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**MEMORANDUM**

**To: Philip James, J.D., Ph.D. / Trial Solutions, Inc.**

**Date: November 25, 2004**

**Re: Discoverability of Trial Research Results and Witness Testimony**

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## I. QUESTIONS PRESENTED

1. Can the results of mock trial research be kept confidential?
2. Can the use of witness testimony in research trials be kept confidential?
3. When confidentiality of research trial results has been, or is suspected to have been broken, what is the course of action an attorney must then follow?

## II. DISCUSSION

This memorandum addresses the protections afforded research trial results. The first section analyzes these protections under federal law. Because the majority of states have adopted some form of the Federal Rules of Civil Procedure's discovery rules as well as the Model Rules of Professional Conduct, the analysis included in this section may be analogized to many states.[1] The second section directly addresses this issue specific to four states – Texas, Florida, New York, and Mississippi. Finally, the third section traces the procedures an attorney should follow when the confidentiality of research trials trial has been, or is suspected to have been broken.

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[1] *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29 (1984); Richard G. Johnson, *Symposium: Happy (?) Birthday Rule 11: Integrating Legal Ethics & Professional Responsibility with Federal Rule of Civil Procedure 11*, 37 LOY. L.A. L. REV. 819, 820–21 (2004); 21 Charles A. Wright & Kenneth W. Graham, Jr., FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5009 & n.3 (Supp. 1999).

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Research trial, at a minimum, fall under the protection afforded attorney work product. Furthermore, the use of witness testimony is likely protected against disclosure by the attorney-client privilege, if the witness is a client, and by the work product doctrine, if the witness is not a client.

## A. FEDERAL CASE LAW

### 1. Doctrinal Background

The attorney-client privilege protects communications between a client and his attorney if such communications are legally related, and if an expectation of confidentiality exists, so long as the privilege has been neither waived nor lost.[2] However, only the communication itself is privileged, leaving the underlying facts discoverable.[3]

Attorney work product consists of assembled information, mental impressions, legal theories and strategies pursued in preparation of litigation.[4] It is usually derived from interviews, statements, memoranda, legal and factual research, personal beliefs and other tangible or intangible devices.[5] Only work which forms an essential step in the procurement of data and represents duties normally attended to by attorneys is protected.[6]

The work product doctrine is distinct from, and broader than, the attorney-client privilege.[7] Because this doctrine affords the broadest protection, this memorandum will focus primarily on that area than on attorney-client privilege.

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[2] Stanley D. Davis & Thomas D. Beiscker, *Discovering Trial Consultant Work Product: A New Way to Borrow an Adversary's Wits?,* 17 AM. J. TRIAL ADVOC. 581, 583 n. 11 (1994) [hereinafter "*Discovering Trial Consultant Work Product*"].

[3] *Id*.

[4] Mary A. Bedikian & Jerome D. Hill, *The Ultimate Power of Persuasion: Using the Mock Trial to Enhance Litigation Strategy*, 72 MICH. B.J. 1046 (1993).

[5] *Id*.

[6] *Id*.

[7] *See generally id.*

The work product doctrine is found in Federal Rule of Civil Procedure 26, which governs discovery in civil cases.[8] Rule 26(b)(1) allows parties to "obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party[.]"[9] Rule 26(b)(3), however, limits this broad language with respect to the discovery of "documents and tangible things" that are "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).[10]

According to that provision, a party may obtain discovery of such items "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."[11] If such a showing has been made, Rule 26(b)(3) mandates that courts "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or *other representative of a party* concerning the litigation."[12]

Rule 26 codified the Supreme Court's decision in *Hickman v. Taylor*, 329 U.S. 495 (1947). The underlying suit in *Hickman* arose from a tug accident. The tug owners' attorney, in conducting his investigation, obtained statements from potential witnesses and took notes during this investigation. Opposing counsel then attempted to obtain copies of this information.[13]

The *Hickman* Court held that written material prepared by an attorney, as well as any

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[8] FED. R. CIV. P. 26.
[9] FED. R. CIV. P. 26(b)(1).
[10] FED. R. CIV. P. 26(b)(3) (emphasis added).
[11] *Id*. (emphasis added).
[12] *Id*. (emphasis added).
[13] *Id*. at 499.

mental impressions formed, while performing legal duties for a client constituted the attorney's work product.[14] Unless the party seeking discovery could show undue prejudice or hardship, such work product was protected from disclosure.[15] The Court recognized the material in question was not protected by the attorney-client privilege, but nonetheless reasoned that, to adequately prepare their client's case, an attorney must have a degree of privacy.[16] Inquiries into an attorney's files and mental impressions could not be justified unless the requisite showing was made.[17]

Thus, *Hickman* established two levels of protection for materials prepared by an attorney for trial, which have since been codified in Rule 26(b)(3): (1) work prepared in anticipation of litigation by an attorney or his agent is discoverable only upon a showing of substantial need and undue hardship; (2) "core" or "opinion" work product that encompasses the "mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation" is "generally afforded near absolute protection from discovery."[18]

As recently noted by the Third Circuit in *In Re Cendent*, the protection is not absolute.[19] Work documents are generally protected, but to the extent case facts are contained in the documents, such facts may be discoverable.[20] Also, documents that are prepared in the regular course of business, as opposed to those prepared "in anticipation of litigation or for trial," are not protected by the work product doctrine.[21] Even if the doctrine otherwise protects materials

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[14] *Id*. at 495.
[15] *Id*.
[16] *Id*. at 504, 510.
[17] *Id*. at 510.
[18] *In re Cendant Corporation Securities Litigation*, 343 F.3d 658, 663 (3rd Cir. 2003).
[19] *Id*.
[20] *Discovering,* 17 AM. J. TRIAL ADVOC. at 585.
[21] *Id*. at 586.

sought, the materials may still be discoverable if the party seeking discovery demonstrates substantial need and an inability to obtain the substantial equivalent by other means without undue hardship.[22] However, the majority of courts adhere to the position that opinion work product is discoverable only in very limited circumstances, where a significant showing of "substantial need" is made.[23]

Like most protections afforded by the law, the work product doctrine may be waived if improper disclosure of the attorney's work product is made by that attorney.[24] However, exchange of work product to third persons who are not parties to the suit will not constitute waiver "unless such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary.[25] Though not determinative evidence, a party's intention to maintain confidentiality can be shown by requiring all participants in the research trial to sign confidentiality agreements.[26]

### 2. <u>Current Case Law Regarding Discoverability of Mock Trial Research</u>

There is very little case law specifically addressing the discoverability of a trial consultant's work product. Indeed, the only case dealing directly with the topic is a 2003 federal securities class action out of the Third Circuit: *In re Cendant Corporation Securities Litigation*.

The issue in *Cendant* was "whether the 'work product' of a non-testifying trial consultant . . . [was] privileged and subject to only limited discovery."[27] Ernst & Young, L.L.P. ("Ernst &

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[22] *Id*.
[23] *Id*. at 587-88.
[24] *Id*. at 588.
[25] *Id*. at 589.
[26] *Id*. at 635.
[27] *In re Cendant*, 343 F.3d at 659.

Young") and Cendant Corporation ("Cendant") were co-defendants in this case. After the underlying claims were settled, only Ernst & Young's and Cendant's cross claims against each other remained. Cendant deposed former Ernst & Young senior manager and auditor, Simon Wood, who prepared the Cendant financial statements at issue. At the deposition, Cendant asked Wood about communications that took place between Wood, Ernst & Young's counsel who also represented Wood, and Dr. Phillip C. McGraw, a consulting expert in trial strategy and deposition preparation hired by Ernst & Young as a non-testifying trial expert.[28]

Ernst & Young's counsel objected to Cendant's inquiry, citing the attorney-client privilege and the work product doctrine.[29] Cendant argued that Rule 26(b)(3)'s work product protection was superseded by Rule 26(b)(4)(B).[30] Rule 26(b)(4)(B) governs discovery of "facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial."[31] Discovery of materials gathered by an expert informally consulted in preparation for trial may be obtained only "upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."[32] If that showing is made, a court is to weigh the exceptional circumstances against the policy considerations behind the Rule of "allowing counsel to obtain the expert advice they need to properly evaluate and present their clients' positions without fear that every consultation with an expert may yield grist for the discovery mill."[33]

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[28] *Id*.

[29] *Id*.

[30] *Id*. at 664; FED. R. CIV. P. 26(b)(4)(B).

[31] FED. R. CIV. P. 26(b)(4)(B).

[32] *Id*.

[33] *Moore's Federal Practice* § 26.80, at 26—236.5 (Mathew Bender 3d ed.).

The court disagreed with Cendant, stating that "Rule 26(b)(3) provides work product protection independently of Rule 26(b)(4)(B)."[34] Quoting its decision in *Bogosian v. Gulf Oil Corp*[35], the court noted:

> The proviso introduces the first sentence of Rule 26(b)(3) ("*Subject to the provisions of subdivision (b)(4) of this rule*, a party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial . . .") and signifies that trial preparation material prepared by an expert is also subject to discovery, but only under the special requirements pertaining to expert discovery set forth in Rule 26(b)(4). The proviso does not limit the second sentence of Rule 26(b)(3) restricting disclosure of work product containing "mental impressions" and "legal theories." Thus, it does not support the district court's conclusion that Rule 26(b)(3), protecting this category of attorney's work product, "must give way" to Rule 26(b)(4), authorizing discovery relating to expert witnesses.[36]

The court further stated that trial consultants retained to help an attorney prepare witnesses may qualify as non-attorneys who are protected by the work product doctrine.[37] Moreover, a "consultant's advice that is based on information disclosed during private communications between a client, his attorney, and a litigation consultant may be considered 'opinion' work product which requires a showing of exceptional circumstances to be discoverable."[38]

Holding that McGraw's work product was privileged and, as such, subject only to limited discovery, the court stated that Woods could only be asked whether his anticipated testimony had been practiced or rehearsed, but noted that even this limited question must be circumscribed.[39] The court reasoned:

> In retaining Dr. McGraw, Ernst & Young expected all counsel's communications

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[34] *In re Cendant Corporation Securities Litigation*, 343 F.3d at 664-65.

[35] *Bogosian v. Gulf Oil Corp*, 738 F.2d 587, 594 (3rd Cir. 1984).

[36] *Id*. at 665 (emphasis in original).

[37] *Id.*

[38] *Id*.

[39] *Id.* at 667.

> with him to be confidential and protected from discovery. Had Ernst & Young or its counsel anticipated that counsel's communications with this litigation consultant would be subject to discovery, Ernst & Young asserts Dr. McGraw would not have been retained or the nature and extent of the matters counsel communicated to him would have been severely curtailed.
> . . .
> Furthermore, in connection with these discussions, Dr. McGraw was provided with documents prepared by Ernst & Young's counsel reflecting counsel's mental impressions, opinions, conclusions, and legal theories. In addition, Dr. McGraw's notes of these discussions may reflect the mental impressions, opinions, conclusions, and legal theories of Ernst & Young's counsel. Discovery of this information goes to the core of the work product doctrine and, therefore, is discoverable only upon a showing of extraordinary circumstances. Cendant has failed to cite any extraordinary circumstances that would justify discovery of the information sought. Thus, the private communications between Wood, Dr. McGraw, and counsel merit protection under the work product doctrine, as they reflect and implicate Ernst & Young's legal strategy regarding a deposition taken as part of this litigation.[40]

Because the majority resolved this issue under the work product doctrine, it did not address whether such protection could also be afforded by the attorney-client privilege. However, in a concurring opinion, Judge Garth wrote that the discovery sought was also precluded by such privilege.[41] Ernst & Young's counsel noted, and Judge Garth agreed, that the "attempt to carve out allegedly non-privileged two-way communications between a client and a trial consultant during a three-way meeting among *counsel*, the client, and the trial consultant [was] impossible to execute."[42]

Most jurisdictions are in accord with respect to the application of the attorney-client privilege and the work product doctrine in the use of witness testimony in research trials.[43] If the

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[40] *Id*. at 667.

[41] *Id*. at 668 (Garth, J. concurring).

[42] *Id*. (emphasis in original) (internal quotations omitted).

[43] *Discovering*, 17 AM. J. TRIAL ADVOC. at 626-27 (stating that communications between a client practicing testimony and a consultant are not discoverable because they are "intertwined with the client's responses to research questions, and the consultant's reactions thereto," and "will inevitably be client communications … which are intended by the client to be a confidential part of the relationship with counsel. Extirpating the comments of the consultant from this context may well be impossible without bringing along these communications and thus frustrating the purpose of the attorney-client privilege.").

witness is a client, protection may be found under the attorney-client privilege.[44] If the witness is not a client, protection may be found under the attorney work product doctrine.[45] To reiterate, however, there is a paucity of case law directly on point with respect to research trials. Because of this, attorneys and consultants would be well-advised to conduct their discussions and research in ways that minimize the risk of rendering it discoverable by a judge who opts to rule contrary to the majority of courts.[46]

### 3. Proactive Suggestions for Attorneys and Consultants

In *Discovering Trial Consultant Work Product*, the authors offer the following "minimum guidelines" to help "maximiz[e] the protection afforded the research work product from discovery":

> 1. The trial consultant should be retained by a written agreement with counsel, not with the party to the litigation. This will clearly identify the consultant as a "representative of the lawyer" for attorney-client purposes and will tie the consultant more directly to counsel for work product purposes.
>
> 2. The retainer agreement should contain an explicit confidentiality provision under which the consultant agrees to share the research work product only with counsel and her designee. This will make explicit counsel's intent on confidentiality.
>
> 3. Once the relationship has been established properly, trial counsel should feel free to share with the trial consultant all information necessary for the consultant to understand the case and to perform the engagement . . . . [T]hese disclosures should not constitute a waiver of the attorney-client or work product privileges in an appropriate relationship between counsel and consultant.
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> 4. To the extent possible, counsel should be present during all research or witness preparation sessions with the trial consultant. Although technically not required for certain attorney-client and work product privilege situations, the presence of counsel bolsters all arguments for application of

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[44] *Id.*

[45] *Id*.

[46] *See also* Patricia J. Kerrigan, *Witness Preparation,* 30 TEX. TECH L. REV. 1367, 1372 (1999).

these privileges to defeat discovery.

5. Separate engagements should be entered for research projects likely to generate work product that will be placed "in issue" and projects designed to be used in confidence for trial preparation. For example, a community attitude survey designed to support a motion for change of venue should be undertaken pursuant to an engagement agreement separate from a mock summary jury trial.

6. Similarly, a single community attitude survey should not gather data for both a change of venue motion and jury selection issues. Such commingling increases significantly the risk that all data from the project would be "in issue" and thus discoverable. Indeed, any attempt to claim that different components of a single research protocol are severable is inherently problematic.

7. Mock jurors should be required to enter into confidentiality agreements with respect to what they see and hear during the research sessions. Such agreements are relevant to the intent of both counsel and the parties to the action and lay the basis for arguing that any disclosure by a research juror is unauthorized. The receipt signed by the research juror upon being given the stipend for participation in the research session should reiterate the confidentiality promise.

8. Share as little information with research jurors about the overall goals of the project as possible, and do not discuss results with any research juror. Self-evidently, the less the participants know, the lower the risk of privileged material being "leaked" to the other side.

9. Unless absolutely necessary, do not use trial consultants to prepare witnesses who are neither clients nor retained experts. The only protection from discovery available here would be the lower security accorded factual work product.

10. The trial consultant should explicitly agree and understand that any relevant facts about the dispute uncovered in the research process must be shared with trial counsel. Fact development is always ongoing in the litigation process. Occasionally, unknown facts, or those not previously recognized as important, will emerge from the research project. The trial consultant must feel free to share, and indeed must understand the necessity of sharing, any such facts with trial counsel. These facts can then be disclosed to the other side in accordance with traditional discovery rules.[47]

[47] 17 AM. J. TRIAL ADVOC. 581, 634-35 (1994).

### B. State Evaluations

This section addresses discoverability issues specific to four states – Texas, Florida, New York, and Mississippi. Although these states also have no case law or state rules directly on point, this section discusses the analyses most courts apply when determining whether comparable materials are discoverable. This section also addresses the same two questions: (1) whether witness testimony preparation can be kept confidential; and (2) whether the results of research trial research can be kept confidential.

These states frequently focus on three factors when determining whether witness testimony and trial research are discoverable: (1) whether the disputed work product was prepared "in anticipation of litigation;" (2) whether the opposing party will suffer substantial hardship if they are unable to obtain the information sought; and (3) whether the disputed work product may contain a significant amount of the attorney's opinions, trial strategy, and case theories.

#### 1. Texas

Although not extensive, Texas case law provides the most ample supply of comparable situations to the questions addressed in this report. Under Texas case law, a trial consultant's research results and witness preparation testimony are probably only discoverable upon a showing of substantial prejudice towards the opposing party.

An appropriate comparison to trial consultant's research results is encompassed in Texas Rule of Civil Procedure 192. Under the rule, "work product" is defined as "(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, *consultants* . . . or (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or

among a party's representatives, including the party's attorneys, *consultants* . . . ."[48] "Core work product" is defined as "the work product of an attorney or an attorney's *representative* that contains the attorney's or the attorney's *representative's* mental impressions, opinions, conclusions, or legal theories" and that "core work product" is "not discoverable."[49] The rule continues, stating: "[t]he identity, mental impressions, and opinions of a *consulting expert* whose mental impressions have not been reviewed by a testifying expert are not discoverable."[50]

In *National Tank Company v. 30th Judicial District Court*[51], the Texas Supreme Court noted that the federal work product doctrine established in *Hickman v. Taylor* and followed by Texas courts[52] no longer distinguishes between an "investigation" conducted by a party and one conducted by its representative, thus emphasizing the growing importance of an attorney's representative's role in pre-trial work. Generally, Texas courts have interpreted the "work product" rule to allow minimal discovery by opposing sides.[53] Texas courts focus primarily on the likelihood the "work product" is heavily cloaked in the opinion and thought processes of the attorney.[54]

The discoverability of videotaped witness testimony may be analogized to the Texas Court of Criminal Appeals'[55] decision in *Washington v. Texas*[56] which held tape recordings of interviews by a prosecutor preparing a State witness for his testimony were protected work

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[48] TEX. R. CIV. P. 192.5(a) (emphasis added).

[49] TEX. R. CIV. P. 192.5(b) (emphasis added).

[50] TEX. R. CIV. P. 192.3(e) (emphasis added).

[51] *Nat'l Tank Co. v. 30th Judicial Dist. Court*, 851 S.W.2d 193, 203 (Tex. 1993).

[52] *See, e.g., Owens-Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 751 (Tex. 1991).

[53] *See, e.g., Occidental Chem. Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995).

[54] *See, e.g., General Motors Corp. v. Gayle*, 951 S.W.2d 469, 474-75 (Tex. 1997); *Occidental Chem. Corp.*, 907 S.W.2d at 490.

[55] The Texas Court of Criminal Appeals is the state's highest court for criminal appellate review. The Texas Supreme Court does not review criminal cases; these cases are heard by the Court of Criminal Appeals.

[56] *Washington v. Texas*, 856 S.W.2d 184, 188-89 (Tex. Crim. App. 1993).

product.[57] The circumstances differ in several ways: (1) it was a criminal case; (2) the interviewer was an attorney; and (3) the tapes were audio only. However, in the absence of analogous case law, the similarities between this scenario and that which surfaces when a trial consultant and attorney participate in videotaped preparation of a witness are evident. Applying the Court's holding in *Washington*, a videotape of witness preparation is arguably protected work product where *both* the trial consultant, as representative of the attorney, and the attorney representing the party contribute to the preparation. Only the underlying facts should be discoverable in this situation.

Considering recent decisions identifying the role of an attorney's representative in the pre-trial discovery process, the Texas work product doctrine will likely protect the results of trial research. Notes taken by attorneys during research trials as well as during witness preparation are even more apt to be protected because of the state's marked treatment of notes containing attorneys' opinions and legal theories. There is much room for argument as to the discoverability of videotaped witness preparation; however, case law suggests that with proper precautions demonstrating the parties' intent on confidentiality, videotapes would at least be afforded status as qualified privilege.

**2. <u>Florida</u>**

As in most other states, Florida's discovery rules are modeled from the federal rules. "Although the Federal Rules of Civil Procedure and the Florida Rules of Civil Procedure differ in some respects, 'the objective in promulgating the Florida rules has been to harmonize our rules with the federal rules.'"[58] "Thus, we look to the federal rules and decisions for guidance in

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[57] *See also Cullen v. State*, 719 S.W.2d 195, 198-99 (Tex. Crim. App. 1986) (also holding tape recordings were protected, reasoning that "clearly the purpose of the interview was to prepare the witness for his trial testimony").

[58] *Gleneagle Ship Mgmt. Co. v. Leondakos*, 602 So. 2d 1282, 1283 (Fla. 1992).

interpreting Florida's civil procedure rules."[59] Considering the lack of law on point, Florida is likely to follow federal opinions interpreting the Federal Rules in similar situations, such as the Third Circuit's recent decision that a trial consultant's work product is protected in *In Re Cendant*.

Florida Rule of Civil Procedure 1.280(4)(B) provides:

> A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party *in anticipation of litigation* or preparation for trial and *who is not expected to be called as a witness at trial . . . or upon a showing of exceptional circumstances* under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.[60]

Current case law in Florida emphasizes two inquiries when considering the discovery issues discussed here. Florida courts have repeatedly stressed the importance of determining (1) whether the disputed work product was prepared "in anticipation of litigation;" and (2) whether the opposing party will suffer substantial hardship if they are unable to obtain the information sought.[61]

If the "work product" is prepared without litigious intent, it is certainly unprotected.[62] Generally, materials such as visual aids and diagrams pictures prepared in anticipation of admitting those materials into evidence at trial do not fall under the work product doctrine and are not protected from discovery.[63] However, the personal views of the attorney regarding presentation and evaluation of evidence, the attorney's personal notes and records of witnesses, jurors, proposed arguments, and other notations not intended for use as evidence are generally

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[59] *Id.* at 1283-84.

[60] FLA. R. CIV. P. 1.280(4)(B) (emphasis added).

[61] *See Falco v. N. Shore Lab. Corp.*, 866 So. 2d 1255, 1256 (Fla. 1st DCA 2004); *Jacksonville v. Rodriguez*, 851 So. 2d 280, 283 (Fla. 1st DCA 2003); *Toward v. Cooper*, 634 So. 2d 760, 761 (Fla. 4th DCA 1994); *Lifshutz v. Citizens and Southern Bank of Fla.*, 626 So. 2d 252, 252-53 (Fla. 4th DCA 1993).

[62] FLA. R. CIV. P. 1.280

[63] *Northup v. Acken*, 865 So. 2d 1267, 1270 (Fla. 2004).

protected under the work product doctrine.[64]

One Florida case provides a holding that may be analogized to instances in which a trial consultant visits a site to conduct research such as note-taking on operations or photographing conditions. In *Centex Rooney Construction Co. v. SE/Broward Joint Venture*,[65] the Florida Court of Appeals held that notes and photographs taken by a non-testifying expert hired by one of the parties were non-discoverable where the opposing party had access to the same facilities. Thus, if a trial consultant visits a facility to prepare for trial research, his materials from that visit are likely protected.

As to videotapes of witness preparation, only analogies may be considered as there is no law directly on point. However, a Florida Appellate Court interpreted a Florida Supreme Court case dealing with surveillance videos used by an investigative expert to prepare a report and stated, "if the materials are only to aid counsel in trying the case, they are 'work product,' but any 'work product' privilege that existed ceases once the materials or testimony are intended for [admission at trial]."[66]

Coupling Florida's liberal discovery policy with its admitted following of federal precedent in areas of state law lacking precedent, Florida courts will probably afford the protection of its work product doctrine to both trial research results as well as videotaped witness preparation.

**3. <u>New York</u>**

New York case law evinces somewhat greater risk for discovery of trial research results, particularly in the case of witness preparation on videotape. Although New York's discovery

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[64] *Id.*

[65] *Centex Rooney Constr. Co. v. SE/Broward Joint Venture*, 697 So. 2d 987, 988 (Fla. 4th DCA 1997).

[66] *5500 N. Corp. v. Willis*, 729 So. 2d 508, 512 (Fla. 5th DCA 1999).

rules are worded much like those of other states, New York courts interpret the work product doctrine more narrowly than other states, instead preferring the "strong policy" in favor of full disclosure.[67] The New York discovery rule provides, "[t]he work product of an attorney shall not be obtainable."[68] The rule also explains:

> [M]aterials otherwise discoverable under subdivision (a) of this section and prepared *in anticipation of litigation* or for trial by or for another party, or by or for that other party's representative (including an attorney, *consultant*, surety, indemnitor, insurer or agent), may be obtained only upon a showing that the party seeking discovery has *substantial need* of the materials in the preparation of the case and is unable without *undue hardship* to obtain the substantial equivalent of the materials by other means. In ordering discovery of the 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.[69]

New York courts do, however, place a strong emphasis on protecting attorneys' opinions and legal theories.[70] Some courts have deemed the presence of a third party consultant does not necessarily interfere with the status of materials as work product; however, the courts often consider the parties' expectations that the communication is confidential.[71] This intent should be effectively indicated where the trial consultant signs a confidentiality form.

"Notes and memoranda made in connection with a lawyer's interview of a witness procured in the course of litigation constitute attorney's work product**,** which is absolutely exempt from discovery."[72] A recent amendment to New York's discovery rule concerns the

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[67] *See, e.g.*, *Tran v. New Rochelle Hosp. Med. Ctr.*, 786 N.E.2d 444 (N.Y. 2003); *Rotundi v. Mass. Mut, Life Ins. Co.*, 702 N.Y.S.2d 150 (App. Div. 2000); *Beckford v. Gross*, 774 N.Y.S.2d 316 (Sup. Ct. 2004); *Marigliano v. Krumholtz,* 603 N.Y.S.2d 1020 (Sup. Ct. 1993).

[68] N.Y. C.P.L.R. § 3101(c) (Consol. 2004).

[69] N.Y. C.P.L.R. § 3101(d)(2) (emphasis added).

[70] *See, e.g.*, *Corcoran v. Peat, Marwick, Mitchell & Co.*, 542 N.Y.S.2d 642 (App. Div. 1989); *Weiser v. Grace*, 683 N.Y.S.2d 781 (Sup. Ct. 1998).

[71] *See, e.g.*, *Lichtenberg v. Zinn,* 663 N.Y.S.2d 452 (App. Div. 1997); *Corcoran*, 542 N.Y.S.2d 642; *Condon v. Niagara County Dist. Attorney's Office*, 495 N.Y.S.2d 863 (App. Div. 1985).

[72] *Siemens Solar Industries v. Atlantic Richfield Co.*, 667 N.Y.S.2d 248, 248 (App. Div. 1998).

disclosure of videotapes and other media. The rule provides in part:

> In addition to any other matter which may be subject to disclosure, **there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving** . . .
> [(1) a party, or the officer, director, member, agent or employee of a party;
>
> (2) a person who possessed a cause of action or defense asserted in the action;
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> . . .
>
> (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.][73]

"There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use."[74] In one of the first cases to address the new rule, a New York court held notes and memoranda taken by the attorneys from a video surveillance tape were discoverable.[75] The court stressed, "New York has long favored an open far-reaching discovery policy."[76] However, the court did recognize redaction as a possible barrier in disclosure of attorney's notes.[77] New York's highest court has recently stated that no "substantial need" or "undue hardship" is required for disclosure of the actual videotapes.[78] Nevertheless, arguments may be made against disclosure of videotaped witness preparation because currently accrued case law speaks specifically to disclosure of surveillance videotapes only,[79] and most courts' reasoning argues disclosure of such videotapes is necessary to prevent

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[73] N.Y. C.P.L.R. § 3101 (emphasis added).

[74] N.Y. C.P.L.R. § 3101(i) (emphasis added).

[75] *Marigliano,* 603 N.Y.S.2d 1020.

[76] *Id.* at 1023; *see also Kavanagh v. Odgen Allied Maintenance Corp.*, 705 N.E.2d 1197, 1198 (N.Y. 1998); Melissa E. Rosenthal, *Liberal Discovery of Non-Party Records: In Defense of the Defense*, 7 CARDOZO WOMEN'S L.J. 59 (2000) (discussing liberal discovery practices in New York).

[77] *Id.*

[78] *Tran*, 786 N.E.2d at 447; *see also Rotundi*, 702 N.Y.S.2d at 152-53.

[79] *See Falk v Inzinna*, 749 N.Y.S.2d 259, 261 (App. Div. 2000) (". . .the legislature created a new discovery rule governing disclosure of *surveillance tapes* . . .") (emphasis added).

tampering and alterations.[80] These concerns voiced by the courts do not apply to videotaped witness preparation.

New York offers the most threatening outlook for discovery of trial research results and witness testimony preparation. Although no case law on point has been established, New York's admitted preference toward full disclosure of all pre-trial matters provides scant optimism for trial consultants.

### 4. Mississippi

Mississippi provides the most limited body of case law with which to analyze trial research results. In its interpretation of attorney-client privilege, Mississippi follows the uniform rule adopted by a majority of the states; however, the Mississippi Supreme Court has stated it interprets the privilege broadly, allowing much communication to qualify as privileged.[81] Mississippi also follows the United States Supreme Court's reasoning in *Hickman v. Taylor* when describing its approach to the work product doctrine.[82] The Mississippi Supreme Court quoted from *Hickman* in a 2003 opinion:

> In performing his various duties . . . 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 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 . . . .[83]

Similar to the other states profiled in this report, Mississippi also emphasizes

[80] *See, e.g.*, *Tran*, 786 N.E.2d 444; *Beckford*, 774 N.Y.S.2d 316; *Marigliano,* 603 N.Y.S.2d 1020; *Marte v. W.O. Hickok Mfg. Co.*, 552 N.Y.S.2d 297 (App. Div. 1990).

[81] *Hewes v. Langston*, 853 So. 2d 1237, 1244 (Miss. 2003).

[82] *Id.*

[83] *Hickman*, 329 U.S. at 510-11.

consideration of the hardship placed on the opposing party by not allowing discovery[84]; however, again like the other states, Mississippi fervently protects opinion work product.[85] Discovery is governed by the Mississippi Rules of Civil Procedure which state a party may obtain materials:

> . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including that party's attorney, *consultant*, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has *substantial need* of the materials . . . 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*.[86]

Mississippi case law provides little guidance in the area of work product other than its recent decision in *Hewes*. Given the Supreme Court's decision in *Hewes*, trial research and witness preparation are likely protected under the Mississippi work product doctrine; however, in the absence of case law in this area, this state is perhaps the most fertile legal ground for argument.

### C. CONFIDENTIALITY BREACH

The procedures an attorney should follow when a confidentiality breach is suspected vary as to the circumstances of the breach. The Federal Rules of Evidence and Civil Procedure as well as the Model Rules of Professional Conduct contribute significantly to analysis of this issue. Two scenarios are most likely to arise within the confines of confidentiality breaches, and this section addresses those scenarios in turn.

#### 1. Scenario One

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[84] *See, e.g., Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC*, 864 So. 2d 939, 947-48 (Miss. 2004).

[85] *See, e.g., Hewes*, 853 So. 2d 1237; *Thorson v. State*, 721 So. 2d 590 (Miss. 1980) (holding that attorney's notes taken during voir dire about prospective jurors were protected because they contained opinions and legal theories).

[86] MISS. R. CIV. P. 26(b)(3) (emphasis added).

Confidentiality is unquestionably breached when opposing counsel admits or provides evidence of his or her receipt of research trial research. In this scenario, opposing counsel will have received specific research components such as completed juror questionnaires or verdict forms, final research reports, videos of the research trials, or videos of jury deliberations. Opposing counsel may have received this information either through his or her own intentional conduct or the inadvertent actions of another.[87]

The status of trial research results is of paramount importance in this scenario because that status determines the gravity with which the trial judge will evaluate the breach. As was proposed in preceding sections, trial research results are likely protected under the work product doctrine. This protection affords clients the right to keep those results from discovery by opposing counsel. Therefore, when opposing counsel has admitted receipt of the results, the work product doctrine likely applies and opposing counsel has committed both legal and ethical violations.

Federal Rule of Civil Procedure 26(b) mandates that courts "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[88] Because the rule requires that a court must protect this information, judicial review is guaranteed when opposing counsel is in receipt of such information. Although this situation falls within an undeveloped area of the law, standard legal procedures may be used to combat the violation.

Under each of the two scenarios discussed in this section, the first step that should be taken is to contact opposing counsel. This preliminary communication must attempt to

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[87] Note that a minority of courts have held that inadvertent disclosure of privileged information may waive the privilege. However, these courts typically allow an exception when the side claiming the privilege has made concerted efforts to keep the information from disclosure. *See Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001) for a detailed discussion of such issues.

[88] FED. R. CIV. P. 26(b).

determine whether the disclosure of the results was inadvertent. Under this first scenario, opposing counsel will admit receipt of the research results because it is assumed under this scenario that a client has some proof of the receipt. Although civility may suggest that counsel for both sides attempt to "work it out," this scenario presumes the research results are highly prejudicial and require use of one of the following remedies: suppression of the research results at trial and return of the results to the client, reporting opposing counsel to the State Bar Association for an ethical violation, disqualification of opposing counsel, or declaration of a mistrial.

If opposing counsel intends to use the results as evidence at trial, a client may file a motion to suppress as well as a motion to compel return of the results. Although it is the least severe of the remedies in this section, this approach via the court system still requires proof of the violation. As this is such a tenuous area of the law, the contents of the research results must be such that a judge should feel that, absent action on his or her part, the likelihood of prejudice to the client is great and the results must be protected.

The final three options mentioned above – reporting opposing counsel to the State Bar Association for an ethical violation, disqualification of opposing counsel, and declaration of a mistrial – are extreme remedies and should only be considered where a client has concrete evidence that opposing counsel used unethical tactics to retrieve or retain research results. Absent proof of such conduct, these remedies are too excessive to contemplate.

However, when the circumstances do present unethical conduct by opposing counsel, three procedural devices may be employed in addition to those outlined above. First, a client

may report opposing counsel to the State Bar Association for suspicion of an ethical violation.[89] The Model Rules of Professional Conduct require that an attorney with information from opposing counsel that is obviously privileged or protected under the work product doctrine must return that information.[90]

Additionally, "a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[91] When an attorney is reported to the State Bar for an ethical violation, the Bar Association sanctions the attorney as it deems fit. Although this may be a long-term solution to relations between a client and a particular opposing attorney, this remedy does nothing to resolve the lawsuit for which the research trial was conducted.

A better alternative under these circumstances is a motion to disqualify the opposing counsel.[92] Under this remedy, the lawsuit can be preserved and may continue with new representation. However, where the "new" attorney for the opposing side is affiliated with the previous opposing counsel, this remedy again may not correct the prejudice created by the disclosure. This remedy is most effectively employed where opposing counsel has not likely shared the research results with other attorneys or staff.

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[89] In the interest of brevity, this memorandum does not address the procedures involved in reporting attorneys to state bars in each of the states. However, a simple search consisting of words such as "report attorney ethical violation" on an internet search engine such as Google.com will retrieve the websites of all state bars. Through those websites, an attorney can find information on the procedures required to report such a violation. Additionally, a search on a legal research website such as Westlaw or Lexis-Nexis will return similar results. One should also note that although hard evidence is not usually required to report an attorney to the State Bar for an ethical violation, an attorney who files such a report without a good faith belief in the existence of unethical conduct is himself acting unethically.

[90] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-382 (1994).

[91] MODEL RULES OF PROF'L CONDUCT R. 8.3(a).

[92] For a thorough and effective discussion of disqualification of an attorney as a result of his receipt of privileged material, *see Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001).

Where the opposing counsel has complete knowledge of the research results, a motion for mistrial may be considered. However, critical evaluations are necessary in this situation. First and foremost, the client must consider how damaging the research results are to his case. Absent severe prejudice, this remedy is inappropriate. Second, the client must consider whether the costs and efforts associated with beginning the litigation process again are too great. Another crucial consideration under this option is the reaction of the judge. If the judge does not consider the violation particularly damaging, the practical consequences of the motion may take the form of discretionary rulings decided against the client both before and during trial. All of the considerations that must be taken into account when deciding whether to proceed with a motion for mistrial indicate that remedy is impractical in the majority of cases.

**2. Scenario Two**

Confidentiality may also be breached without a client's direct knowledge or proof of the breach. In this scenario, opposing counsel will have indirectly notified the client or consultant of his receipt of the results, or the client will have heard from an outside source that opposing counsel has the information. However, the information to which opposing counsel is privy may merely be that a research trial was conducted, and opposing counsel may then attempt to use that information as leverage in settlement negotiations without any knowledge of the actual research results. The key in this scenario is to find out what information opposing counsel has in fact received.

If, after an initial inquiry, opposing counsel refuses to disclose what information he or she actually has, the client is in a precarious position. The prudent approach is for the client to wait for settlement discussions. At this point, if opposing counsel attempts to use the information as a tactical advantage, he or she will likely disclose the extent of their knowledge at that time. If

opposing counsel only makes vague references to the results, another inquiry by the client into the extent of opposing counsel's knowledge is appropriate. Then, if opposing counsel continues to refuse to divulge the extent of his knowledge, that refusal provides a valid basis for the client to request a hearing with the court to determine what information opposing counsel actually has or, alternatively, to file a motion to suppress and compel return of the research results.

The reasonable course of action when deciding to proceed with a motion to compel is to notify opposing counsel of such intentions. If at this point opposing counsel fails to reveal that he or she does not have any specific knowledge of the research results and knew only that a research trial had been conducted, the client may then legitimately proceed with judicial review of opposing counsel's actions.

## III. CONCLUSION

In sum, the results obtained from research trials, as well as the use of witness testimony therein, most likely fall under the protection afforded by the work product doctrine. Because most states' discovery rules derive from the Federal Rules, in the absence of case law, they will likely look to federal case law for supporting precedent. As a result, the states will likely defer to the Third Circuit's decision in *In Re Cendant* for its persuasive value and analogous facts.

However, because of the limited case law directly on point, there is still ample room for argument on the topic and, as such, precautions should be taken in order to make it clear to judges that secrecy among the parties remains a paramount goal, despite the involvement of a trial consultant and the use of research trials. In this vein, such precautions may also limit the amount of discoverable information that may be made available to an opposing side.

Additionally, attorneys should take a prudent approach when dealing with an opposing counsel whom the attorney suspects has knowledge of research trial results. Although two

possible scenarios are addressed by this memorandum, the circumstances which may arise in this discrete area of law are unpredictable, and attorneys should weigh the risks involved before proceeding with formal procedures.