NOTE

Losing the Protected Status of Attorney Opinion Work Product: An Examination of *Regional Airport Authority of Louisville v. LFG, L.L.C.*

Alexander J. Kramer[*]

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[*] Articles Editor, UC Davis Law Review. J.D. Candidate, UC Davis School of Law, 2008; B.A. Political Science, UC Irvine, 2005. Many thanks to Kimberly Jensen, Patrick Snyder, Elizabeth Donald, and Christina Lee for their invaluable editing. Special thanks to my family, friends, and Erin, for putting up with me throughout this process and providing me with unwavering support.

INTRODUCTION

Imagine a high stakes case in federal court.[1] Early in the litigation, the plaintiff's attorney jots down his mental impressions of the case, including potential strategies and theories for success. As the case progresses, the attorney hires an expert to look at the evidence and testify on the client's behalf. To assist the expert's analysis, the attorney hands over all the information he has on the case, including his impressions, theories, and strategies. The attorney believes this information will remain privileged under the attorney opinion work product doctrine codified in Federal Rule of Civil Procedure 26 ("Rule 26").[2]

Despite the plain language of Rule 26, however, the Sixth Circuit recently held this protection no longer exists.[3] Thus, because the attorney gave these materials to the expert, defense counsel will have unfettered access to the attorney's impressions and theories during the discovery process.[4] Access to these materials gives defense counsel the upper hand throughout litigation, making it considerably easier for the defendant to successfully move for summary judgment.[5]

In *Regional Airport Authority of Louisville v. LFG, L.L.C.*, the Sixth Circuit Court of Appeals enabled such an unbalanced result.[6] The court created a bright-line rule requiring parties to disclose all information given to testifying expert witnesses under Rule 26.[7] The court based this bright-line rule on an originalist analysis of the 1993 amendments to Rule 26 and the accompanying Advisory Committee's Note.[8] Unfortunately, the court made no exception for attorney opinion work product, which has traditionally received a higher level of protection than general attorney work product.[9]

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[1] The following hypothetical is based on *Regional Airport Authority of Louisville v. LFG, L.L.C.*, 460 F.3d 697 (6th Cir. 2006).

[2] *See* FED. R. CIV. P. 26(b)(3) (protecting attorney opinion work product); *see also id.* 26(a)(2)(B) (creating disclosure requirements without any mention of taking away protections of attorney opinion work product).

[3] *Reg'l Airport Auth.*, 460 F.3d at 715.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 715.

[7] *Id.* at 716-17; *see* FED. R. CIV. P. 26(b)(3).

[8] *Reg'l Airport Auth.*, 460 F.3d at 716-17; *see* FED. R. CIV. P. 26; FED. R. CIV. P. 26 advisory committee's note (1993).

[9] *Reg'l Airport Auth.*, 460 F.3d at 716-17; *see* Upjohn Co. v. United States, 449 U.S. 383, 400 (1981) (stressing that work product encompasses special protection for

This Note argues that the Sixth Circuit erred in *Regional Airport Authority* because attorney opinion work product deserves a higher level of protection from discovery.[10] Part I examines Rule 26 and how the 1993 amendments changed Rule 26's language.[11] Part I also addresses statutory interpretation, including the doctrines of originalism and textualism.[12] Part II provides the facts, procedure, and rationale in *Regional Airport Authority*.[13] Part III then argues that the Sixth Circuit erred in *Regional Airport Authority* by eroding the protections provided by the attorney opinion work product doctrine.[14] Specifically, the court failed to follow U.S. Supreme Court precedent requiring a specific statement from the legislature in order to undermine the doctrine's protections.[15] The Sixth Circuit also incorrectly used an originalist analysis instead of a textualist analysis when interpreting the text of the rule.[16] Finally, the court's holding will create unfair constraints on indigent parties by leaving a loophole only accessible to wealthier parties.[17] Therefore, the Supreme Court should grant certiorari on this issue and reverse the Sixth Circuit's holding.[18]

I. BACKGROUND

An analysis of *Regional Airport Authority* requires an understanding of the attorney opinion work product doctrine, Rule 26, and the 1993

attorney's mental processes); Kennedy v. Baptist Mem'l Hosp.-Booneville, Inc., 179 F.R.D. 520, 522 (N.D. Miss. 1998) (holding attorney should not fear loss of protection of attorney opinion work product for openly conversing with retained expert); *see also* Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 639 (E.D.N.Y. 1997) (discussing how to invoke protection of attorney opinion work product).

[10] *See Reg'l Airport Auth.*, 460 F.3d at 716-17; *see also* Hickman v. Taylor, 329 U.S. 495, 514 (1947) (stating mental impressions of attorney should remain free from discovery); Bogosian v. Gulf Oil Corp., 738 F.2d 587, 593 (3d Cir. 1984) (holding Rule 26 provides protection for attorney opinion work product against discovery of expert information); *infra* Part III.

[11] *See* FED. R. CIV. P. 26 (codifying protection of work product doctrine in Rule 26(b)(3), but with Rule 26(a)(2)(B) delineating disclosure requirement); FED. R. CIV. P. 26 advisory committee's note (1993) (stating purpose of amendments is to increase disclosure requirement); *infra* Part I.

[12] *See infra* Part I.E.

[13] *See infra* Part II.

[14] *See infra* Part III.

[15] *See infra* Part III.A.

[16] *See infra* Part III.B.

[17] *See infra* Part III.C.

[18] *See infra* Part III.

amendments thereto. Adopted in 1937, Rule 26 regulates disclosure requirements during discovery, including discovery with respect to expert testimony.[19] The plain language of Rule 26 affords particularly strong protection to an attorney's mental impressions given to testifying experts.[20] After the passage of the 1993 amendments, however, some courts began to erode this protection by requiring the disclosure of attorney opinion work product.[21]

A. The Work Product and Attorney Opinion Work Product Doctrines

Attorney opinion work product falls under the broader category of the general work product doctrine, thereby receiving the protection afforded to general work product.[22] The general work product doctrine protects material prepared by an attorney in anticipation of or during the course of litigation.[23] Litigation in this context includes the defense or prosecution of a variety of proceedings, including civil litigation, grand jury investigations, and depositions.[24]

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[19] FED. R. CIV. P. 26 (1937) (amended 1993) (discussing general requirements of pretrial disclosures and discovery); *see* Upjohn Co. v. United States, 449 U.S. 383, 400 (1981) (discussing protection given to work product of attorney's mental processes and opinions); Kennedy v. Baptist Mem'l Hosp.-Booneville, Inc., 179 F.R.D. 520, 522 (N.D. Miss. 1998); *see also* Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 639 (E.D.N.Y. 1997) (discussing attorney opinion work product and requirements to invoke protection).

[20] *See generally* FED. R. CIV. P. 26 (discussing discovery process for expert testimony, disclosure requirements, and scope of privilege).

[21] *See In re* Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001); Karn v. Ingersoll Rand Co., 168 F.R.D. 633, 637-41 (N.D. Ind. 1996); Gall v. Jamison, 44 P.3d 233, 238-39 (Colo. 2002); *see also* Smith v. Transducer Tech., Inc., 197 F.R.D. 260, 261-62 (D.V.I. 2000); *cf.* Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 751 (7th Cir. 2005) (holding Rule 26(a)(2)(B) requires disclosure of all information considered by testifying expert before deposition). *But see* Moore v. R.J. Reynolds Tobacco Co., 194 F.R.D. 659, 663-64 (S.D. Iowa 2000) (providing absolute protection to attorney opinion work product except in rare circumstances).

[22] *See generally* FED. R. CIV. P. 26 (showing Rule 26(b)(3) covers attorney opinion work product or mental impressions of attorneys as part of general work product doctrine); Steven C. Bennett, *Managing E-Discovery: Some Essential Issues*, 859 PLI/PAT 219, 241 (2006) (arguing attorney opinion work product is part of general work product doctrine).

[23] *In re* Grand Jury Proceedings, 33 F.3d 342, 348 (4th Cir. 1994).

[24] *See* BLACK'S LAW DICTIONARY 952 (8th ed. 2004); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED 1322 (1993). *See generally In re* Grand Jury Proceedings, 867 F.2d 539 (9th Cir. 1989) (applying work product doctrine to grand jury investigations, thereby expanding definition of litigation).

The attorney opinion work product doctrine is a subsection of the general work product doctrine.[25] Attorney opinion work product consists of the attorney's own mental impressions and conclusions about a case.[26] Courts have traditionally given attorney opinion work product a higher level of protection than general work product.[27]

B. Hickman v. Taylor*: The Scope of the Attorney Opinion Work Product Doctrine*

In 1947, the Supreme Court laid the foundation for protecting attorney opinion work product in *Hickman v. Taylor*.[28] George Hickman hired a law firm to defend him in litigation arising out of a shipping accident.[29] The law firm interviewed witnesses and took statements.[30] During discovery, plaintiff's counsel sought copies of this information, but Hickman's attorney refused to disclose the statements.[31] After defense counsel refused to comply with a court order requiring disclosure, the district court found Hickman and his attorney in contempt.[32]

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[25] *See generally* FED. R. CIV. P. 26 (showing attorney opinion work product is part of general work product doctrine); Bennett, *supra* note 22, at 241 (stating opinion work product falls under general work product).

[26] Bennett, *supra* note 22, at 239-43 (defining opinion work product more narrowly than fact work product); Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 591 (2000) (defining attorney opinion work product as only consisting of attorney's opinions, mental impressions, and legal theories).

[27] Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984) (holding that although facts from work product may be discoverable, opinions from work product remain protected); Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 292-96 (W.D. Mich. 1995) (holding that courts afford opinion work product more protection than factual work product); *see In re* Sealed, 676 F.2d 793, 809-10 (D.C. Cir. 1982) (stating work product receives higher levels of protection when revealing thought process, opinions, and judgments of counsel); Bennett, *supra* note 22, at 241.

[28] *See* 329 U.S. 495, 510-11 (1947) (holding that work product doctrine is critical to attorney's ability to render his services and therefore vital to practice of law); *see also* Rep. Dan Lungren & Rep. William Delahunt, Op-Ed., *The Importance of Keeping Attorney-Client Privilege*, THE HILL, Sept. 7, 2006, http://www.hillnews.com/thehill/export/TheHill/Comment/OpEd/090706.html (arguing protection for work product is oldest evidentiary privilege in United States, even older than Constitution and Bill of Rights).

[29] *Hickman*, 329 U.S. at 498-500.

[30] *Id.*

[31] *Id.*

[32] *Id.*

The Supreme Court reversed the lower court's decision, reasoning that Rule 26 protected the material under the general work product doctrine.[33] The Court held that a lawyer must have a certain amount of privacy from opposing counsel.[34] Specifically, opposing counsel should not be able to use the attorney's work product to their advantage.[35] In so holding, the Court created the foundation for the general work product doctrine.[36]

The *Hickman* Court also discussed the protections surrounding the mental impressions of an attorney.[37] Finding that these impressions deserve a higher level of protection than ordinary work product, the Court reasoned that holding otherwise would force lawyers to put nothing in writing.[38] The Court rationalized that such protection is essential to the efficacy of the legal profession, the interest of clients, and the cause of justice.[39] As a result, the Court held that an explicit statement from the legislature would be necessary to undermine this protection.[40] Other courts have subsequently cited *Hickman* as the basis for the attorney opinion work product doctrine and its attendant protections.[41]

C. Rule 26 Before the 1993 Amendments

In 1970, Congress codified the attorney opinion work product doctrine in Rule 26(b)(3).[42] This subsection gave opinion work

[33] *Id.* at 513-15.

[34] *Id.* at 510-11.

[35] *Id.* (reasoning lawyer must work with certain degree of privacy, free from unnecessary intrusion by opposing parties, and be able to plan strategy without undue interference).

[36] *Id.* at 510-15 (discussing mental impressions of attorneys and creating basis for protecting mental impressions along with ordinary work product).

[37] *Id.*

[38] *Id.* at 511.

[39] *Id.* at 510-15.

[40] *Id.* at 513 (commenting on traditional protection of attorney opinion work product); *see* Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984) (noting courts have traditionally given attorney opinion work product heightened protection).

[41] Many courts quote and discuss *Hickman* when dealing with the general work product doctrine and the opinion work product doctrine. *See, e.g.*, Karn v. Ingersoll Rand Co., 168 F.R.D. 633, 637-41 (N.D. Ind. 1996) (discussing *Hickman* while dealing with attorney opinion work product); Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 292-96 (W.D. Mich. 1995) (noting *Hickman* requires explicit statutory language to override attorney opinion work product).

[42] FED. R. CIV. P. 26(b)(3); *see Haworth*, 162 F.R.D. at 294 (stating in 1970 Congress codified attorney opinion work product as discussed in *Hickman*).

product a higher level of protection than general work product.[43] Under Rule 26(b)(3), a party can discover documents created by opposing counsel for use in litigation only when there is a showing of substantial need.[44] Even with substantial need, the party can only discover factual information.[45] Moreover, even when facts are discoverable, subdivision (b)(3) requires that a judicial order compelling discovery protect against disclosing attorney opinion work product.[46] Prior to 1993, there was no question that Rule 26 provided the strong protection of attorney opinion work product required by *Hickman*.[47]

D. The 1993 Amendments to Rule 26

In 1993, Congress approved amendments to Rule 26, adding additional mandatory prediscovery disclosures.[48] Arguably the most significant of these changes, subdivision (a)(2)(B) requires two types of disclosures with respect to any expert hired to testify.[49] First, the disclosing party must reveal the information that the expert witness used in creating his opinion.[50] Second, the disclosing party must give a report to opposing counsel before the expert's deposition, setting forth the expert's opinions and reasoning.[51]

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[43] *See* FED. R. CIV. P. 26(b)(3); *Bogosian*, 738 F.2d at 595.

[44] FED. R. CIV. P. 26(b)(3).

[45] *Id.* (protecting attorney opinion work product from disclosure); *see Hickman*, 329 U.S. at 512 (holding in circumstances of present case there is no showing of need that could justify production of mental impressions of attorney); *Bogosian*, 738 F.2d at 592-93 (holding court shall protect against attorney opinion work product disclosure).

[46] FED. R. CIV. P. 26(b)(3) (stating Rule 26 protects against disclosure of mental impressions, conclusions, opinions, or legal theories of attorneys).

[47] *Id.* (codifying rule in *Hickman*); *Hickman*, 329 U.S. at 514 (creating requirement of clear statutory language to override attorney opinion work product).

[48] FED. R. CIV. P. 26(a)(1)-(4) (creating new aspects to Rule 26 that relate to disclosure throughout discovery); *see* FED. R. CIV. P. 26 advisory committee's note (1993) (stating purpose of 1993 amendments was to require more mandatory disclosure); *see also* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1104 (2002) (describing procession of Rules through various bodies until adoption).

[49] FED. R. CIV. P. 26(a)(2)(B); *see* Easton, *supra* note 26, at 537-39.

[50] FED. R. CIV. P. 26(a)(2)(B) (adding language that some courts have found ambiguous, such as "the data or other information considered by the witness in forming the opinions").

[51] *Id.*

The 1993 amendments also changed subdivision (b)(4) to state that a party has the right to depose any expert that may testify at trial.[52] Although the addition of subdivision 26(a)(2)(B) created a substantive change, for the most part, the language in Rule 26 that protects attorney opinion work product remains unchanged.[53] Specifically, subdivision (b)(3), which extends a higher level of protection to attorney opinion work product, remains the same, protecting attorney opinion work product from disclosure.[54]

Notwithstanding the limited changes to the rest of Rule 26, the Advisory Committee's Note to the 1993 amendments indicate that subdivisions (a)(1) to (4) impose a duty of disclosure.[55] One comment in particular asserted that, considering the purpose of increased disclosure, any material given to testifying experts receives no privilege or protection.[56] This calls for a much more expansive view of the 1993 amendments than the explicit language of the amendments themselves.[57]

E. Statutory Interpretations

Whether a court will find protection for attorney opinion work product often depends on how the court interprets Rule 26 and the 1993 amendments thereto.[58] Courts use various methods of statutory

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[52] *Id.* 26(b)(4)(A).

[53] *See id.* 26(b)(3).

[54] *Id.*

[55] FED. R. CIV. P. 26 advisory committee's note (1993) (stating 1993 amendments increase amount of disclosure between parties and that attorneys should no longer consider material furnished to experts privileged).

[56] *See id.* (stating because amendments require disclosure, litigants should no longer be able to argue materials relied upon by testifying experts are protected). Some courts have found Rule 26(a)(2)(B) to be vague. *See In re* Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001); *see also* Karn v. Ingersoll Rand Co., 168 F.R.D. 633, 637-41 (N.D. Ind. 1996); Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 295 (W.D. Mich. 1995). Neither Rule 26(a)(2)(B) nor the accompanying Advisory Committee's Note explicitly states anything about subverting the high standard of protection accorded to attorney opinion work product. *See* FED. R. CIV. P. 26(a)(2)(B); FED. R. CIV. P. 26 advisory committee's note (1993).

[57] FED. R. CIV. P. 26(a)(2)(B) (identifying what information attorney must include in predeposition report with regard to expert testimony); *id.* 26(b)(3) (protecting attorney opinion work product doctrine from discovery); *see* FED. R. CIV. P. 26 advisory committee's note (1993) (stating 1993 amendments to Rule 26 increase level of required disclosure in discovery process).

[58] *Compare* Reg'l Airport Auth. of Louisville v. LFG, L.L.C., 460 F.3d 697, 716-17 (6th Cir. 2006) (holding Advisory Committee's Note accompanying 1993 amendments require full disclosure of attorney opinion work product), *In re Pioneer*,

interpretation to determine the meaning of a rule or statute.[59] Two theories of statutory interpretation are particularly relevant with regard to interpreting Rule 26: originalism and textualism.[60]

Originalism is a theory of statutory interpretation that looks to the original intent of the drafters via the legislative history.[61] Originalists aim to interpret a statute as the drafters originally intended.[62] Originalism is appropriate when a statute is vague or ambiguous.[63] In *Ardestani v. INS*, for example, the Supreme Court utilized originalism when analyzing the use of the term "adjudication" in an ambiguous

238 F.3d at 1375 (holding 1993 amendments and Advisory Committee's Note to 1993 amendments make it clear Rule 26 requires full disclosure), *Karn*, 168 F.R.D. at 637-39 (noting drafters of 1993 amendments meant to trump any privilege from preventing full disclosure, including attorney opinion work product), *and* Gall v. Jamison, 44 P.3d 233, 238-39 (Colo. 2002) (requiring full disclosure as only way to give meaning to intent of drafters of 1993 amendments), *with Haworth*, 162 F.R.D at 292-96 (holding new provisions of Rule 26 do not reduce attorney opinion work product protections).

[59] *See, e.g.*, NLRB v. United Food & Commercial Workers, 484 U.S. 112, 123 (1987) (noting if language of statute is clear, there is no need to look at extrinsic sources); Marshak v. Treadwell, 240 F.3d 184, 192 (3d Cir. 2001) (stating first step of any statutory interpretation should be determining whether language is capable of plain meaning); United States v. Anderson, 942 F.2d 606, 611 (9th Cir. 1991) (finding use of Advisory Committee's Note to discover intent of ambiguous statute is proper).

[60] *See* Natasha Dasani, *Class Actions and the Interpretation of Monetary Damages Under Federal Rule of Civil Procedure 23(b)(2)*, 75 FORDHAM L. REV. 165, 177-84 (2006) (discussing textualism and intentionalism, also referred to as originalism, as two relevant theories of statutory interpretation for Rules); Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 800-04 (2002) (same).

[61] Pittman, *supra* note 60, at 800; *see* Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 809-10 (1994) (arguing originalist's job is to give meaning to statutes by looking at what legislature intended).

[62] Pittman, *supra* note 60, at 800. One source of legislative history that courts commonly use to interpret the Federal Rules of Civil Procedure is the Advisory Committee's Note. *See, e.g.*, United States v. Navarro, 169 F.3d 228, 237 (5th Cir. 1999) (using Advisory Committee's Note to interpret Rule 43); *Anderson*, 942 F.2d at 611 (noting significance of Advisory Committee's Note in interpreting Rule because it accurately identifies drafters' intent).

[63] Pittman, *supra* note 60, at 800-02; *see, e.g.*, INS v. Cardoza-Fonseca, 480 U.S. 421, 447-49 (1987) (finding if meaning of statute is unclear, court's use of legislative history is acceptable); Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984) (noting courts may use traditional canons to ascertain intent if plain meaning is unclear); United States v. Cooper, 396 F.3d 308, 310 (3d Cir. 2005) (stating if court cannot find plain meaning, it may use traditional canons and other government agency interpretations of statute to determine intent); Lee v. Ashcroft, 368 F.3d 218, 222 (3d Cir. 2004) (stating courts use normal tools of statutory construction if no clear congressional intent is apparent from language alone).

statute.[64] The Court examined the statute's legislative history and concluded that adjudication did not cover the specific type of hearing at issue.[65] The Court, however, qualified its use of legislative history by noting that such use is acceptable only when interpreting ambiguous statutory language.[66]

In contrast, textualism is a theory of statutory interpretation that looks solely to the plain language of the statute.[67] Unlike originalism, courts apply textualism when a statute is clear on its face.[68] In *Exxon Mobil Corp. v. Allapattah Services*, for example, the Supreme Court used a textualism approach to interpret the Class Action Fairness Act ("CAFA").[69] The Court was able to resolve the case based on the plain language of CAFA.[70] Thus, the Court reasoned that there was no need to look at CAFA's legislative history.[71] Justice Kennedy, writing for the majority, held that this basic canon of statutory interpretation applied, that is, textualism is appropriate for unambiguous statutes.[72]

F. Courts' Interpretations of the 1993 Amendments

Whether a court applies a textualist or an originalist approach to Rule 26 has great implications for its interpretation of the 1993

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[64] *See* 502 U.S. 129, 142 (1991) (using legislative history because statute was vague and ambiguous).

[65] *Id.* at 142-45.

[66] *Id.* at 142; *see* BedRoc Ltd. v. United States, 541 U.S. 176, 186-87 (2004) (stating use of legislative history in statutory interpretation is only acceptable when statute is ambiguous); United States v. Fisher, 6 U.S. (2 Cranch) 358, 358-90 (1805) (holding if statute is clear, it is not acceptable to use outside sources to interpret it).

[67] Dasani, *supra* note 60, at 177-78 (defining textualism); Pittman, *supra* note 60, at 802 (same); *see, e.g.*, *Cooper*, 396 F.3d at 310 (noting initial step in statutory interpretation is determining whether text has plain meaning); *In re* Sunterra Corp., 361 F.3d 257, 265 (4th Cir. 2004) (finding statutory analysis is unnecessary if statute language is unambiguous or clear on face); Valansi v. Ashcroft, 278 F.3d 203, 209 (3d Cir. 2002) (stating court must first determine if language in statute has plain and unambiguous meaning); Marshak v. Treadwell, 240 F.3d 184, 192 (3d Cir. 2001) (same).

[68] Pittman, *supra* note 60, at 802-04; *see, e.g.*, Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (stating if language has plain meaning, court should conduct analysis using textualism); NLRB v. United Food & Commercial Workers, 484 U.S. 112, 123 (1987) (noting if language affords clear intent, court's statutory analysis is complete); *Chevron USA*, 467 U.S. at 842 (same).

[69] 545 U.S. 546, 549 (2005).

[70] *Id.* at 567-68.

[71] *Id.*

[72] *Id.*

amendments.[73] Courts disagree about the value of the Advisory Committee's Note, and as a result, two lines of cases have emerged from the 1993 amendments.[74] One series of cases upholds the strong protection of the attorney opinion work product doctrine.[75] The other creates a bright-line rule requiring full disclosure of all information given to experts, including attorney opinion work product.[76]

Courts that afford strong protection to attorney opinion work product tend to look at the plain language of Rule 26 and its amendments.[77] For example, in *Haworth, Inc. v. Herman Miller, Inc.*, the District Court for the Western District of Michigan protected attorney opinion work product from discovery.[78] In that patent infringement case, the magistrate judge compelled Haworth's expert to answer questions concerning communications with Haworth's counsel.[79] In reversing the magistrate judge's ruling, the district court held that the newly added subdivision (a)(2)(B) did not cancel the protection of subdivision (b)(3).[80] The court ruled that attorney opinion work product is not discoverable simply because an attorney

[73] *Compare In re* Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001) (holding value of Advisory Committee's Note is high and deference should be given to legislative purpose of Rule 26), *with* Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 293-94 (W.D. Mich. 1995) (evaluating "words and history" of statute and finding nothing in text takes away from protection of attorney opinion work product).

[74] Two lines of cases have developed from these new amendments on the issue of discoverability regarding attorney opinion work product. *Compare In re Pioneer*, 238 F.3d at 1375 (creating bright-line rule that requires disclosure of all information provided to experts), *with Haworth*, 162 F.R.D. at 292-96 (holding attorney opinion work product is not discoverable just because attorney shared it with testifying expert).

[75] *See Haworth*, 162 F.R.D. at 292-96; *see also* Smith v. Transducer Tech., Inc., 197 F.R.D. 260, 261-62 (D.V.I. 2000) (holding Rule 26(a)(2)(B) requires only facts to be discoverable and protects mental impressions of attorneys); Moore v. R.J. Reynolds Tobacco Co., 194 F.R.D. 659, 663-64 (S.D. Iowa 2000) (holding attorney opinion work product has near absolute protection and is only discoverable in rarest of circumstances).

[76] *In re Pioneer*, 238 F.3d at 1375 (requiring full disclosure including attorney opinion work product due to new bright-line rule); *see* Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 751 (7th Cir. 2005) (same); Karn v. Ingersoll Rand Co., 168 F.R.D. 633, 637-41 (N.D. Ind. 1996) (arguing drafters of 1993 amendments meant to trump any privilege from preventing full disclosure, including attorney opinion work product); Gall v. Jamison, 44 P.3d 233, 238-39 (Colo. 2002).

[77] *See Haworth*, 162 F.R.D. at 292-96; *see also Smith*, 197 F.R.D. at 261-62; *Moore*, 194 F.R.D. at 663-64.

[78] *See Haworth*, 162 F.R.D. at 292-96.

[79] *Id.* at 291.

[80] *Id.* at 295.

shared it with an expert expected to testify.[81] Rule 26, even as amended, lacked sufficiently concrete language to erode the attorney opinion work product doctrine.[82]

In contrast, the Eighth Circuit Court of Appeals has held there is no protection for attorney opinion work product under Rule 26 (a)(2)(B).[83] In *In re Pioneer Hi-Bred International, Inc.*, plaintiff's counsel gave the testifying expert information to create financial reports regarding an upcoming merger.[84] This information included some attorney opinion work product.[85] Defense counsel sought this information, and the court compelled Pioneer's counsel to answer questions regarding these reports and the information used to create these reports.[86] Pioneer appealed this decision to the Eighth Circuit.[87]

In affirming the judge's ruling, the Eighth Circuit created a bright-line rule for interpreting Rule 26 after the 1993 amendments.[88] This rule requires full disclosure of all information given to experts, including information normally protected as attorney opinion work product.[89] To justify this bright-line rule, the court used an originalist approach and focused on Rule 26's legislative history.[90] In particular, the court relied heavily on the language found in the Advisory Committee's Note calling for complete disclosure.[91] The court did not

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[81] *Id.*

[82] *Id.* (finding use of Advisory Committee's Note improper because language of Rule 26 was clear and therefore mandated textualist analysis); *see also* Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (stating if statutory language is clear, textualism is appropriate); Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (same).

[83] *In re* Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001).

[84] *Id.* at 1372-73.

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Id.* at 1372-73, 75 (creating bright-line rule requiring full disclosure of any information given to testifying experts, including attorney opinion work product).

[90] *See id.*

[91] *Id.*; *see* FED. R. CIV. P. 26 advisory committee's note (1993) (stating congressional intent of 1993 amendments was to increase disclosure in discovery process). Some courts have found the Advisory Committee's Note useful in interpreting the Rules. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614-17 (1997) (citing Advisory Committee's Note in regards to Rule 23); Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 544-45 (1991) (rejecting plaintiffs' reading of Rule 11 because there was no indication in Advisory Committee's Note that supported such reading); *cf.* Hohn v. United States, 524 U.S. 236, 255 (1998) (Scalia, J., dissenting) (using 1967 Note to Federal Rule of Appellate Procedure 22 as basis to disagree with majority's interpretation).

address the *Haworth* line of cases, which looked solely at the text of Rule 26.[92] The Eighth Circuit's reliance on the Advisory Committee's Note created the basis for the reasoning used by the Sixth Circuit in *Regional Airport Authority*.[93]

II. *REGIONAL AIRPORT AUTHORITY OF LOUISVILLE V. LFG, L.L.C.*

In *Regional Airport Authority of Louisville v. LFG, L.L.C.*, the Sixth Circuit held that attorney opinion work product given to testifying experts receives no protection.[94] In so holding, the court relied heavily on the Advisory Committee's Note to the 1993 amendments to Rule 26.[95] It thus rejected the statutory interpretation used in the *Haworth* line of cases.[96]

A. Factual and Procedural Background

In 1988, the Regional Airport Authority ("Authority") commenced an airport improvement plan to expand its airport.[97] To carry out the plan, the Authority condemned a large quantity of private land, including land owned by LFG.[98] Because LFG had previously used hazardous material on the site, the land had to undergo an environmental inspection before any construction could begin.[99] The Authority retained Camp, Dresser & McKee, Inc. as experts to conduct this investigation.[100] This inspection revealed that the

[92] *See* Smith v. Transducer Tech., Inc., 197 F.R.D. 260, 261-62 (D.V.I. 2000); Moore v. R.J. Reynolds Tobacco Co., 194 F.R.D. 659, 663-64 (S.D. Iowa 2000); Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 292-96 (W.D. Mich. 1995). *But see* Fid. Nat'l Title Ins. Co. of N.Y. v. Intercounty Nat'l Title Ins. Co., 412 F.3d 745, 751 (7th Cir. 2005); *In re Pioneer*, 238 F.3d at 1375; Karn v. Ingersoll Rand Co., 168 F.R.D. 633, 637-41 (N.D. Ind. 1996); Gall v. Jamison, 44 P.3d 233, 238-39 (Colo. 2002).

[93] Reg'l Airport Auth. of Louisville v. LFG, L.L.C., 460 F.3d 697, 716-17 (6th Cir. 2006); *see In re Pioneer*, 238 F.3d at 1375; *see also Karn*, 168 F.R.D. at 637-41; *Gall*, 44 P.3d at 238-39.

[94] *See generally Reg'l Airport Auth.*, 460 F.3d at 697 (holding attorney opinion work product is discoverable under Rule 26(a)(2)(B)).

[95] *See id.* at 714-17 (discussing relevant changes to Rule 26 in 1993 amendments and how they affect discovery of information given to experts); *see also* FED. R. CIV. P. 26 advisory committee's note (1993).

[96] *Reg'l Airport Auth.*, 460 F.3d at 714-17; *In re Pioneer*, 238 F.3d at 1375; *see Haworth*, 162 F.R.D. at 292-96.

[97] *Reg'l Airport Auth.*, 460 F.3d at 700.

[98] *Id.*

[99] *Id.* at 700-01.

[100] *Id.*

condemned site required remediation, which would cost an estimated $9.5 million of the projected total cost of $17.5 million.[101] Despite the cost, the Authority decided to continue its construction as planned and completed the runway in December 1997.[102]

The Authority subsequently filed a claim against LFG to recover the remediation cost under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA").[103] CERCLA permits current property owners to recover costs from prior property owners for necessary clean up of contaminated land.[104] Throughout the litigation process, extensive discovery took place.[105] LFG requested thousands of documents relating to exchanges between the Authority's attorneys and their experts at Camp, Dresser, & McKee.[106] Refusing to disclose these documents, the Authority claimed protection under the attorney-client privilege and attorney opinion work product doctrine.[107]

Because the Authority refused to produce the documents, LFG took its request to the magistrate.[108] On May 4, 2001, the magistrate ordered production of all the documents given to Camp, Dresser, & McKee, with the exception of 151 documents the magistrate wanted to examine in camera.[109] On November 19, 2001, the court ordered production of these documents as well.[110]

In June 2004, the court granted LFG's motion for summary judgment.[111] The Authority appealed this decision to the Sixth Circuit, arguing in part that the attorney opinion work product doctrine protected the documents.[112] The Sixth Circuit upheld the district court's ruling on the discovery orders, concluding that attorney opinion work product receives no protection once given to experts.[113]

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[101] *Id.* at 701.
[102] *Id.*
[103] *Id.* at 702.
[104] *Id.* at 699-700.
[105] *Id.* at 702.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 702-03.
[112] *Id.* at 703.
[113] *Id.* at 716-17.

B. Rationale

The Sixth Circuit created a bright-line rule requiring full disclosure of any and all information given to experts expected to testify.[114] The court went beyond the holding of the Eighth Circuit in *In re Pioneer* by conducting a more thorough analysis of the two lines of cases interpreting Rule 26.[115] The court summarized the view of the *Haworth* line of cases as well as that of the *In re Pioneer* line.[116] Ultimately, the Sixth Circuit adopted a bright-line rule similar to that set forth in *In re Pioneer*.[117]

In its analysis, the Sixth Circuit used the Advisory Committee's Note to the 1993 amendments to give meaning to Rule 26(a)(2)(B).[118] The Note states that the purpose of the amendments is to provide for a greater amount of disclosure in discovery.[119] From this, the court ruled that the disclosures required in Rule 26(a)(2)(B) overrode the protections of Rule 26(b)(3).[120] In so holding, the Sixth Circuit ignored Supreme Court precedent, rules of statutory interpretation, and important public policy considerations.[121]

III. ANALYSIS

The Sixth Circuit erred in *Regional Airport Authority* by failing to afford proper protection to attorney opinion work product.[122] In relying on the Advisory Committee's Note to interpret the 1993 amendments, the court ignored the traditionally high level of

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[114] *Id.* at 714-17 (stating Rule 26 now requires full disclosure of any information given to testifying experts, including attorney opinion work product).

[115] *Compare id.* at 714-15, *with In re* Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001) (holding value of Advisory Committee's Note is high and courts should defer to legislative purpose of Rule 26), *and* Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 292-96 (W.D. Mich. 1995) (holding nothing in text takes away from protection of attorney opinion work product).

[116] *Reg'l Airport Auth.*, 460 F.3d at 714-15.

[117] *Id.* at 716-17.

[118] *Id.* at 715-17.

[119] *Id.* at 716-17.

[120] *Id.*

[121] *See id.*; *see also* Hickman v. Taylor, 329 U.S. 495, 514 (1947).

[122] *See Reg'l Airport Auth.*, 460 F.3d at 714-15 (holding Rule 26 does not protect attorney opinion work product from disclosure due to 1993 amendments).

protection given to this type of information.[123] It instead focused on language that did not make its way into the statute itself.[124]

By expanding the disclosure requirements of Rule 26 and weakening the attorney opinion work product doctrine, the Sixth Circuit erred in three ways.[125] First, the court failed to follow Supreme Court precedent requiring explicit statutory language to erode the protection of attorney opinion work product.[126] Second, the court incorrectly used an originalist analysis when the language in Rule 26 is not vague.[127] Lastly, the court failed to consider the unfair practical implications for parties who are fiscally constrained in the number of experts they can afford.[128]

A. In Deferring to the Advisory Committee's Note, the Sixth Circuit Ignored Supreme Court Precedent Requiring Express Statutory Language to Undermine the Attorney Opinion Work Product Doctrine

In *Regional Airport Authority*, the Sixth Circuit erred by giving too much deference to the Advisory Committee's Note to the 1993 amendments to Rule 26.[129] This deference directly conflicts with

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[123] *See id.* (applying reasoning found in Advisory Committee's Note and creating bright-line rule to explain ambiguity found in Rule 26). *See generally Hickman*, 329 U.S. at 495 (creating basis of work product doctrine and attorney opinion work product doctrine); *In re* Burlington N., Inc., 822 F.2d 518 (5th Cir. 1987) (holding work product doctrine protected documents prepared for litigation from discovery); Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984) (same); *In re* Grand Jury Matter, 147 F.R.D. 82 (E.D. Pa. 1992) (protecting work product as long as it is created for legal purposes).

[124] *See Reg'l Airport Auth.*, 460 F.3d at 714-17 (using Advisory Committee's Note to 1993 amendments as opposed to only language of Rule 26 itself); *see also* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291 2455, 2457 (2006) (arguing legislative history can be insufficient help in determining legislative intent); Pittman, *supra* note 60, at 800-04 (discussing idea that originalism is at times flawed means of statutory interpretation because courts may have to use ambiguous outside sources). Many courts find that using legislative history is dangerous because it can be ambiguous. *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 168 (2001) (stating it is incorrect to interpret statute based on ambiguous language in legislative history); Bryan v. United States, 524 U.S. 184, 185 (1998) (stating legislative history is too ambiguous to provide any help in interpretation); Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 170 (1993) (stating use of legislative history over plain text turns concept of statutory interpretation on its head).

[125] *See infra* Part III.

[126] *See infra* Part III.A.

[127] *See infra* Part III.B.

[128] *See infra* Part III.C.

[129] *See Reg'l Airport Auth.*, 460 F.3d at 716-17.

Supreme Court precedent requiring that any limitation on the attorney opinion work product doctrine be expressly created by statute. [130] By basing its holding on the Advisory Committee's Note rather than explicit statutory language, the Sixth Circuit failed to provide adequate support for its bright-line rule. [131]

The Supreme Court clearly delineated the proper approach for interpreting potential limitations on the attorney opinion work product doctrine in *Hickman v. Taylor*.[132] In *Hickman*, the Court stated that attorney opinion work product must receive a high level of protection.[133] This increased protection is vital to the legal profession.[134] Without this protection, attorneys would avoid putting anything in writing for fear that it would be discoverable.[135] Consequently, the Court held that until Congress adopted a new rule

[130] *Compare id.* (holding attorney opinion work product is discoverable due to Advisory Committee's Note), *with* Hickman v. Taylor, 329 U.S. 495, 514 (1947) (holding without explicit language contained within statute or rule, courts cannot delete attorney opinion work product doctrine).

[131] *Reg'l Airport Auth.*, 460 F.3d at 716-17 (holding 1993 amendments justify requirement of full disclosure of attorney opinion work product in regards to testifying experts); *see, e.g.*, Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (stating if language is clear on its face, court should not look to other sources to further analysis); *see Hickman*, 329 U.S. at 513-14 (holding that clear and unambiguous language in statute is required to trump attorney opinion work product).

[132] *Hickman*, 329 U.S. at 513-14; *see* Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 295 (W.D. Mich. 1995) (citing *Hickman*, 329 U.S. at 513-14) (noting importance of attorney opinion work product and strict requirement to detract from this doctrine's protection).

[133] *Hickman*, 329 U.S. at 510-11 (discussing that it is essential for lawyer to work with degree of privacy and be free from intrusion by opposing counsel while preparing for litigation); *see* Letter from Michael S. Greco, Am. Bar Ass'n, to Alberto Gonzales, Att'y Gen. of the U.S. (May 2, 2006), *available at* http://www.acc.com/public/article/attyclient/aba_to_ag.pdf (asking Attorney General Alberto Gonzales to stop department action that has acted to erode principles of work product doctrine); *see also* LECTRIC LAW LIBRARY, PROTECTION FROM DISCOVERY — A LITTLE ABOUT WORK-PRODUCT, ATTORNEY-CLIENT AND COMMON-INTEREST PRIVILEGES (2006), *available at* http://www.lectlaw.com/files/lit16.htm (discussing demoralizing aspects of any loss to protection of attorney opinion work product and work product doctrine in general).

[134] *See* Letter from Michael S. Greco, *supra* note 133 (arguing attorney opinion work product doctrine is vital to legal profession and courts should not erode doctrine for any reason). *See generally* Lungren & Delahunt, *supra* note 28 (claiming actions being taken to erode work product privilege are dangerous and Congress will hold hearings to look into this situation).

[135] *Hickman*, 329 U.S. at 511; *see* Letter from Michael S. Greco, *supra* note 133. *See generally* Lungren & Delahunt, *supra* note 28 (arguing it is dangerous to legal profession to undermine attorney opinion work product privilege).

specifically and clearly undermining this protection, the doctrine must remain fully intact.[136]

In relying on the Advisory Committee's Note, however, the Sixth Circuit's analysis turned almost entirely on language that did not make it into Rule 26.[137] This directly conflicts with the Supreme Court's holding in *Hickman*.[138] Language contained within the Advisory Committee's Note does not fulfill the requirement of explicit language found within a statute.[139] Moreover, nothing in Rule 26 explicitly states that the attorney opinion work product doctrine does not apply to information shared with experts.[140] Thus, under Supreme Court precedent, the Sixth Circuit's holding in *Regional Airport Authority* lacked adequate support.[141]

Opponents would argue that the Sixth Circuit's bright-line rule does not violate the holding in *Hickman*.[142] These opponents would

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[136] *Hickman*, 329 U.S. at 513-14; *see Haworth*, 162 F.R.D. at 295 (citing *Hickman*, 329 U.S. at 513-14) (discussing requirement of explicit language to override strong protections of attorney opinion work product).

[137] Reg'l Airport Auth. of Louisville v. LFG, L.L.C., 460 F.3d 697, 716-17 (6th Cir. 2006) (using Advisory Committee's Note to create disclosure requirement of attorney opinion work product); *see Hickman*, 329 U.S. at 512-13 (calling for protection of attorney opinion work product and strict requirement against erosion of this protection); *Haworth*, 162 F.R.D. at 292-97 (continuing protection of attorney opinion work product and refusing to base analysis on language of Advisory Committee's Note to 1993 amendments).

[138] *Compare Reg'l Airport Auth.*, 460 F.3d at 716-17 (creating bright-line rule requiring disclosure of attorney opinion work product based on language found in Advisory Committee's Note), *with Hickman*, 329 U.S. at 513-14 (holding Rule 26 protects attorney opinion work product), *and Haworth*, 162 F.R.D. at 292-97 (refusing to use legislative history to undermine from attorney opinion work product).

[139] *See* Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (refusing to use legislative history when textualist approach will suffice); NLRB v. United Food & Commercial Workers, 484 U.S. 112, 123 (1987) (noting courts use nothing outside statutory language in textualist analysis); Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (stating courts may not use legislative history to analyze clear statute because it is not part of statute's language).

[140] *See* FED. R. CIV. P. 26(a)(2)(B) (stating attorney must disclose all information used by expert in forming opinion in predeposition report); *id.* 26(b)(3) (stating courts must protect attorney opinion work product from discovery); *id.* 26(b)(4) (stating experts must provide report based on expected testimony).

[141] *Reg'l Airport Auth.*, 460 F.3d at 716-17 (creating bright-line rule requiring full disclosure of attorney opinion work product based on language found in Advisory Committee's Note); *see* FED. R. CIV. P. 26 advisory committee's note (1993) (stating attorneys should not be able to hide information behind any protective doctrine during discovery relating to expert testimony).

[142] *See Reg'l Airport Auth.*, 460 F.3d at 716-17 (using Advisory Committee's Note to create bright-line rule requiring full disclosure); *In re* Pioneer Hi-Bred Int'l, Inc., 238

contend that the *Hickman* decision merely requires clear and unambiguous proof of the drafters' intent.[143] The Advisory Committee's Note provides definitive proof of the intent of the drafters of the 1993 amendments.[144] These Notes reflect the drafters' intent to create more disclosure in the discovery process.[145] Therefore, the purpose of the 1993 amendments was clear, and the Notes justified the Sixth Circuit's creation of the bright-line rule.[146]

This argument, however, misstates the rule in *Hickman*.[147] The standard created by the Supreme Court requires explicit language in Rule 26 itself to justify disclosure of attorney opinion work product.[148]

F.3d 1370, 1375 (Fed. Cir. 2001) (same). *See generally* Struve, *supra* note 48, at 1152-62 (discussing use of Advisory Committee's Note in analysis of meaning and intention of Federal Rules of Civil Procedure).

[143] *See* FED. R. CIV. P. 26 advisory committee's note (1993) (stating intent of 1993 amendments to Rule 26 is to increase disclosure requirement in regards to testifying experts); *see also* Struve, *supra* note 48, at 1152-62 (showing Advisory Committee's Note help in discovering intent of amendments to Federal Rules of Civil Procedure); *cf*. *Hickman*, 329 U.S. at 514 (holding there must be explicit change in statute to cancel protections of attorney opinion work product).

[144] *See* FED. R. CIV. P. 26 advisory committee's note (1993) (stating clear intent to increase disclosure and not protect information through work product doctrine); *see also* United States v. Anderson, 942 F.2d 606, 611 (9th Cir. 1991) (stating Advisory Committee's Notes show intent of Rule because they are written by Rule's drafters); Struve, *supra* note 48, at 1152-57 (noting that when Congress passes amendment to Federal Rule of Civil Procedure, they also pass accompanying Notes, signifying their approval of these notes).

[145] *See* Struve, *supra* note 48, at 1152-57 (discussing Advisory Committee's Notes explain intent of Rule because Congress passes them along with amendment, showing agreement with both Rule and Notes); *see also* FED. R. CIV. P. 26 advisory committee's note (1993) (stating attorney opinion work product no longer should protect information given to experts); United States v. Navarro, 169 F.3d 228, 237 (5th Cir. 1999) (referring to Advisory Committee's Note to interpret Rule); *Anderson*, 942 F.2d at 611 (same).

[146] *See Reg'l Airport Auth.*, 460 F.3d at 716-17; *see also* FED. R. CIV. P. 26 advisory committee's note (1993) (stating intent of 1993 amendments is to increase disclosure); Struve, *supra* note 48, at 1152-57 (noting that Advisory Committee's Note is great source to derive intent of drafters of amendments to Federal Rules of Civil Procedure because Congress passes Notes alongside amendments).

[147] *Compare Hickman*, 329 U.S. at 514 (creating requirement of clear and explicit language in rule to erase protections of attorney opinion work product doctrine), *with Reg'l Airport Auth.*, 460 F.3d at 716-17 (using Advisory Committee's Note to justify creation of bright-line rule detracting from attorney opinion work product), *and* FED. R. CIV. P. 26 advisory committee's note (1993) (showing amendments increase disclosure and chip away at protective doctrines).

[148] *Hickman*, 329 U.S. at 513-14 (creating requirement for explicit language in statute or rule before court can take away from attorney opinion work product doctrine); *see* Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 295 (W.D. Mich.

Therefore, it is insufficient that this language is found in the Notes accompanying Rule 26.[149] Language contained within the Advisory Committee's Note is not the equivalent of the language of Rule 26.[150] Although Congress approves the Advisory Committee's Note alongside the Rule, they remain a secondary source.[151] As a result, the Sixth Circuit erred by detracting from the protection of attorney opinion work product without the required statutory language.[152]

B. The Sixth Circuit Incorrectly Used an Originalist Analysis Instead of a Textualist Analysis

In *Regional Airport Authority*, the Sixth Circuit also erred by using an inappropriate theory of statutory interpretation.[153] The language in Rule 26 is clear with respect to attorney opinion work product and

1995) (citing *Hickman*, 329 U.S. at 513-14) (same).

[149] *See Hickman*, 329 U.S. at 513-14; *see also Haworth*, 162 F.R.D. at 295 (refusing to reduce protection of attorney opinion work product without more explicit language than that found in 1993 amendment to Rule 26).

[150] *See Hickman*, 329 U.S. at 514 (creating requirement of clear and explicit language in rule itself, not in legislative history); *see also Reg'l Airport Auth.*, 460 F.3d at 716-17 (using Advisory Committee's Note to justify creation of bright-line rule detracting from attorney opinion work product doctrine); FED. R. CIV. P. 26 advisory committee's note (1993) (showing amendments increases disclosure and chips away at attorney opinion work product with respect to testifying experts).

[151] Struve, *supra* note 48, at 1152-57 (stating Advisory Committee's Note is strong secondary source in determining intent of drafters of amendment to rules of procedure); *see* Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc., 498 U.S. 533, 544-45 (1991) (rejecting reading of Rule because Advisory Committee's Note give no support to such reading); *see also Reg'l Airport Auth.*, 460 F.3d at 716-17 (using Advisory Committee's Note to create bright-line rule requiring full disclosure of information given to testifying experts); FED. R. CIV. P. 26 advisory committee's note (1993) (stating intent of 1993 amendments is to increase disclosure in discovery).

[152] *Compare Hickman*, 329 U.S. at 514 (creating requirement of clear and explicit language in Rule itself, alluding to fact that legislative history not enough), *with Reg'l Airport Auth.*, 460 F.3d at 716-17 (using legislative history to justify creation of bright-line rule), *and* FED. R. CIV. P. 26 advisory committee's note (1993) (showing amendment increases disclosure and chips away at attorney opinion work product in regards to testifying experts).

[153] *See Reg'l Airport Auth.*, 460 F.3d at 716-17 (using originalist approach by looking at Advisory Committee's Note instead of just plain language contained within Rule 26); *see also* Pittman, *supra* note 60, at 800-04 (discussing how textualism requires court to look only at language while originalism requires court to look at legislative history to determine drafters' intent).

thus mandates a textualist approach.[154] Consequently, the Sixth Circuit erred in using an originalist analysis.[155]

Rule 26(b)(3) explicitly protects attorney opinion work product.[156] The newly amended Rule 26(a)(2)(B) calls for a report including an expert's opinion and the information he used to reach this conclusion.[157] It says nothing about disclosing attorney opinion work product.[158] Although the amendments also affected subsections (b)(4) and (a)(1) to (4), these provisions make no reference to attorney opinion work product.[159] Thus, because the language of Rule 26 is not vague with respect to attorney opinion work product, a textualist analysis is appropriate.[160]

The Sixth Circuit's analysis, however, applied an originalist approach in that it relied on language not found within the four corners of Rule 26.[161] The court looked at extrinsic sources to

[154] *See* FED. R. CIV. P. 26(a)(2)(B) (adding disclosure requirements for predeposition reports for opinions of testifying experts); *id.* 26(b)(3) (codifying protection of attorney opinion work product doctrine); *id.* 26(b)(4) (creating need for disclosure of predeposition report for testifying experts); NLRB v. United Food & Commercial Workers, 484 U.S. 112, 123 (1987) (holding if language is precise, textualism is appropriate); Marshak v. Treadwell, 240 F.3d 184, 192 (3d Cir. 2001) (stating first step in statutory interpretation is to see if statute is plain on its face).

[155] *Reg'l Airport Auth.*, 460 F.3d at 716-17 (using originalist analysis by consulting Advisory Committee's Note to justify creation of bright-line rule); *see In re* Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1375 (Fed. Cir. 2001) (same); *see also* Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 292-96 (W.D. Mich. 1995) (requiring textualist analysis due to requirement of clear and unambiguous language in statute to reduce protection of attorney opinion work product doctrine).

[156] FED. R. CIV. P. 26(b)(3).

[157] *Id.* 26(a)(2)(B).

[158] *See id.*

[159] *Id.* 26(a)(1)-(4); *id.* 26(b)(4).

[160] *See, e.g.*, Conroy v. Aniskoff, 507 U.S. 511, 518-28 (1993) (Scalia, J., concurring) (stating court should stop analysis after determining statute is plain on its face); Finley v. United States, 490 U.S. 545, 554 (1989) (holding court will not read into effect anything Congress did not make clear in statute's language); *see* FED. R. CIV. P. 26 (showing clear language protecting attorney opinion work product with nothing explicitly detracting from doctrine's protection); *see also* Dasani, *supra* note 60, at 177-79 (stating textualism is appropriate when dealing with clear statute or rule); Pittman, *supra* note 60, at 800-04 (same). *But see* Redish & Chung, *supra* note 61, at 810-11 (arguing originalist's job is to give meaning to statutes by looking at what legislature intended).

[161] *See* Reg'l Airport Auth. of Louisville v. LFG, L.L.C., 460 F.3d 697, 716-17 (6th Cir. 2006) (using legislative history as basis for holding); Pittman, *supra* note 60, at 800-02 (arguing use of sources outside statutory language constitutes originalist approach); Redish & Chung, *supra* note 61 at 810-11 (arguing courts' job is to give meaning to statutes and this can best be done by looking at what legislature initially

determine the drafters' intent in the 1993 amendments to Rule 26.[162] In particular, the court relied on the Advisory Committee's Note asserting that the purpose of the 1993 amendments was to increase disclosure.[163]

Had the Sixth Circuit properly used a textualist approach, it would have concluded that Rule 26 still provides clear protection for attorney opinion work product.[164] The language in Rule 26(b)(3) provides explicit protection for attorney opinion work product.[165] No other provision in Rule 26 explicitly reduces this protection.[166] Because Rule 26 is clear on its face, the Sixth Circuit should have used a textualist approach.[167]

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intended); *cf.* Haworth, Inc. v. Herman Miller, Inc. 162 F.R.D. 289, 292-96 (W.D. Mich. 1995) (refusing to use Advisory Committee's Note). *But see* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 2457 (2006) (arguing legislative history can be insufficient help in determining purpose of legislative intent).

[162] *See Reg'l Airport Auth.*, 460 F.3d at 716-17 (using extrinsic source of Advisory Committee's Note); James E. Pfander, *Supplemental Jurisdiction and Section 1367: The Case for a Sympathetic Textualism*, 148 U. PA. L. REV. 109, 113-15 (1999) (calling for sympathetic textualism, which uses extrinsic sources just like originalism); Pittman, *supra* note 60, at 800-02 (noting originalist approach makes use of extrinsic sources).

[163] FED. R. CIV. P. 26 advisory committee's note (1993); *Reg'l Airport Auth.*, 460 F.3d at 716-17 (creating bright-line rule requiring disclosure by using of Advisory Committee's Note); *see* Tome v. United States, 513 U.S. 150, 160 (1995) (plurality opinion) (holding Advisory Committee's Note is useful guide in determining meaning of Rules); *see also* Struve, *supra* note 48, at 1152-57 (arguing using Advisory Committee's Note to determine meaning of Rule is appropriate because Notes are best extrinsic source). *But see Arlington*, 126 S. Ct. at 2457 (arguing legislative history is not helpful).

[164] *Compare* Hickman v. Taylor, 329 U.S. 495, 514 (1947) (holding Rule 26 protects attorney opinion work product), *and Haworth*, 162 F.R.D. at 292-96 (refusing to use Advisory Committee's Note to subtract from attorney opinion work product protections), *with Reg'l Airport Auth.*, 460 F.3d at 716-17 (relying on Advisory Committee's Note to diminish attorney opinion work product protections). When a statute is clear, it is erroneous to look outside the statute by focusing on the Advisory Committee's Note. *See* Pittman, *supra* note 60, at 802-04 (arguing textualism only looks at language contained within statute); *see also Tome*, 513 U.S. at 167 (Scalia, J., concurring) (stating although he has previously approved of using Advisory Committee's Note to interpret statute, he now believes this approach is in error); Eileen A. Scallen, *Interpreting the Federal Rules of Evidence: The Use and Abuse of the Advisory Committee's Note*, 28 LOY. L.A. L. REV. 1283, 1285 (1995) (citing Justice Scalia's argument about how courts needlessly use legislative history when textual analysis will suffice for statutory interpretation).

[165] FED. R. CIV. P. 26(b)(3).

[166] *Id.* 26(a)(2)(B).

[167] *See* United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.) (holding if language of statute is plain, there is no need to look further); Pittman, *supra* note 60, at 802-04 (arguing textualism is proper approach when statute is clear

Opponents would argue that the 1993 amendments created ambiguities about the meaning of Rule 26, and thus an originalist approach was proper.[168] Rule 26(a)(2)(B) calls for disclosure of information used by the expert in forming his opinions.[169] This creates ambiguity because the information used may consist of attorney opinion work product, which Rule 26(b)(3) protects.[170] As a result, Rule 26 is ambiguous as to whether Rule 26(b)(3) continues to protect work product information given to a testifying expert.[171] Thus, not only was the court's approach valid, but it was also necessary to determine the true meaning of Rule 26.[172]

Rule 26 does not meet the requisite ambiguity to justify using an originalist approach.[173] Rule 26(b)(3) clearly provides protection to attorney opinion work product.[174] Because nothing in Rule 26(a)(2)(B) explicitly undermines this protection, there is no ambiguity regarding attorney opinion work product.[175] Thus, because

and textualism does not make use of Advisory Committee's Note); *see also Tome*, 513 U.S. at 167 (Scalia, J., concurring) (stating it is improper to use Advisory Committee's Note in analysis of unambiguous statutes); Scallen, *supra* note 164, at 1285-86 (same).

[168] *Reg'l Airport Auth.*, 460 F.3d at 716-17 (holding bright-line rule answered problem of ambiguity in Rule 26); *see In re* Pioneer Hi-Bred Int'l. Inc., 238 F.3d 1370, 1375-76 (Fed. Cir. 2001) (creating bright-line rule requiring full disclosure after using originalist analysis); *see also* Pfander, *supra* note 162, at 113-15 (using originalism under guise of sympathetic textualism to give meaning to ambiguous statutes); Redish & Chung, *supra* note 61, at 810-11 (showing originalism can make sense of vague statute by looking to intent of drafters).

[169] FED. R. CIV. P. 26(a)(2)(B).

[170] *Id.*; *see id.* 26(b)(3) (protecting attorney opinion work product).

[171] *See In re Pioneer*, 238 F.3d at 1375 (using Advisory Committee's Note to answer problem of ambiguity created by Rule 26(a)(2)(B)). *Compare* FED R. CIV. P. 26(b)(3) (providing protection to attorney opinion work product), *with Reg'l Airport Auth.*, 460 F.3d at 716-17 (holding Rule 26(a)(2)(B) created ambiguity and use of Advisory Committee's Note was necessary).

[172] *Tome*, 513 U.S. at 160 (plurality opinion) (holding Advisory Committee's Note is helpful in determining intent of drafters); *see* Redish & Chung, *supra* note 61, at 810-11 (arguing originalism properly gives meaning to statutes by looking to legislative intent for answers); *see also* BedRoc Ltd. v. United States, 541 U.S. 176, 187 (2004) (using Advisory Committee's Note in context of vague or ambiguous statute); Ardestani v. INS, 502 U.S. 129, 142 (1991) (same); Pittman, *supra* note 60, at 800-04 (arguing originalism helps determine meaning of statute when vague).

[173] FED. R. CIV. P. 26 (discussing requirements and protections in discovery process).

[174] *Id.* 26(b)(3) (protecting attorney opinion work product from discovery).

[175] *Id.* 26(a)(2)(B) (requiring more disclosure of information given to testifying experts in predeposition report but saying nothing explicit as to opinion work product).

the Sixth Circuit should have used a textualist analysis, it erred in its creation of the bright-line rule.[176]

C. The Bright-Line Rule Is Patently Unfair to Fiscally Constrained Parties

The Sixth Circuit's holding in *Regional Airport Authority* also has negative policy implications.[177] A bright-line rule creates fundamental unfairness in the litigation process.[178] Specifically, it puts parties without endless funds to support their legal objectives at a disadvantage relative to wealthier parties.[179]

Because only information given to testifying experts is discoverable under *Regional Airport Authority*, litigants who can afford two tiers of experts will be at an advantage.[180] An attorney with a wealthier client can give a nontestifying expert all information, including his strategies for the case, to investigate a particular problem.[181] The attorney may then ask the nontestifying expert to identify what information is necessary to reach a conclusion that comports with this strategy.[182] Only then will the attorney give that specific information to a separate, testifying expert.[183] This effectively limits the amount of information discoverable under the bright-line rule while simultaneously protecting that attorney's opinion work product.[184]

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[176] *See* Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993) (stating court should look no further if language has plain meaning); NLRB v. United Food & Commercial Workers, 484 U.S. 112, 123 (1987) (noting if language expresses clear intent, court's statutory analysis is complete); Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984) (stating courts are not required to examine other sources if Congress's intent is clear). *Compare* Hickman v. Taylor, 329 U.S. 495, 514 (1947) (requiring explicit statutory language to delete opinion work product), *with Reg'l Airport Auth.*, 460 F.3d at 716-17 (creating bright-line rule reducing protection of opinion work product without explicit statutory language).

[177] 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE CIVIL ¶ 26.80 (3d ed. 2000) (arguing *Haworth* line of cases is superior because it does not hinder litigation).

[178] *See id.* (discussing generally how bright-line rule can have adverse affects on indigent litigants).

[179] *Id.*

[180] *See id.* (explaining allowing wealthy clients to pay for two sets of experts will enable them to circumvent full disclosure of attorney opinion work product).

[181] *See id.*

[182] *See id.*; *see also* Easton, *supra* note 26, at 591 (showing problems with attorney's attempts at getting around disclosure of attorney opinion work product to experts).

[183] *See* 6 MOORE ET AL., *supra* note 177, ¶ 26.80.

[184] *See id.*

Less wealthy clients would be unable to utilize this strategy.[185] At best, their attorneys could guess at what information to withhold from an expert.[186] This creates a situation where an expert may not have all the information needed to generate an effective and complete opinion.[187] Fiscally constrained parties will not be able to protect their attorney opinion work product to the same degree as wealthier parties.[188] This causes a fundamental unfairness to any party facing litigation with a wealthier party.[189] The Sixth Circuit's bright-line rule allows for such a result and makes this unfairness a reality.[190]

CONCLUSION

The Sixth Circuit erred in *Regional Airport Authority* by refusing to give proper protection to attorney opinion work product.[191] Specifically, the court failed to follow the Supreme Court's holding in *Hickman* requiring explicit statutory language to undermine the protection of attorney opinion work product.[192] The court also incorrectly used an originalist analysis when the language in Rule 26 was not ambiguous.[193] Finally, the bright-line rule gives a patently unfair advantage to wealthy clients.[194] Thus, the Sixth Circuit erred in its decision in *Regional Airport Authority*.[195]

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[185] *See id.*

[186] *Id.*

[187] *Id.*

[188] *See id.*

[189] *Id.*; *supra* Part III.

[190] Reg'l Airport Auth. of Louisville v. LFG, L.L.C., 460 F.3d 697, 716-17 (6th Cir. 2006).

[191] *See id.*

[192] *See supra* Part III.A.

[193] *See supra* Part III.B.

[194] *See supra* Part III.C.

[195] *See supra* Part III.