MINNESOTA

Defense

COMPLIMENTARY

WINTER 2017

PREPARED IN ANTICIPATION — TAKING FULL ADVANTAGE OF THE PROTECTIONS IN RULE 26.02(D)

PROTECTING MEDICAL PROVIDERS FROM PHYSICAL HARM WITHOUT EXPOSING THEM TO LIABILITY

CONDO DEVELOPER HELD LIABLE FOR DESIGN AND CONSTRUCTION DEFECTS UNDER MCIOA — IS IT FINALLY TIME FOR A CHANGE?

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VOLUME 37, ISSUE 4 • WINTER 2017

Minnesota Defense is a regular publication of the Minnesota Defense Lawyers Association for the purpose of informing lawyers about current issues relating to the defense of civil actions. All inquiries should be directed to MDLA, 1000 Westgate Drive, Suite 252, St. Paul, MN 55114.

PREPARED IN ANTICIPATION—TAKING FULL ADVANTAGE OF THE PROTECTIONS IN RULE 26.02(D)

By Pete Gregory, Bassford Remele, P.A. and Jessica Kometz, Bassford Remele, P.A.

INTRODUCTION

For most litigators, the practice of law is still learned through a form of apprenticeship. Even senior lawyers tweak their practices from time to time by adopting other lawyers' methods. But the hazard of learning by imitation is that we develop unexplored gaps in our understanding of the theory and authority behind our practices. Or worse, we develop gaps in our practice, overlooking or underutilizing tools available to us as advocates.

Such is the case for many defense practitioners with the time-honored objection to producing material on the ground the requested materials were "prepared in anticipation of litigation." Plaintiffs' attorneys occasionally push back against such objections, but courts rarely have occasion to weigh in. There is considerable confusion about the valid scope of this objection among practitioners and jurists alike. This article will address the authority and theory underlying that objection to assist readers in making full use of this powerful tool.

RULE 26 AND *HICKMAN V. TAYLOR*

The phrase "in anticipation of litigation" comes from Minn. R. Civ. P. 26.02(d), which provides:

> **Trial Preparation: Materials.** Subject to the provisions of Rule 26.02(e) [governing expert discovery] a party may obtain discovery of documents and tangible things otherwise discoverable pursuant to Rule 26.02(b) [governing scope in general] 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.
>
> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a party or other person may obtain without the required showing a statement concerning the action or its subject matter previously made by that person who is not a party. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Minn. R. Civ. P. 26.02(d) (emphasis added).

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Pete Gregory is shareholder at Bassford Remele, P.A. where he focuses his practice on professional liability defense.

Jessica Kometz is a law clerk at Bassford Remele, P.A. and a third-year law student at Mitchell Hamline School of Law. She is expected to graduate in May 2017.

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The 1975 Advisory Committee notes to Rule 26.02 explain that Rule 26.02(d) was intended to address ambiguities created by *Hickman v. Taylor*. Minn. R. Civ. P. 26.02(d) 1975 advisory committee note. In *Hickman*, the U.S. Supreme Court held that a defendant did not have to produce statements taken by defense counsel from survivors of a tug boat accident. 329 U.S. 495, 512-13 (1947). *Hickman* addressed the discoverability of materials prepared in anticipation of litigation that were not protected by attorney-client privilege. *Id.* at 508. The Court held that although not "privileged" or "irrelevant," materials that were prepared in anticipation of litigation or trial "fall[] outside the arena of discovery and contravene[] the public policy underlying the orderly prosecution and defense of legal claims." *Id.* at 510. However, the Court allowed for production of such materials in limited circumstances, such as when a witness is unavailable or can only be reached with difficulty. *Id.* at 511.

A significant body of scholarship and caselaw has developed around *Hickman* and the "work product doctrine," and virtually every United States jurisdiction has developed its own common law jurisprudence regarding this doctrine. The United States Supreme Court defines that doctrine as "a qualified immunity from discovery for the 'work product of the lawyer'" under which "such material could only be discovered upon a substantial showing of 'necessity or justification.'" *F.T.C. v. Grolier, Inc.*, 462 U.S. 19, 24 (1983) (citing *Hickman*, 329 U.S. at 510). The Supreme Court defines it elsewhere as "a qualified privilege for certain materials prepared by an attorney 'acting for his client in anticipation of litigation.'" *United States v. Nobles*, 422 U.S. 225, 237-38 (1975) (citing *Hickman*, 329 U.S. at 508). The Minnesota Supreme Court defines the doctrine as the rule that "'an attorney's mental impressions, trial strategy, and legal theories in preparing a case for trial' are not discoverable." *In re Dedefo*, 752 N.W.2d 523, 529 (Minn. 2008).

Herein lies much of the confusion as to what is meant by materials "prepared in anticipation of litigation under Rule 26.02(d)." These traditional formulations of the "work product doctrine" are considerably narrower than Rule 26.02(d) in two respects. First, whereas the traditional "work product doctrine" typically refers only to materials created by attorneys, Rule 26.02(d) provides broader protection, covering materials and information generated by non-attorneys, including parties or party representatives (consultants, insurers, or agents, etc.). Second, Rule 26.02(d) applies to all "documents and tangible things . . . prepared in anticipation of litigation or for trial"—a much broader category of information than documents containing an attorney's "mental impressions, trial strategy, and legal theories." This means that materials containing mere facts or data may be still protected by Rule 26.02(d).

Despite the difference in scope between the common law work product doctrine and Rule 26.02(d), practitioners, courts, and commentators frequently confuse these two concepts. Indeed, the 1975 committee note describes Rule 26.02(d) as "the 'work product' rule" and boasts that it "resolves many of the questions raised by the present rule and by the application of the work product doctrine in Taylor v. Hickman [*sic*]." Minnesota appellate courts have likewise stated that Rule 26.02(d) "codifie[s]" the attorney work product doctrine. *City Pages v. State*, 655 N.W.2d 839, 845 (Minn. Ct. App. 2003); *see also State ex rel. Humphrey v. Philip Morris, Inc.*, 606 N.W.2d 676, 690 (Minn. Ct. App. 2000) (conflating the attorney work product doctrine with Rule 26.02(d)).

But the text of Rule 26.02(d) does demonstrably more than "codify" the attorney work product doctrine or answer "questions" about the application of *Hickman*. It expands the protections articulated in *Hickman* considerably and creates protection for materials that would otherwise be discoverable. Construing Rule 26.02(d) by reference to the "work product doctrine" poses a serious risk of confusing the scope of Rule 26.02(d). Herr and Haydock insightfully observe the Advisory Committee should have abandoned the use of the term "work product" altogether: "The phrase 'work product' has assumed so many different meanings to different lawyers, judges, and commentators that it is advisable to avoid the use of that phrase and rely on the terms employed by Rule 26." David F. Herr & Roger S. Haydock, 1A Minn. Prac. Series: *Civil Rules Annotated* § 26.13 (5th ed. 2016).

WHAT MATERIALS ARE PROTECTED BY RULE 26.02(D)?

The threshold determination under Rule 26.02(d) of whether material was prepared in anticipation of litigation or trial requires consideration of "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation [or trial]." *City Pages*, 655 N.W.2d at 846. Courts frequently use the phrase "prepared in anticipation of litigation" to contrast trial-preparation materials from records created and maintained in the ordinary course of business, which are not only discoverable but admissible under Minn. R. Evid. 803(6). *See id.* ("[E]ven though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation."); Minn. R. Evid. 803(6) ("A memorandum, report, record, or data compilation prepared for litigation is not admissible under this exception.").

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Other threshold factors to consider under Rule 26.02(d) include the role of the individuals who prepared the material, the timing of when the materials were created, and the reason for which they were prepared. Herr and Haydock § 26:13. For example, the Minnesota Court of Appeals has held that a pre-suit accident report, prepared by a risk manager after consultation with an insurer and an attorney, was created in anticipation of litigation and therefore protected by Rule 26.02(d). *Lindholm v. Carleton Coll.*, No. A15-1846, 2016 Minn. App. Unpub. LEXIS 634, at *16 (Minn. Ct. App. June 27, 2016). The involvement of counsel or a claims handler generally strengthens the argument that materials are prepared in anticipation of litigation and trial. Herr and Haydock § 26:13.

Some of the more difficult questions arise where ordinary business operations involve anticipating and preparing for legal claims. Applying the federal counterpart to Rule 26.02(d), which has similar language, the Eighth Circuit Court of Appeals held that certain risk management documents were discoverable even though they reflected the custodial party's planning with respect to litigation. *Simon v. G.D. Searle & Co.*, 816 F. 2d 397, 400-01 (8th Cir. 1987). The Court recognized that the documents in question were used to track, control and manage litigation but nonetheless held that risk management documents used for setting reserves were assembled for business planning purposes, rather than in anticipation of specific litigation. *Id.* at 401-02. The Court noted that the information in question was not used "in giving legal advice or in mapping litigation strategy in any individual case" but rather "serve[d] numerous business planning functions[.]" *Id.* at 401. Similarly, other courts have held that "[t]he inchoate possibility, or even the likely chance of litigation, does not give rise to the [protection of Rule 26]." *Mission Nat'l Ins. Co. v. Lilly*, 112 F.R.D. 160, 163 (D. Minn. 1986). For example, the investigation file of an insurer may be discoverable as ordinary business records in first-party litigation up to the point that a dispute arises between the insurer and insured over coverage. Herr & Haydock § 26:14. But claims of bad faith may expand the scope of what is discoverable. *Id.* (For more on the unique challenges of protecting litigation materials in bad faith coverage litigation, *see* Frost & Parsons, *Shhh! Why the Attorney-Client Privilege and Work Product Doctrine May Not Protect Communications with Coverage Counsel*, ABA Insurance Coverage Litigation Committee, https://goo.gl/AkCZ5L.)

On the other hand, even seemingly inert information will be protected if assembled in anticipation of specific litigation. The Eighth Circuit held that a database of vehicle identification numbers for vehicles connected with a specific program was presumptively protected from discovery by Rule 26 because it was prepared in anticipation of litigation. *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 845-46 (8th Cir. 1988). Notably, the Eighth Circuit in that case ultimately decided that the database was nonetheless discoverable in part because the custodial party had waived any claim to protection by disclosing the material to another party. *Id.* at 846. Thus, parties possessing information prepared in anticipation of litigation or trial should be aware of the possibility that protections under Rule 26 can be waived much like attorney-client privilege can be waived. Rule 26.02(f) contemplates that the protection of materials prepared in anticipation of litigation or trial will be affirmatively asserted in a privilege log just as with materials that are protected by the attorney-client privilege. And while Rule 26.02(d) protects from disclosure of materials under Rule 34, it does not protect against disclosure of the underlying information contained in those materials under Rules 30 or 33. Herr & Haydock § 26:13(1).

WHAT LITIGATION AND TRIAL-PREPARATION MATERIALS ARE DISCOVERABLE DESPITE RULE 26.02(D)?

The first and most notable exception to the general protection for materials prepared in anticipation of litigation is statements. Statements are defined as "(1) a written statement signed or otherwise adopted or approved by the person making it, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded." Minn. R. Civ. P. 26.02(d). The language of the rule is dense but seems to indicate that a requesting party can obtain statements made by that requesting party or by a non-party. *Id.* at 1975 advisory committee note ("The purpose of the addition of the language 'or a party' is to make it clear that a party without a necessity of seeking a routine motion has the right to obtain statements made by non-party witnesses."); *see also Ossenfort v. Assoc. Milk Producers, Inc.*, 254 N.W.2d 672, 681 (Minn. 1977) ("[S]tatements of non-party witnesses are discoverable as of right, without a showing of need or inability to obtain their substantial equivalent.").

It is less clear that statements in anticipation of litigation made by *the responding party* are discoverable. *Ossenfort*, 254 N.W.2d at 681 (holding statement made by defendant, even though not "privileged" was discoverable only upon a showing of "substantial need"); *Rodenwald v. Minn. Power & Light Co.*, No. C9-93-1664, 1994 Minn. App. LEXIS 604, at *8 (Minn. Ct. App. June 28, 1994) (holding statements made by defendant's representative were given in anticipation of litigation and not discoverable); *Banks v. Wilson*, 151 F.R.D. 109, 112 (D. Minn. 1993) (holding statement given by insured to insurer after notice of claim was not discoverable under Fed. R. Civ. P. 26(b)(3)); *but see Pearson v. Rohn Indus.*, No. A15-0477, 2015 Minn. App. Unpub. LEXIS 1174, at *22 (Minn. Ct. App. Dec. 21, 2015) (holding district court erred in not ordering production of statements given by employees of defendant to defendant's attorney during general

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investigation but that the error was harmless). However, courts have held that statements made by employees who are not named parties are generally discoverable as a matter of course. *Leer v. Chi., M., S. P. & P. R. Co.*, 308 N.W.2d 305, 307 (Minn. 1981) ("[A] statement by an employee who is neither a named plaintiff nor a defendant is a statement of 'a person who is not a party,' and is therefore discoverable."). Notably, Rule 26.02(d) is different from Fed. R. Civ. P. 26(b)(3) in that that the federal rule does not contemplate discovery of non-witness statements given in anticipation of litigation or trial. *Compare* Minn. R. Civ. P. 26.02(d) *with* Fed. R. Civ. P. 26(b)(3)(C); *see also* Herr & Haydock § 26.16.

Setting aside the unique treatment of statements made by the requesting party or a non-party, trial preparation materials are discoverable "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." Minn. R. Civ. P. 26.02(d). Notably, even when this showing has been made, "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation" are not discoverable. *Id.* The advisory committee notes that such non-factual information is thus entitled to "absolute protection against disclosure." *Id.* at 1975 advisory committee note. This "absolute" protection is broader than the common law work product doctrine because it applies not only to the mental impressions, conclusions, opinions, and legal theories of attorneys but also to "other representative[s] of a party." Here again, practitioners should be careful not to conflate the common law work product doctrine and Rule 26.02(d).

As noted above, "substantial need" requires more than mere suspicion that the requested materials might contain information helpful to the requesting party's case. *Ossenfort*, 254 N.W.2d at 680-81. As the Minnesota Supreme Court observed, "mere surmise that a statement might include impeachment material does not constitute substantial need." *Id.* at 681 (quotation omitted). The typical circumstances giving rise to substantial need are unavailability or hostility of a witness, faded memory, or reports made contemporaneously or shortly after an incident. Herr & Haydock § 26:15. A court will be less inclined to find "substantial need" and "undue hardship" if the requested information is available from other discoverable sources. *Ossenfort*, 254 N.W.2d at 682. For example, with respect to a non-discoverable statement given by a representative of the defendant, the Minnesota Supreme Court held that there was no obligation to produce that statement because the witness was accessible to the requesting party, was eventually deposed, and the statement was not given "spontaneously" after the incident, meaning that there was no indication a substantial equivalent could not be obtained by other means. *Id.*

CONCLUSION

Rule 26.02(d) affords broad protections against discovery of materials prepared in anticipation of litigation and trial. Defense attorneys should be careful not confuse these protections with various formulations of the work product doctrine. Protections under Rule 26.02(d) should be separately asserted in response to discovery requests and to the full extent of the plain meaning of Rule 26.02(d).