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Civil Procedure - Discovery - *SEC v. National Student Markinging Corp.*, Work Product Immunity Inapplicable to Attorney-Defendant Where Work Product Is at Issue and Former Client Is No Longer an Interested Party in the Suit

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CIVIL PROCEDURE — DISCOVERY — *SEC v. National Student Marketing Corp.*, Work Product Immunity Inapplicable to Attorney-Defendant Where Work Product Is at Issue and Former Client Is No Longer an Interested Party in the Suit

In a recent decision, *Securities and Exchange Commission* v. *National Student Marketing Corp.*,[1] the United States District Court for the District of Columbia held that an attorney's confidential memoranda containing litigation plans and strategies may not, under certain circumstances, be afforded the qualified immunity from discovery normally accorded such matter under the work product doctrine embodied in rule 26(b)(3) of the Federal Rules of Civil Procedure.[2]

The suit was brought by the Securities and Exchange Commission (SEC) for alleged securities fraud against National Student Marketing Corporation (NSMC), Interstate National Corporation, certain officers and directors of both firms, and their respective auditors and outside legal counsel. The SEC sought injunctive relief for violations of the anti-fraud,[3] proxy,[4] and reporting[5] sections of the securities laws allegedly resulting from the release of misleading financial information intended to inflate the price of NSMC stock and thereby to enable NSMC to fraudulently acquire other companies in an exchange for its own stock.[6] The SEC charged White & Case, NSMC's outside legal counsel, and Marion Jay Epley, a partner in the White & Case firm (hereinafter collectively referred to as White & Case) with actively participating in the fraud by failing to disclose damaging financial information, improperly participating in the merger of Interstate National

1. 18 FED. RULES SERV. 2d 26b.72, Case 5 (D.D.C. June 25, 1974).
2. FED. R. CIV. P. 26(b)(3).
3. Securities Act of 1933, 15 U.S.C. § 77q(a) (1970); Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (1970).
4. Securities Exchange Act of 1934, 15 U.S.C. § 78n(a) (1970).
5. *Id.* § 78m(a).
6. The full text of the complaint is reproduced at BNA SEC. REG. & L. REP. No. 138 at D-1 (Feb. 9, 1972).

Corporation into NSMC, rendering a questionable opinion concerning the sale of NSMC stock acquired in the merger, and failing to legally report the sales of two NSMC subsidiaries.[7] NSMC was dismissed from the suit when it consented to the entry of a permanent injunction against it.[8] In connection with that injunction, NSMC expressly waived "any privilege or restriction upon disclosure (attorney-client, work product or otherwise) with respect to any records, documents, correspondence and other papers" in existence on the date the suit was filed.[9]

Subsequently, the SEC sought the discovery of a large number of memoranda, charts and other documents from White & Case which its partners and associates had prepared on behalf of NSMC in connection with the SEC investigation and other related private litigation. White & Case resisted production of the documents, claiming an immunity from discovery under the work product doctrine.[10] Thereafter, the SEC brought a motion to compel White & Case to produce the documents in question.[11]

The court ordered White & Case to produce the documents.[12] While recognizing that these documents were in a form traditionally considered work product, the court held that they were not within the purview of the qualified immunity normally extended to an attorney's trial preparation materials. The court rested its decision on two factors. First, the alleged violations of the securities laws by White & Case occurred in connection with its legal representation of NSMC, thereby placing its activities as counsel directly at issue in the action.[13] Second, NSMC had eliminated the necessity of presenting any defense by agreeing to the consent order, and, hence, ceased to be an interested party in the suit. This fact precluded the application of work protection which, in the court's opinion, was principally intended to facilitate the attorney's representation of his client.[14] The court also

7. SEC v. National Student Marketing Corp., 18 FED. RULES SERV. 2d 26b.72, Case 5 (D.D.C. June 25, 1974). This seemingly novel action brought against attorneys in the course of client representation for violations normally attributed to clients alone raised quite a commotion among securities lawyers. The Wall Street Journal referred to the SEC's complaint as "the best read document since 'Gone With The Wind' ". Wall Street Journal, Feb. 15, 1972, at 1, col. 1. *See generally* Comment, *Securities Regulation —Attorneys' Liability—Advising, Abetting and the SEC's National Student Marketing Offensive*, 50 TEXAS L. REV. 1265 (1972).

8. SEC v. National Student Marketing Corp., 18 FED. RULES SERV. 2d 26b.72, Case 5 at 1304 n.4 (D.D.C. June 25, 1974).

9. *Id.* at 1306 n.8.

10. *Id.* at 1304. This motion was brought pursuant to FED. R. CIV. P. 34 and 37. Various other parties brought motions to compel discovery of documents. The court's rulings on these motions will not be discussed in this comment.

11. *Id.* at 1303.

12. *Id.* at 1305.

13. *Id.*

14. *Id.* at 1306.

noted that the production requests were made upon White & Case as a defendant and not in its role as attorney for a former client.[15] In light of these peculiar circumstances, the court addressed itself to the rationale underlying the work product doctrine, concluding that these policy considerations would not be subverted by requiring White & Case to produce the documents which the SEC sought. In so doing, the court applied a narrow construction of the doctrine, that is, that the immunity would extend only so far as necessary to further the interest of the client for whom the work had been done. However, the court appears to have overlooked another important policy underlying the doctrine: that work product should also be protected in order to facilitate the functioning of counsel in the adversary system. The court could have reached the same result without adopting such a narrow construction of the doctrine. The mechanism presently incorporated in the Federal Rules of Civil Procedure offers an alternative consistent with the broader rationale of the doctrine.

WORK PRODUCT—A QUALIFIED IMMUNITY

Discovery is the process by which a party obtains information and other materials relevant to a pending lawsuit before trial.[16] Until 1938, discovery played a relatively minor role in suits at law or in equity. Litigation was largely a game of detailed pleadings and surprise played by opposing attorneys. This practice was frequently referred to as the "sporting theory of justice" under which the outcome of litigation often depended upon the "fortuitous availability of evidence or the skill and strategy of counsel."[17] In 1938, the Federal Rules of Civil Procedure were adopted.[18] The adoption of the federal rules represented a major change in the philosophy of litigation in the federal courts. A significant component of this new outlook was the provision for extensive pre-trial discovery embodied in rules 26 through 37.[19] The fundamental objectives of pre-trial discovery under

15. *Id.* at 1305. The court states: "[W]ith White & Case as named defendants and in light of NSMC's present posture, the court is of the opinion that the documents do not fall under Rule 26(b)(3)'s protective umbrella." *Id.* at 1306.

16. *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 942 (1961).

17. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2001 (1970) [hereinafter cited as 8 C. WRIGHT & A. MILLER]; Millar, *The Mechanism of Fact-Discovery*, 32 ILL. L. REV. 424, 437-53 (1937), for a history of discovery prior to the federal rules. *See also* Martin v. Reynolds Metals Corp., 297 F.2d 49 (9th Cir. 1961).

18. RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS APPENDIX 28 U.S.C. (1970).

19. *See generally* Pike & Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179 (1938); Pike, *The New Federal Deposition-Discovery Procedure and the Rules of Evidence*, 34 ILL. L. REV. 1 (1939); Sunderland, *Discovery before Trial under the New Federal Rules*, 15 TENN. L. REV. 737 (1939).

the federal rules are to clarify and narrow the basic issues between the parties and to ascertain facts relevant to the subject matter of the action.[20] Accordingly, the scope of discovery was necessarily expanded to include all matter which was relevant and not privileged.[21] Thus, implementation of the various discovery devices would help to eliminate the element of surprise from the litigation process.

One troublesome issue relating to the scope of discovery under the federal rules has been the extent to which a party may inspect and avail himself of the "work product"[22] of his adversary's attorney—interviews, statements, memoranda, correspondence, documents containing mental impressions, conclusions, legal strategies and theories, and other information obtained in anticipation of litigation or in preparation for trial.[23]

At common law, little, if any, discovery of material prepared by a lawyer in anticipation of litigation was allowed. The claim of "professional privilege" was summarily upheld.[24] English courts continue to sustain this broad privilege and have developed this concept to include all documents prepared by or for counsel with a view toward litigation.[25] Additionally, English courts follow the rule "once privileged,

20. Hickman v. Taylor, 329 U.S. 495, 501 (1947); Taejon Bristle Mfg. Co. Ltd. v. Omnex Corp., 13 F.R.D. 448, 450 (S.D.N.Y. 1953).

21. FED. R. CIV. P. 26(b)(1).

22. Hickman v. Taylor, 329 U.S. 495, 500 (1947).

23. 4 J. MOORE, FEDERAL PRACTICE ¶ 26.63[1], at 26-343 (2d ed. 1974) [hereinafter cited as MOORE]. Much confusion remains as to which documents and materials constitute work product. For general discussion of matter held to constitute work product, see Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026 (1950); Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498 (1958); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1027-46 (1961). This article assumes that the trial preparation material discussed is within the definition of work product.

24. For a historical perspective of work product at common law and under the federal rules prior to *Hickman*, see La France, *Work Product Discovery: A Critique*, 68 DICK. L. REV. 351 (1964).

25. Lord Justice Bowen, in Lyell v. Kennedy, 27 Ch. Div. 1 (C.A. 1884), stated the basis of the English privilege:

> We are not dealing now with documents which the party has procured himself; we are dealing with documents which have been procured at the instigation of a solicitor; and, bearing in mind the rule of privilege which the law gives in respect of information obtained by a solicitor, it seems to me we cannot make the order asked for by Mr. MacClymont without doing very serious injustice in this case. A collection of records may be the result of professional knowledge, research and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarian or virtuoso, and even if the solicitor has employed others to obtain them, it is his knowledge and judgment which have probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and you cannot have disclosure of them without asking for the key to the labour which the solicitor has bestowed in obtaining them.

Id. at 31.

always privileged" even though discovery is later sought in a separate case and even though the litigation originally anticipated never materialized.[26]

The issue of whether an attorney's materials prepared for trial are subject to discovery arose in the United States in its modern perspective shortly after the federal rules were adopted. Federal courts attempting to resolve this issue generally denied discovery of such matter relying on various theories.[27] In the landmark case of *Hickman* v. *Taylor*,[28] the United States Supreme Court attempted to enunciate a standard relating to the discoverability of an attorney's work product and to resolve the conflicting lower court decisions on this question.[29] Justice Murphy, speaking for the Court, posed the problem as follows:

> Examination into a person's files and records, including those resulting from the professional activities of an attorney, must be judged with care. It is not without reason that various safeguards have been established to preclude unwarranted excursions into a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task.[30]

The Court expressly dispelled the notion that an attorney's trial preparation material was absolutely privileged in an evidentiary sense. Nevertheless, the Court extended a qualified immunity to an attorney's work product. This immunity would recede upon a showing of "necessity or justification" by the party seeking discovery, or by a showing that "denial . . . would unduly prejudice the preparation of petitioner's case," or "cause hardship or injustice."[31] However, an attorney's mental impressions, legal strategies, opinions and conclusions were apparently not made discoverable upon such a demonstration. Rather, discovery was limited to the rare cases to which Justice Murphy alluded

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26. Pearce v. Foster, 15 Q.B. 114 (C.A. 1885).

27. *See, e.g.*, McCarthy v. Palmer, 29 F. Supp. 585 (E.D.N.Y. 1939); Seals v. Capital Transit Co., 1 F.R.D. 133 (D.D.C. 1940); Blank v. Great No. Ry. Co., 4 F.R.D. 213 (D. Minn. 1943).

28. 329 U.S. 495 (1947).

29. The Court held that statements by crew members who were witnesses to a tug boat accident obtained by an attorney in preparation for trial, were not discoverable without a showing of necessity or justification therefor. The Court characterized the attempt to get the witnesses' statements as an "unwarranted inquiry into the files and mental impressions of an attorney." *Id.* at 510.

30. *Id.* at 497. *See also* E.I. du Pont de Nemours & Co. v. Philips Petroleum Co., 24 F.R.D. 416, 420-21 (D. Del. 1959), which accurately described the essential dilemma the court faces whenever discovery of work product is sought:

> to prevent the use of the discovery machinery to hinder the orderly and proper administration of justice by impairing the effectiveness of a lawyer's preparation of his client's case and at the same time not to defeat the purposes of discovery by allowing supression of relevant facts.

31. 329 U.S. at 509-10.

but failed to describe.[32]

In the succeeding years, lower courts, relying on *Hickman*, developed conflicting views in the application of discovery principles.[33] The major difficulty was the existence of two distinct standards of justification, each conferring a qualified immunity upon materials prepared for trial. One standard was that set forth in *Hickman*. The other standard used was the "good cause" requirement of rule 34 relating generally to the production of documents.[34] Confusion existed among courts as to whether "good cause" was established by a showing of relevance and lack of privilege or whether it also required a showing of necessity. This confusion was compounded by the resulting difficulty of relating the good cause requirement contained in the rule and the "necessity or justification" showing of *Hickman* when discovery was sought of materials prepared for trial.[35]

The failure to clearly distinguish these two standards led, in part, to amendments of the Federal Rules of Civil Procedure in 1970.[36] These amendments eliminated the general requirement of good cause from rule 34, and substantially codified the *Hickman* standard regarding materials prepared for trial. Hence, non-work product documents were made routinely discoverable.

The current governing standard for the production of tangible materials prepared in anticipation of litigation or for trial is found in rule 26(b)(3). Such material is subject to discovery:

> [O]nly 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 representatives of a party concerning the litigation.[37]

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32. *Id.* at 513.

33. *See, e.g.*, Brown v. New York, New Haven & Hartford R.R. Co., 17 F.R.D. 324 (S.D.N.Y. 1955); Connecticut Mutual Life Ins. Co. v. Shields, 17 F.R.D. 273 (S.D.N.Y. 1955); Philadelphia Electric Co. v. Anaconda American Brass Co., 275 F. Supp. 146 (E.D. Pa. 1967). For a description of the difficulties in following the *Hickman* rule and the large number of conflicting judicial opinions, see La France, *Work Product Discovery: A Critique*, 68 DICK. L. REV. 351 (1964); Comment, *Attorney's Work Product Rule—An Area of Confusion*, 31 FORDHAM L. REV. 530 (1963).

34. FED. R. CIV. P. 34.

35. *See* MOORE, *supra* note 23, ¶ 26.63[8].

36. ADVISORY COMMITTEE'S EXPLANATORY STATEMENT CONCERNING AMENDMENTS OF THE DISCOVERY RULES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DISCOVERY, 48 F.R.D. 487, 500 (1970) [hereinafter cited as ADVISORY COMMITTEE].

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

In order to pierce this protection, the required criteria is now expressed in terms of the elements of the special showing to be made rather than any degree of "good cause."[38] However, such a showing is not entirely dispositive for it is further provided that the court shall protect from discovery any material which reflects the mental impressions, conclusions or legal theories of an attorney. One commentator has described these conceptual efforts of an attorney as "hard core" work product.[39] Although the documents which the SEC sought to discover from White & Case in *National Student Marketing* were described as work product "in classic form,"[40] the district court did not analyze the production motion in terms of the special showing required under rule 26(b)(3).[41] Rather, it held that work product immunity was entirely inapplicable. However, its holding that such work product is discoverable upon a showing of relevancy obscures part of the reason for the protection of materials prepared in anticipation of trial.

Work Product of Attorney at Issue

National Student Marketing was the first decision since the adoption of the 1970 amendments concerning the discoverability of work product where the conduct of an attorney was at issue in a lawsuit. On the infrequent occasions prior to 1970 when such conduct was at issue, the federal courts consistently compelled production of documents which the attorney had prepared in connection with his representation in previous litigation.[42] To do this, the courts employed various standards of justification to overcome the asserted work product immunity. All of these cases, however, considered the material qualifiedly protected under *Hickman* and required some showing of need or hardship to divest that protection. In contrast, the court in *National Student Marketing* held that work product protection was entirely inapplicable and, therefore, required no special showing.

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38. Advisory Committee, *supra* note 36, at 500.
39. Cooper, *Work Product of the Rulesmakers*, 53 Minn. L. Rev. 1269, 1279 (1969); *see* Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product*, 17 Wayne L. Rev. 1145, 1155 (1971).
40. 18 Fed. Rules Serv. 2d at 1305.
41. Fed. R. Civ. P. 26(b)(3).
42. *See* LaRocca v. State Farm Mut. Auto Ins. Co., 47 F.R.D. 278 (W.D. Pa. 1969); Kirkland v. Morton Salt Co., 46 F.R.D. 28 (N.D. Ga. 1968); Insurance Company of North America v. Union Carbide Corp., 35 F.R.D. 520 (D. Colo. 1964); Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F. Supp. 979 (E.D. Wis. 1969). *See also*, Natta v. Zletz, 418 F.2d 633 (6th Cir. 1969); Bourget v. Government Employees Ins. Co., 48 F.R.D. 29 (D. Conn. 1969); Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D. 37 (E.D. S.C. 1964).

In *Kirkland* v. *Morton Salt Co.*,[43] the plaintiff-garnishee sued the defendant-garnishor for malicious use of process in bringing a garnishment proceeding after payment of the obligation had already been made by the plaintiff. The plaintiff subsequently sought discovery of materials of the defendant's attorney indicating how and when he acquired certain information and what communications he had made concerning that information in preparation for the garnishment action. The court stated:

> Necessity is clear. In fact, under the peculiar circumstances here the actions taken by the attorneys in the former litigation are the very actions here complained of. Looking to what interest defendant has in withholding the information, this Court can see none except simple opposition to the case.[44]

In *Kearney & Trecker Corporation* v. *Giddings & Lewis, Inc.*,[45] an action for patent infringement, the defendant asserted the defense of unclean hands. He sought discovery of documents relating to the relationship between the plaintiff and a former employee of the patent office and the activities of both the plaintiff's house and outside counsel. In allowing discovery, the court noted that "it is the very fruit of the lawyer's labor that is being called into question."[46] As in *Kirkland*,[47] the court balanced the competing interests—the work product immunity retreating as good cause and necessity were shown.

In *La Rocca* v. *State Farm Mutual Automobile Ins. Co.*,[48] the court found the necessary showing of good cause by virtue of the fiduciary and agency relationship existing between the plaintiff and the defendant who had previously been the plaintiff's attorney. In that case, the plaintiff sued his insurance company over an alleged bad faith settlement of a previous lawsuit, seeking and obtaining the entire litigation file of the attorney who had represented both the insured and the insurance company in the prior action.[49]

In a case closely analogous to *National Student Marketing, Insurance Co. of North America* v. *Union Carbide Corp.*,[50] suit was brought by an insurance company against the law firm that had represented it in

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43. 46 F.R.D. 28 (N.D. Ga. 1968).
44. *Id.* at 30.
45. 296 F. Supp. 979 (E.D. Wis. 1969).
46. *Id.* at 982.
47. Kirkland v. Morton Salt Co., 46 F.R.D. 28 (N.D. Ga. 1968).
48. 47 F.R.D. 278 (W.D. Pa. 1969).
49. Production of work product was sought by way of a *subpoena duces tecum* rather than under rule 34. The court nevertheless held a showing of "good cause" under *Hickman* was still required. *Id.* at 282.
50. 35 F.R.D. 520 (D. Colo. 1964).

a prior action as well as against other parties to that suit. The plaintiff-insurer alleged that the attorneys in the prior litigation had conspired to deprive the insurer of its right of subrogation for workmen's compensation payments made to the plaintiff in the prior action. The insurer sought discovery of correspondence between its counsel and defense counsel in the prior case. As in *National Student Marketing*, the attorneys involved in the prior action were named defendants and the attorney-defendants no longer represented their client in the latter proceedings. The motion to produce in both *National Student Marketing* and *Union Carbide* sought not the work product in the on-going proceeding but, rather, the work product prepared in connection with the previous suit. The court in *Union Carbide* granted the motion, stating:

> It seemed that the plaintiff's interest in determining . . . whether any agreement of the sort alleged did in fact exist between the attorneys provided sufficient good cause to order production of non-privileged documents even though they might embody the work product of those attorneys.[51]

Although federal courts have steadfastly protected from disclosure work product containing an attorney's mental impressions, those instances where the lawyer's own acts have been at issue have marked the rare occasions where discovery has been ordered.[52] Presumably these are the rare situations to which Justice Murphy alluded, but did not describe in *Hickman*.[53] These lower courts recognized a highly qualified immunity for such work product, an immunity which would yield in special circumstances. And, they viewed the fact that the attorney's conduct was directly at issue as a significant, perhaps crucial factor in establishing a showing of necessity and thereby causing the immunity to yield to disclosure.[54]

Unlike the above cases, the court in *National Student Marketing* used a different analysis, although reaching the same result. Giving great weight to the fact that White & Case was charged with acting in complicity with its client while presumably representing its client's interest, the court found that the work product doctrine embodied in

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51. *Id.* at 524.
52. *See* Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product*, 17 WAYNE L. REV. 1145, 1156 (1971).
53. 329 U.S. at 513.
54. Since the protection of the lawyer's work product and the showing of substantial need necessary to overcome it are interdependent and, when as here, the factors supporting the claim of work product are weak, the requisite showing of substantial need is correspondingly lessened. *See* United States v. Swift & Co., 24 F.R.D. 280, 284 (N.D. Ill. 1959).

rule 26(b)(3) was inapplicable. Accordingly, the documents were discoverable merely upon a showing of relevancy. Assuming *arguendo* that some of the material the SEC sought to discover from White & Case contained so-called "hard core" work product which rule 26(b)(3) appears to give absolute protection,[55] the court in *National Student Marketing* could no doubt have found that the SEC had made a showing of substantial need of the materials and an inability, without undue hardship, to obtain their substantial equivalent as contemplated by rule 26(b)(3). The court could then have ordered production of those documents pursuant to the rule. By allowing discovery of such conceptual matter, the heart of a lawyer's professional effort, upon a showing of mere relevance, the court departed from prior case law.[56]

POLICY BASIS FOR WORK PRODUCT IMMUNITY

The *National Student Marketing* decision was based only in part on the fact that White & Case's legal representation of NSMC was the subject matter of the suit against it. The court also considered another factor, namely, that NSMC had ceased to be an interested party to the action. Accordingly, it concluded that White & Case was precluded from claiming work product protection on the basis that it was serving or protecting the rights of its client.[57] The court, therefore, extended work product immunity only insofar as the client had a real interest in the case. As mentioned above, the court's reading of *Hickman* and underlying rationale of the work product doctrine is relatively narrow, viewing the lawyer's right to keep material prepared for trial confidential only in those circumstances where confidentiality furthers vigorous

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

56. Perhaps one reason why the court in *National Student Marketing* did not follow the approach taken by previous courts is that rule 26(b)(3), if read literally, may be interpreted to give an absolute immunity to "hard core" work product, while giving a qualified immunity to work product of a factual nature. *See* Smedley v. Travelers Ins. Co., 53 F.R.D. 591 (D.N.H. 1971); 8 C. WRIGHT & A. MILLER, *supra* note 17, § 2026. *But see* Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts and Attorney's Work Product*, 17 WAYNE L. REV. 1145, 1161-62 (1971), which interprets rule 26(b)(3) as giving only a highly qualified immunity to "hard core" work product based upon the United States Supreme Court's rejection of the 1946 Proposed Amendments to the federal rules which explicitly forbid discovery of such mental impressions of the attorney. In a similar vein, Professor Moore states:

> [W]hen the activities of counsel are inquired into because they are at issue in the action before the Court, there is cause for production of documents that deal with such activities, though they are "work product." . . . [And] . . . while Rule 26(b)(3) provides that protection against discovery of the attorney's or representative's "mental impressions, conclusions, opinions, or legal theories" shall be provided, such protection would not screen information directly at issue . . . .

MOORE, *supra* note 23, ¶ 26.64[4] at 26-447.

57. 18 FED. RULES SERV. 2d at 1306.

representation of the client. Therefore, the policy underlying the doctrine disappears when the particular client for whom the work product was prepared settles his suit or otherwise ceases to be interested in the outcome of the controversy.

National Student Marketing thus confines work product protection strictly within limitations consistent with what that court apparently viewed as the sole reason for the doctrine—furtherance of a particular client's interest. This view appears to be inconsistent with the broader reading of *Hickman* taken by some courts. Justice Murphy's majority opinion describing the policy reasons behind work product protection was ambiguous as to whom the protection really runs—the client or the attorney:

> In performing his various duties, however, it 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 be relevant from the unrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference.[58]

Justice Murphy warned of the dangers that would arise if an attorney's work product was not protected:

> Much of what is put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the client and the cause of justice would be poorly served.[59]

Based upon these statements, the United States Supreme Court seems to view work product protection as intended to preserve the adversary system by assuring an attorney that his private files will, except in unusual circumstances, remain free from the encroachments of opposing counsel.[60]

In the typical factual situation, one advocate seeks discovery of the trial preparation materials prepared by the opposing advocate in connection with the litigation in which discovery is sought. In such situations, the interests of both the client and attorney are furthered by pro-

58. 329 U.S. at 510-11.
59. *Id.* at 511.
60. *See* Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55, 58 (N.D. Ohio 1953). *See also* Ceco Steel Products Corp. v. H.K. Porter Co., 31 F.R.D. 142, 143 (N.D. Ill. 1962).

tecting the attorney's work product from discovery. As the Supreme Court recognized in *Hickman*, this protection of counsel's work furthers the interest of the adversary system by enabling attorneys to commit their strategies, legal theories and other thoughts to writing without fear of disclosure.

However, in the infrequent case such as *National Student Marketing*, where the attorney is being sued as a result of his representation of a former client and the client has no interest in preserving the confidentiality of the materials prepared on his behalf, the question arises whether any other interests exist which demand protection of these materials. The court in *National Student Marketing* evidently did not believe so. Other courts, however, have recognized policy considerations underlying work product protection which relate to the integrity of the legal profession and not just to the interest of a particular client. These courts have apparently concluded that the qualified immunity may apply even if the original client is not a party to the lawsuit for which the material is sought.

Thus, the court in *La Rocca* v. *State Farm Mutual Automobile Ins. Co.*,[61] noted: "We feel there are serious impediments to compelling an attorney to divulge his work product even though the prior action is ended and his client is not a party to the present action."[62] The court declared that the rationale of the protection of an attorney's work product, as set forth in *Hickman*, was applicable to closed as well as pending cases. The court further said:

> The attorney work product, if privilege it is, is the privilege of the attorney and not of the client, its rationale is based upon the right of a lawyer to enjoy privacy in the course of preparation of his suit.[63]

If this is the case, then the fact that the client for whom the material was prepared is no longer an interested party should not, in and of itself, preclude the application of the qualified protection to an attorney's work product.

The Fourth Circuit, in *Duplan Corp.* v. *Moulinage et Retorderie de*

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61. 47 F.R.D. 278 (W.D. Pa. 1969).
62. *Id.* at 282. In this case, an insurance company was being sued by its insured for bad faith settlement in a prior action. The insured sought discovery of the plaintiff's attorney's file in the prior action which had resulted in a verdict against the insured.
63. *Id. See also* Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 483 n.12 (4th Cir. 1973); United States v. 38 Cases, etc., labelled Mr. Enzyme, 35 F.R.D. 357 (W.D. Pa. 1964); Radiant Burners, Inc. v. American Gas Assoc., 207 F. Supp. 771 (N.D. Ill. 1962).

Chavanoz,[64] recently held that an attorney's work product did not lose the qualified immunity extended to it under rule 26(b)(3) when the litigation for which it was prepared terminated. The court ruled that such documents did not become freely discoverable in subsequent and unrelated litigation.[65] The court's reading of *Hickman* is more important to this analysis than its holding. For it viewed the essential thrust of *Hickman* as the granting of a qualified protection to the "professional effort, confidentiality and activity of an attorney which transcends the rights of litigants."[66] Thus, the court's statement in *National Student Marketing* that *Hickman* and the 1970 amendments to the federal rules do not give attorneys a preferred position as parties to a lawsuit ignores a fundamental reason some courts have set forth for the protection of work product. As *Duplan* indicates, the broader rationale of *Hickman* and the work product doctrine is not based upon the posture or rights of litigants vis-a-vis each other, but on the integrity of the legal profession.[67] That broader rationale would appear to be applicable to the situation where the attorney is a defendant and the case has been closed as to his client despite factual allegations tending to defeat its application.[68]

Moreover, some showing of need has consistently been required by federal courts since *Hickman* to justify discovery of an attorney's work product, especially when his mental impressions and legal theories are involved. For in *Hickman*, the Court stated:

> [T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden

64. 487 F.2d 480 (4th Cir. 1973). It should be noted that *National Student Marketing* distinguished *Duplan* on two grounds: first, that NSMC did not engage the same lawyers for both the SEC investigation and the second suit; and second, that White & Case was a named defendant in the second proceeding. Consequently, the court did not attach any significance to the currency of the work product sought to be discovered. 18 FED. RULES SERV. 2d at 1306 n.10.

65. *See also* Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni, 61 F.R.D. 653 (D.P.R. 1974). *But see* Hanover Shoe, Inc. v. United Shoe Machinery, 207 F. Supp. 407 (M.D. Pa. 1962); Tobacco & Allied Stocks, Inc. v. Transamerica Corp., 16 F.R.D. 537 (D. Del. 1954). *See also* Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551 (2d Cir. 1967).

66. 487 F.2d at 483.

67. *Id.*

68. *Cf.* Duffy v. United States, 473 F.2d 840 (8th Cir. 1973), where the Eighth Circuit reversed a finding of civil contempt for an attorney's refusal, on grounds of the "work product privilege," to produce certain of his notes and memoranda before a grand jury. The court held that no showing sufficient to overcome the immunity had been made. It stated:

> [T]his has nothing to do with whether lawyers . . . should be treated better or worse than other people. It has to do with how the public may fare depending on the course followed with applications like the one before us.

Id. at 843; *In re* Terkeltoub, 256 F. Supp. 683 (S.D.N.Y. 1966).

> rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.[69]

Without placing such a burden on the party seeking discovery, the risk is increased that attorneys will feel constrained to leave unwritten and unrecorded many of their impressions and plans. The cumulative effect of this practice would be to inhibit attorneys in their preparation of cases for trial—the very fear expressed in *Hickman*. For if candid professional opinions, prepared in anticipation of litigation for a client under investigation, become freely discoverable in subsequent litigation against the same attorney, the quantity and quality of legal advice are apt to be lessened. It is important to recognize that it is the apprehension of possible disclosure which can work this inhibiting effect. Consequently, the possibility of both present and future disclosure is a significant consideration for work product protection.[70]

CONCLUSION

Any decision which permits discovery of documents containing an attorney's legal theories and mental impressions, without requiring an explicit showing of substantial need for those documents, is rightfully alarming to the legal profession. The decision in *National Student Marketing* does just that. It demonstrates that if a court concludes that the policy underlying the work product doctrine would not be served by its application in a particular factual context, the court may choose not to apply rule 26(b)(3) and the special showing it requires. The case will therefore be disquieting to many attorneys who share the belief of White & Case that the decision inhibits attorneys from preparing rule 26(b)(3) material, particularly on behalf of a client under investigation by a regulatory agency "since they would do so at the risk of disclosure should they later be named as defendants."[71]

Such fears are probably unfounded. Courts have ample authority to recognize and remedy the unwarranted naming of an attorney as a defendant, and plainly no such abuse was involved in the SEC's prosecution of White & Case. The opinion carefully noted that the charges against White & Case did not appear spurious. Moreover, the court stressed that its ruling that rule 26(b)(3) was inapplicable was

69. 329 U.S. at 512.
70. *See* Comment, *Civil Procedure—Discovery—Work Product Privilege Extends to Subsequent, Unrelated Litigation*, 27 VAND. L. REV. 826, 833 (1974).
71. 18 FED. RULES SERV. 2d at 1306.

a narrow one, resting upon the concurrence of two unusual factors: that White & Case was a defendant, and that NSMC, its former client, was no longer an interested party to the lawsuit.

The result reached by the district court in *National Student Marketing* is in the interest of justice. When a lawyer is charged with violating the law in the course of representing his client, the public's right to every man's evidence,[72] demands that he be required to disclose all relevant documents, even those containing work product. However, the court's conclusion as to the inapplicability of rule 26(b)(3) is questionable. That rule is well suited to the disposition of all discovery motions relating to material which is unquestionably work product. Its requirement of a special showing of need for the discovery of work product will ordinarily be met in cases such as *National Student Marketing* where the attorney is a defendant or his conduct is otherwise at issue. Moreover, the requirement that the party seeking discovery make such a special showing in all cases where work product, and especially work product of a theoretical nature, is sought, will tend to diminish the inhibiting effect on the legal profession which might otherwise result. In this way, all of the interests traditionally protected by the work product doctrine will be better served without frustrating the interests of justice.

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72. See United States v. Bryan, 339 U.S. 323, 331 (1950).