that the seemingly innocuous questions threatened to establish more than the mere existence or non-existence of documents, and would result in the improper disclosure of counsel's opinion work product.¹⁹ Judge Gibson reasoned that because of the voluminous nature of A.M.C.'s files, counsel's knowledge of the existence of specific documents, if revealed, would be tantamount to exposing her mental process of selection and compilation.²⁰ Additionally, the court noted that the sanction of default judgment imposed by the district court was unwarranted since A.M.C. was forced either

Id. at 1327 (citations omitted).

¹⁶ *Id.* at 1330. The court asserted that "where . . . the deponent is opposing counsel and has engaged in a selective process of compiling documents from among voluminous files in preparation for litigation, the mere acknowledgment of the existence of those documents would reveal counsel's mental impressions, which are protected as work product." *Id.* at 1326.

¹⁷ *See id.* Discussing the work product doctrine, Judge Gibson stated that an attorney's "thought processes, opinions, conclusions, and legal theories" all merit work product protection. *See id.* at 1328 (citing *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977)).

¹⁸ *See Shelton*, 805 F.2d at 1329. The court distinguished the case at bar from those cited by the plaintiffs, *see Smith v. Insurance Co. of N. Am.*, 30 F.R.D. 534, 538 (M.D. Tenn. 1962) (knowledge of existence of memoranda not protected as work product); *McCall v. Overseas Tankship Corp.*, 16 F.R.D. 467, 469 (S.D.N.Y. 1954) (same), in contending that the existence or non-existence of work product was discoverable by noting that the answers sought would reveal more than the documents existence. *Shelton*, 805 F.2d at 1329.

¹⁹ *See id.* The court reasoned that "[under] these circumstances we believe that any recollection Burns may have of the existence of documents in A.M.C.'s possession likely would be limited to those . . . she has selected as important to her legal theories Thus . . . the questions asked require more than merely acknowledging the existence of certain documents." *Id.*

²⁰ *Id.* The *Shelton* court noted the importance of an attorney's selection and compilation of documents in cases where a large volume of documents are involved in discovery. *Id.* In support of its position that the selection process of an attorney constitutes opinion work product, the *Shelton* Court cited the Third Circuit's decision in *Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985). The *Shelton* court noted that "Burns' selective review of A.M.C.'s numerous documents was based upon her professional judgment of the issues and defenses involved in this case. This mental selective process reflects Burns' legal theories and thought processes which are protected as work product." *Shelton*, 805 F.2d at 1329.

to disobey the district court's orders to answer or to divulge the knowledge of counsel claimed to be attorney work product.²¹

Dissenting, Judge Battey reasoned that neither the work product doctrine nor the attorney-client privilege protected counsel's knowledge of the existence or non-existence of documents.²² Judge Battey stressed that the majority holding failed to comport with earlier precedent in the Eighth Circuit²³ and would condone the "stonewalling" strategy in which he felt the defendants had engaged.²⁴ Finally, Judge Battey determined that the defendants' persistent attempts to avoid and protract the discovery process constituted a "willful failure," the element required to support the imposition of Rule 37 sanctions.²⁵

It is suggested that, in an effort to protect an attorney's complex trial preparation process from unfair discovery tactics, the *Shelton* court's decision unjustifiably enlarged the scope of the attorney work product doctrine, and, accordingly, will impede the operation of the federal discovery mechanism. After reviewing the history of the work product doctrine,²⁶ this Comment will assert that the *Shelton* court mischaracterized the underlying nature of the requested factual information and overemphasized its probative value regarding counsel's "mental impressions" of the case. In contrast to the holding in *Shelton*, this Comment will suggest that requiring counsel to divulge knowledge of the mere existence or non-existence of documents will reinforce the strong policy considerations supporting the discovery process without jeopardizing opinion work product. Finally, this Comment will examine the possible detrimental effects of the *Shelton* decision, which, it is sub-

²¹ See *id.* at 1329-30, 1330 n.7.

²² See *id.* at 1331 (Battey, J., dissenting).

²³ *Id.* (Battey, J., dissenting). Judge Battey asserted the privilege claimed here did not pass the five-point test established in *Investors Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1978) (en banc). See *Shelton*, 805 F.2d at 1333 (Battey, J., dissenting).

²⁴ See *Shelton*, 805 F.2d at 1331 (Battey, J., dissenting). Judge Battey noted that: [t]his case is replete with evidence of [the defendant's] repeated acts and attempts to avoid the discovery of documents in its possession. . . .

The constant, growing tendency of litigants to frustrate the trial discovery process such as was done by A.M.C. is dangerous and "chilling" to a process which is geared toward a search for truth.

Id. (Battey, J., dissenting).

²⁵ See *id.* (Battey, J., dissenting).

²⁶ See *infra* notes 39-44 and accompanying text. See generally Cohn, *The Work Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 917-21 (1983) (review of origins and development work product doctrine).

mitted, will dilute the United States District Courts' regulatory power over discovery proceedings and encourage a reversion to the common-law system of a trial by surprise.²⁷

WORK PRODUCT DOCTRINE

The modern discovery system²⁸ provides for pre-trial discovery of all materials relevant to ensuing litigation which do not fall within the protection of an established evidentiary privilege.²⁹ The Supreme Court in *Hickman v. Taylor*³⁰ held that the public's interest in full disclosure of the facts must yield at some point to the need to protect the privacy of an attorney's work in preparation for trial.³¹ However, the work product doctrine as enunciated in *Hickman*, did not contemplate the limiting effect on meaningful

²⁷ Cf. *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1028 (1961) (difficulty of reconciling use of work product with "principle of an open proceeding in which surprise is minimized").

²⁸ Before the adoption of the Federal Rules of Civil Procedure in 1938, see 308 U.S. 645 (1949), parties to an action at law generally were precluded from taking depositions of witnesses and other parties and using interrogatories for discovery purposes. See *National Cash-Register Co. v. Leland*, 94 F. 502, 504-05 (1st Cir.), cert. denied, 175 U.S. 724 (1899); see also Cohn, *supra* note 26, at 918 (after procedural merger of law and equity, "the game of blindman's buff [sic] continued" because litigants only knew contents of pleadings and bills of particulars). Moreover, state laws allowing for such discovery were preempted by the federal statutes then in force. See 28 U.S.C. §§ 631-35 (1940) (recodified and revised by Act of June 25, 1948, ch. 646, 62 Stat. 869); see also *Ex Parte Fisk*, 113 U.S. 713, 721 (1885) (New York procedural statute conflicting with federal statute inapplicable); *National Cash-Register*, 94 F. at 503-05 (Massachusetts statute prescribing interrogatories inapplicable in federal court); *Developments in the Law*, *supra* note 27, at 950 (liberal state discovery procedures unavailable to federal litigants).

Parties in need of discovery prior to the Federal Rules could file in equity a bill of discovery to aid their action at law. See *Pressed Steel Car Co. v. Union P.R.R.*, 240 F. 135, 136-37 (S.D.N.Y. 1917). The equitable bill of discovery was of limited use, however, because of conflicts over its proper scope. See *id.*; see generally F. JAMES & G. HAZARD, CIVIL PROCEDURE § 5.1 (3d ed. 1985) (discussing bill of discovery in prior equity practice).

Most commentators consider the Federal Rules to have greatly improved federal pre-trial procedures. See generally 4 J. MOORE & L. LUCAS, MOORE'S FEDERAL PRACTICE § 26.03[3], at 26-73 to -74 (rev. 2d ed. 1986) [hereinafter MOORE'S] (criticizing discovery practice prior to Federal Rules); Sunderland, *The Theory and Practice of Pre-trial Procedure*, 36 MICH. L. REV. 215, 216-17, 226 (1937) (recognizing inadequacy of trial preparation based solely on pleadings and advocating adoption of Federal Rules); *Developments in the Law*, *supra* note 27, at 944-50 (surveying the federal law of discovery before and after Federal Rules were adopted).

²⁹ See FED. R. CIV. P. 26(b)(1).

³⁰ 329 U.S. 495 (1947).

³¹ See *id.* at 510-11. Writing for the Court, Justice Murphy stated that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Id.* at 510.

discovery which would result from the Eighth Circuit's decision in *Shelton*.³² The *Shelton* court assumed that plaintiffs would be able to secure the factual information needed through other means of discovery.³³ It became apparent, however, that neither plaintiffs nor the district court were able to acquire the desired information from A.M.C. during the lengthy course of the discovery proceedings.³⁴ The magistrate purposely allowed plaintiffs to take counsel's deposition following the original deponents' failure to respond to relevant questions due to their inadequate knowledge or asserted privilege.³⁵ The *Shelton* court, by cloaking counsel's knowledge of the document's existence with work product protection, may have foreclosed the plaintiffs' only alternative method of uncovering facts necessary to prepare their case.³⁶ It is submitted that the *Shelton* court erroneously identified counsel's knowledge of the existence or non-existence of documents with the mental process of sifting through and selecting documents,³⁷ which has

³² See *id.* at 507. The *Shelton* court, however, by holding that in-house counsel's knowledge of such facts was within the ambit of work product protection, denied the plaintiffs access to relevant facts, namely, the existence or non-existence of documents. See *Shelton*, 805 F.2d at 1329.

³³ See *Shelton*, 805 F.2d at 1327. In *Shelton*, the Eighth Circuit determined that the plaintiffs would be able to obtain, or had already obtained, the information sought through A.M.C. personnel other than in-house counsel Burns. *Id.* This finding, however, ignored the fact that A.M.C.'s trial counsel earlier had instructed employees of A.M.C. not to answer similar questions, which, ironically, eventually led the magistrate to allow Burns to be deposed. See *id.* at 1325.

³⁴ See *Shelton*, 106 F.R.D. at 497. While discussing the sanction of default judgment, Judge Waters noted that:

Although defendants argue that the information sought was available to plaintiffs through other avenues, having considered the materials submitted by the parties, the court concludes that such attempts were made and were relatively unsuccessful. The court is satisfied that defendants have "played games" with the federal discovery process in the course of Jeep CJ rollover litigation. To cite some minor examples, the court notes that the defendants' engineers have repeatedly objected to various questions, contending that they do not understand such plain English terminology as "propensity to roll over." However, . . . [A.M.C. engineers] used similar terminology in studies and prepared charts

Another example indicates that defendants have disguised rollover testing as "tire tests" and falsely denied . . . that any written documentation of those tests were made.

Id.

³⁵ See *id.* at 491-92; *supra* note 13.

³⁶ See *Shelton*, 805 F.2d at 1328-29; *supra* note 33.

³⁷ See *Shelton*, 805 F.2d at 1328-29. The Eighth Circuit in *Shelton* agreed with A.M.C.'s contentions that:

Burns' acknowledgment of the existence of documents referred to by plaintiffs' counsel would reflect her judgment as an attorney in identifying, examining, and

been held to be within the scope of the work product doctrine.³⁸

EXPANSION OF THE WORK PRODUCT DOCTRINE

Federal Rule 26(b)(3)³⁹ represents a codification and attempted clarification of the work product doctrine.⁴⁰ It prescribes a "substantial need" test for the discovery of ordinary tangible work product which cannot be obtained elsewhere without "undue hardship."⁴¹ Further, Rule 26(b)(3) is a reminder that an attorney's thought processes, opinions, mental impressions and legal theories,

selecting from AMC's voluminous files those documents on which she will rely in preparing her client's defense in this case. In these circumstances Burns' recollection of the documents concerning a certain subject will be limited to those documents she has selected as significant and important with respect to her legal theories. Therefore, . . . requiring Burns to testify that she is aware that documents exist . . . is tantamount to requiring her to reveal her legal theories and opinions concerning that issue.

Id. at 1328.

The court further discussed the process of selection and compilation of documents, noting that an attorney's recollection of selected documents would be likely to indicate the attorney's theories regarding the case. *See Shelton*, 805 F.2d at 1329; *see also Sporck v. Peil*, 759 F.2d 312, 316 (3d Cir.) (attorney's document selection reflects counsel's legal theories and therefore protected as opinion work product), *cert. denied*, 474 U.S. 903 (1985); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982) (same). The *Shelton* court's application of this rationale, however, far surpasses the protection afforded in such cases as *Sporck*. *See infra* note 38 and accompanying text.

³⁸ *See Sporck*, 759 F.2d at 315. In *Sporck*, however, the documents were selected by defendant's counsel from among thousands of documents already produced by the defendant during discovery. *Id.* at 313-14. Therefore, the court deemed discovery of the selection process itself as lacking any meaningful factual content since the documents themselves had already been produced. *Id.* at 316. Indeed, the court in *Sporck* noted that there were no allegations that the defendant had failed to produce or intentionally concealed any documents requested by the plaintiff. *Id.* at 313.

In *Shelton*, however, the existence of certain documents had not yet been established. *See Shelton*, 805 F.2d at 1325-26. It is submitted, therefore, that unlike the process of selecting documents from among those already produced during discovery, the factual knowledge of counsel concerning the existence of documents not yet produced during discovery is of utmost value, and should clearly be discoverable, where allegations exist that one party has failed to comply with the discovery process.

³⁹ *See* FED. R. CIV. P. 26(b)(3); *supra* note 2.

⁴⁰ *See* FED. R. CIV. P. 26(b)(3). *See generally* 4 MOORE'S, *supra* note 28, § 26.63, at 26-310 to -347. Subdivision (b)(3) was added to Rule 26 to eliminate confusion which had arisen over the proper showing required for production of trial preparation materials. *See* FED. R. CIV. P. 26(b)(3), advisory committee's note of 1970.

⁴¹ *See* FED. R. CIV. P. 26(b)(3); *supra* note 2. The advisory committee explained that the new test required a special showing to be made: "substantial need of the materials in the preparation of [the] case and . . . [inability] without undue hardship to obtain the substantial equivalent of the materials by other means." FED. R. CIV. P. 26(b)(3), advisory committee's note of 1970.

commonly referred to as opinion work product,⁴² shall remain inviolate absent a showing of rare circumstances.⁴³ Case law interpreting Rule 26 consistently has declared that the work product doctrine does not encompass an attorney's knowledge of the existence of facts.⁴⁴ Departing from this established principle, the *Shelton* court asserted that an attorney's recollection of the existence of documents contained in voluminous files could be used to forecast such attorney's legal strategy.⁴⁵ It is submitted, however, that an attorney's recollection of the existence of documents fails to supply opposing counsel with more than that fact, as opposing counsel may only speculate as to whether the document recalled has actually been selected or simply reviewed and discarded.⁴⁶ Moreover,

⁴² See FED. R. CIV. P. 26(b)(3). Rule 26(b)(3) provides that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation." *Id.* Thus, under Rule 26(b)(3), the opinion work product of an attorney must be afforded a higher degree of protection than ordinary tangible work product. See *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977); see generally Wolfson, *Opinion Work Product—Solving the Dilemma of Compelled Disclosure*, 64 NEB. L. REV. 248, 255 (1985) (defining boundaries of opinion work product); Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760 (1985) (discussing work product doctrine).

⁴³ See, e.g., *In re Grand Jury Investigation*, 599 F.2d 1224, 1231-32 (3d Cir. 1979) (interview memoranda containing opinion work product subject to disclosure); *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977) (opinion work product discoverable in "very rare and extraordinary circumstances"); *Byers v. Burleson*, 100 F.R.D. 436, 439-40 (D.D.C. 1983) (overwhelming necessity for information justified revealing opinion work product).

⁴⁴ See, e.g., *Smith v. Insurance Co. of N. Am.*, 30 F.R.D. 534, 538 (M.D. Tenn. 1962) (work product doctrine does not prevent inquiry into existence of work product); *McCall v. Overseas Tankship Corp.*, 16 F.R.D. 467, 469 (S.D.N.Y. 1954) (work product doctrine does not protect knowledge of existence of work product itself); see also *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1199-1200 (D.S.C. 1975) (on reconsideration) (distinguishing creative legal thought from mere recognition of knowledge of observed facts, which is not protected as work product); *Xerox v. I.B.M.*, 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974) (opinion work product not protected at expense of concealment of non-privileged facts). Professors Wright and Miller note that:

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

8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2023, at 194 (1970) (footnote omitted) [hereinafter WRIGHT & MILLER].

⁴⁵ See *Shelton*, 805 F.2d at 1328-29.

⁴⁶ It is asserted that the court's statement in *Shelton* that "any recollection Burns may have of the existence of documents in AMC's possession likely would be limited to those . . . she has selected as important to her legal theories," 805 F.2d at 1329, and "that Burns' acknowledgment would indicate to her opponent that she had reviewed the document and . . . may be relying on it preparing her client's case," *id.*, is indicative of the speculative basis

after establishing existence, the discovering party may not inquire further into what significance, if any, counsel has attached to a specific document.⁴⁷ Therefore, the *Shelton* court, it is suggested, satisfied its displeasure with the increasingly popular practice of deposing attorneys by curtailing discovery of essential facts.⁴⁸ Furthermore, the decision in *Shelton* blurs the well-settled distinction between counsel's knowledge of related facts, such as the existence of documents, which historically has not been considered work product,⁴⁹ and counsel's opinion as to such documents, which may constitute work product if formed with a view towards litigation.⁵⁰

ADVERSE IMPACT OF THE *Shelton* DECISION

Although striving to protect the adversarial basis of our system of jurisprudence, the *Shelton* court expanded the parameters of work product protection and, alarmingly, aided in the removal of facts from judicial scrutiny.⁵¹ The Eighth Circuit's decision has circumvented earlier case law defining the scope of the work product doctrine⁵² by aligning knowledge of the existence of underlying facts concerning trial preparation with the process of selecting and compiling documents through trained legal analysis.⁵³ It is asserted that the decision in *Shelton* will serve only to hinder and prolong the already burdened discovery process by fostering claims of work product protection relating to nonprivileged knowledge of relevant facts. The specific purpose of pretrial discovery is to narrow the issues for trial by compelling parties to disclose such facts.⁵⁴ The

supporting the courts finding that the "answers to [the plaintiff's] questions . . . would reveal more than the mere existence of documents." *Id.* It is submitted that any slight inferential value that the plaintiffs would receive from Burns' acknowledgment is far outweighed by the need to establish the existence of such documents.

⁴⁷ See, e.g., FED. R. CIV. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) (attorney's legal theories must be protected from needless interference).

⁴⁸ See *Shelton*, 805 F.2d at 1327. It is submitted that the *Shelton* decision severely limits the ability to take opposing counsel's deposition by deeming counsel's knowledge of observed facts to be work product. See *id.* at 1327, 1328-29.

In *Hickman v. Taylor*, however, the Supreme Court determined that "[w]here 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 properly be had." 329 U.S. at 511.

⁴⁹ See *supra* note 44 and accompanying text.

⁵⁰ See *supra* note 2.

⁵¹ See *Shelton*, 805 F.2d at 1326.

⁵² See *supra* note 44 and accompanying text.

⁵³ See *Shelton*, 805 F.2d at 1329; see also *supra* notes 37-38 and accompanying text.

⁵⁴ See *supra* note 1 and accompanying text; see generally 8 WRIGHT & MILLER, *supra*

Shelton decision, however, will help reduce the discovery process to a tactical battle, whereby parties to a lawsuit can avoid disclosing factual information which might expose liability.⁵⁵ It is further suggested that the decision in *Shelton* will undermine the authority of the district courts to moderate the flow of discovery to and from each party.⁵⁶ For an orderly progression of discovery to occur, the trial court must decide whether information sought is privileged or protected as work product.⁵⁷ The *Shelton* decision implicitly encourages non-compliance with a district court's orders compelling discovery pending appellate review.⁵⁸ Thus, it is asserted that the *Shelton* decision will provide an added incentive for the unethical abuse of the discovery process by attorneys and invariably will result in the waste of judicial resources by requiring appellate review of matters rightfully within the discretion of the trial court.⁵⁹

CONCLUSION

The discovery of facts is essential to the proper functioning of

note 44, § 2001, at 15 (explaining purpose of discovery mechanism).

⁵⁵ Cf. Brazil, *supra* note 3, at 1311-15 (proponents of liberal discovery rules failed to appraise the psychological pressures inherent in adversarial system); Comment, *Tactical Use and Abuse of Depositions Under the Federal Rules*, 59 YALE L.J. 117, 125-38 (1949) (discussion of other abuses of discovery process).

⁵⁶ See FED. R. CIV. P. 37. Under Rule 37(b), a district court may impose sanctions against parties who fail to abide by the discovery process contained in Rules 26-36. FED. R. CIV. P. 37(b); see also FED. R. CIV. P. 37, advisory committee's general note of 1970 (failure to afford discovery sufficient for sanctions).

⁵⁷ See FED. R. CIV. P. 26(c). Under Rule 26(c), a district court may upon motion by a party or person from whom discovery is sought fashion a protective order which justly protects that party's interests. *Id.* The court, in its discretion, may deny such party's motion, in whole or in part, and order discovery of the materials for which protection was sought. *Id.* These orders by a district court are interlocutory and therefore not appealable before final judgment has been rendered. See, e.g., *In re Grand Jury Proceedings, Vargas*, 723 F.2d 1461, 1465 (3d Cir. 1983) (denial of motion to quash held to be non-appealable); see generally 4-8 MOORE's, *supra* note 28, §§ 26-83[3] (discovery orders not ordinarily appealable before final judgment entered).

⁵⁸ *Shelton*, 805 F.2d at 1331 (Battey, J., dissenting). In his dissent, Judge Battey opined that "[t]he ability of the court [to use and threaten sanctions] in a given case, properly supported by the appellate court, contributes greatly to the prompt resolution of the many cases facing the federal trial courts." *Id.* (Battey, J., dissenting). Additionally, Judge Battey noted that "the majority opinion will provide added incentive to . . . counsel to hide from judicial scrutiny otherwise discoverable documents." *Id.* at 1333 (Battey, J., dissenting).

⁵⁹ See *supra* note 57. It is asserted that the defiant position taken by the defendant's and upheld by the court in *Shelton*, will force district courts to impose sanctions. In effect, this will vitiate the courts' discretion as to the issuance of protective orders and force appellate review of the ultimate sanction imposed.

our civil trial system. The *Shelton* decision, however, distorts the traditional boundaries between the work product of an attorney and the underlying non-privileged facts which often become intertwined with such work product. While the nature of the adversarial system dictates that attorneys prepare their cases free from intrusion by opposing counsel, no such protection is justified when it results in the suppression of essential facts.

Michael F. Sweeney