

the substance of the facts or opinions which you obtained from each present or former employee.” (Def.’s Second Interrog. No. 13.)

The plaintiff objected to the discovery requested in this interrogatory on the ground of the work product doctrine. In an order entered on January 14, 2002, the magistrate judge overruled the plaintiff’s objection. The plaintiff filed an objection to this decision of the magistrate judge pursuant to Federal Rule of Civil Procedure 72(a). The objection has been responded to and is ripe for decision.

The plaintiff represents that telephone interviews have been conducted by his counsel of a number of former employees of the defendant. The plaintiff argues that any record of these interviews necessarily contain theories and opinions formed in anticipation of litigation. However, the plaintiff is willing to voluntarily supply the names, addresses, and phone numbers of the persons interviewed.

The defendant contends that it is faced with a burden in discovering facts in this case based on the fact that the defendant corporation is no longer a viable business and that its former employees may hold the defendant in a negative light. In view of these problems, the defendant argues that the identity of the interviewees, the facts that they know about the case and the opinions that they hold should be discoverable through the plaintiff’s records of such information. In addition, the defendant argues that this

information is “substantially similar” to the disclosures required under Federal Rule of Civil Procedure 26(a)(1)(A).

II

In 1970, the civil discovery rules were amended to incorporate the work product doctrine, which had been recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947). The rules now provide that materials prepared in anticipation of litigation may not be discovered unless “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.” Fed. R. Civ. P. 26(b)(3).

The comments to the rule explain that the revised rule requires more than a showing of good cause and noted that *Hickman* provided “special protection” from discovery of memoranda created after an oral interview of a witness. Fed. R. Civ. P. 26(b)(3) advisory committee’s note to 1970 amendment. Rule 26(b)(3) protects only “documents and tangible things,” so that nontangible work product, such as counsel’s recollections, are technical protected by *Hickman*, and not the rule.

The Supreme Court revisited the work product doctrine again in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). The Court considered the *Hickman* holding as

well as the revision to the rules and concluded that discovery of oral statements of witnesses requires more than a “showing of substantial need and inability to obtain the equivalent without undue hardship.” *Id.* at 401. The Court noted that some circuits had instituted an absolute bar against discovery of such material, but declined to decide whether a per se rule would apply. *Id.*

After *Upjohn Co.*, the Fourth Circuit declined to adopt a per se rule, but held that oral statements made to a party’s attorney are not discoverable without a showing of “extraordinary circumstances.” *In re Doe*, 662 F.2d 1073, 1079 (4th Cir. 1981). In that case, the court recognized a fraud exception to the doctrine and held that its protection could be waived by disclosing the material to an adverse party. *See id.* at 1081.

In this case, the defendant has not shown any extraordinary circumstances to warrant discovery of interviews conducted by the plaintiff’s attorney. The persons interviewed are former employees of the defendant. The fact that the defendant corporation is no longer in business or that these former employees may have negative feelings about the defendant adds little to the argument.

Contrary to the defendant’s assertion, the interrogatory in question has nothing to do with the information available under rule 26(a)(1)(A). That rule simply requires disclosure of names and addresses of those individuals who might have discoverable

information along with the subject of such information. *See* Fed. R. Civ. P. 26(a)(1)(A). There is no requirement for disclosure of interviewees' statements, in comparison to the rule that mandates disclosure of certain retained expert opinion. *See* Fed. R. Civ. P. 26(a)(2).

Nothing in the rules requires disclosure of facts and opinions learned during oral interviews by counsel in the preparation of the case. In fact, rule 26(b)(3) forbids discovery of such information absent a proper showing sufficient to pierce the work product bar.

In the present case, I find that the defendant has not made such a showing. The defendant's interrogatory requests "information," and does not specify the form of the information. To the extent that the interrogatory requests material contained in documents or other tangible form, that material is protected from discovery by rule 26(b)(3). Likewise, to the extent that the interrogatory requests nontangible information, that information is protected from discovery by *Hickman*.

Therefore, I hold that the defendant may not compel the plaintiff to disclose the information requested in interrogatory number thirteen of the defendant's second set of interrogatories.

III

Accordingly, it is **ORDERED** that the plaintiff's objection [Doc. No. 43] to the magistrate judge's order entered January 14, 2002, is sustained.

ENTER: February 1, 2002

United States District Judge