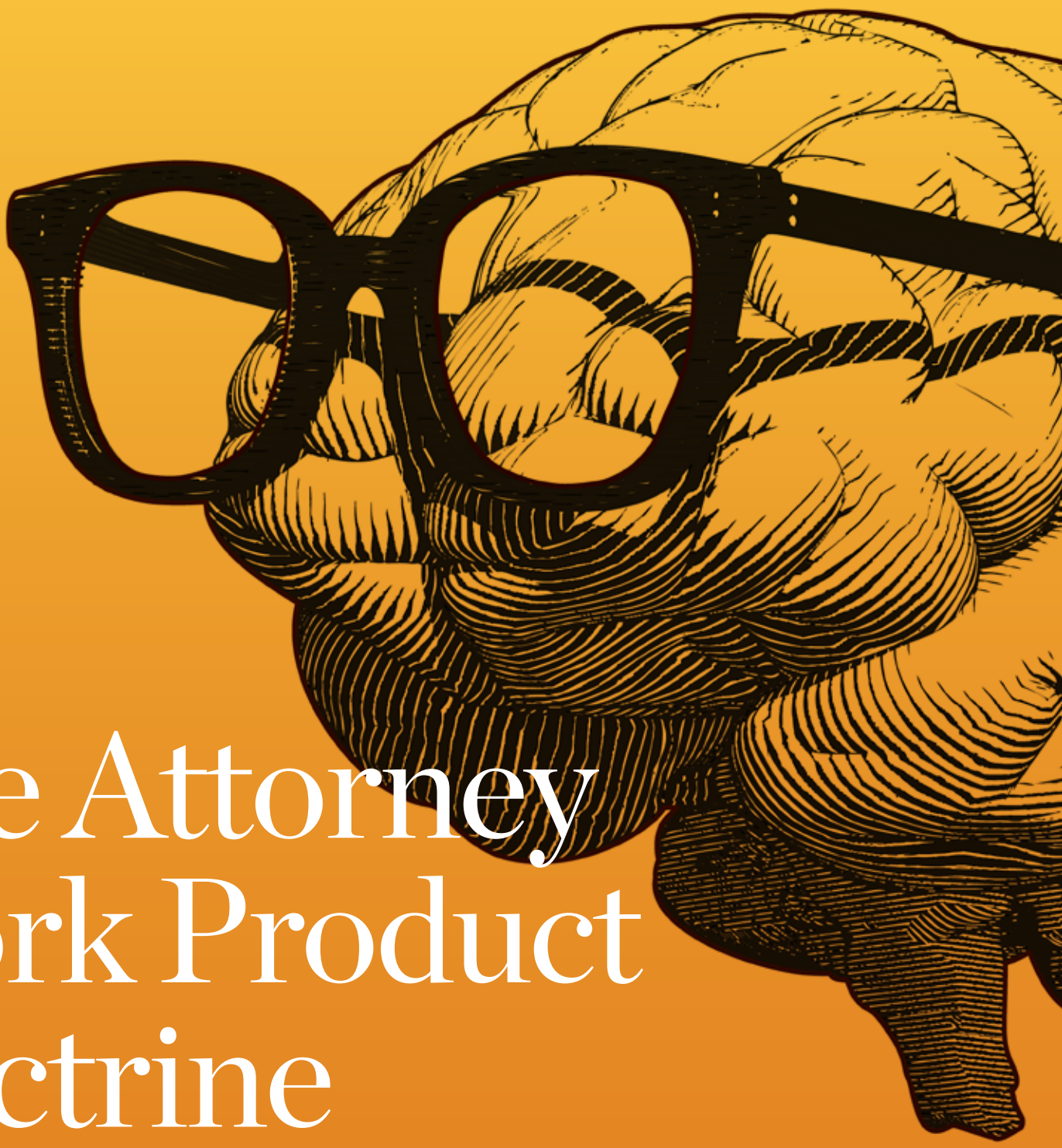

The Attorney Work Product Doctrine

Its History and Application

BY FRANZ HARDY AND GREG S. HEARING

This article discusses the evolution and scope of the work product doctrine and how it differs from the attorney-client privilege.

The attorney work product doctrine is a relatively recent development in American jurisprudence. While the attorney-client privilege traces its roots to English common law, the work product doctrine was developed in the mid-20th century when courts recognized the need to protect an attorney's mental thoughts and impressions and thus preserve the attorney's trial strategy in anticipated or pending litigation. Together with the attorney-client privilege, the work product doctrine allows counsel and their clients to communicate effectively and shield case strategy from discovery.

This article discusses how the work product doctrine evolved and what information it covers. It also distinguishes work product protections from the attorney-client privilege.

History of the Work Product Doctrine

The work product doctrine was first established in 1947 in the US Supreme Court's landmark case *Hickman v. Taylor*.[1] In *Hickman*, the Court aimed to balance the "competing interests" of the privacy of a lawyer's work and public policy encouraging reasonable and necessary inquiries.[2] *Hickman* concerned the defense of the owners of a sunken tugboat following the drowning of five of its nine crew members while they were operating the tugboat to assist a car float across the Delaware River. A month after the accident, a public hearing was held before the US Steamboat Inspectors, at which the four survivors were examined. Three weeks later, the survivors were privately interviewed by a lawyer retained in anticipation of litigation against the tugboat owners. While four of the five deceased crew members' estates settled before litigation, the fifth claimant brought a lawsuit eight months after the interviews were conducted.

The issue in *Hickman* concerned the defense's refusal to answer an interrogatory directed to the tug owners requesting them to "[s]tate whether any statements of the members of the crew of the 'J.M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.'"[3] The US District Court for the Eastern District of Pennsylvania held that the requested information was not privileged, but the US Court of Appeals for the Third Circuit reversed, leading to the Supreme Court granting certiorari.[4]

In a unanimous decision, Justice Murphy wrote that "[p]roper preparation of a client's case demands that [a lawyer] assemble information, sift what he [or she] considers to be the relevant from the irrelevant facts, prepare his [or her] legal theories and plan [a] strategy without undue and needless interference."[5] Much of the opinion centered on the Third Circuit's interpretation of Rule 26 of the newly conceived Federal Rules of Civil Procedure. The Court observed that "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney."[6] The opinion further noted that interpreting the rules to allow for such materials to be open to opposing counsel on mere demand would develop "[i]nefficiency, unfairness, and sharp practices" in the giving of legal advice and in the preparation of cases.[7] Further,

> [w]hen Rule 26 and the other discovery rules were adopted, this Court and the members of the bar in general certainly did not believe or contemplate that all the files and mental processes of lawyers were thereby opened to the free scrutiny of their adversaries. And we refuse to interpret the rules at this time so as to reach so harsh and unwarranted a result.[8]

The Court explained that work product would not shield underlying facts from discovery. Instead, the discovery of underlying facts contained within work product could only be had in certain limited circumstances, and the party seeking such discovery must carry the burden to demonstrate production:

> Where relevant and non-privileged facts remain hidden in an attorney's file, and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence, or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. But the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production through a subpoena or court order.[9]

From this opinion, the work product doctrine was officially recognized. It was codified into the Federal Rules of Civil Procedure 23 years later with the 1970 amendments.[10]

In *F.T.C. v. Grollier*, decided 36 years after *Hickman*, the work product doctrine was held to extend even after the litigation was over.[11] Justice White, in the majority opinion, was the first to address the "temporal scope" of the work product immunity and held that while the federal rule is silent on the issue, the literal language protecting against discovery for any litigation as long as the documents were prepared for some pending litigation leans toward protection for future litigation as well.[12] Justice Brennan, in his concurrence, recognized the advantage presented to opposing parties to be able to obtain work product from previous litigation with government entities or insurance providers that deal with hundreds or thousands of similar cases.[13] Justice Brennan sought to avoid "some inhibition" in creating and retaining work product that could later be used by an opponent wholly unrelated to the original litigation that the documents were prepared for; concluding this line of thought, he noted that this "demoralization" is precisely what *Hickman* warned against.[14]

As a result of *Hickman*, *Grollier*, and their progeny, the work product doctrine is now well-established. While the particulars of what is protected by the work product doctrine can vary by jurisdiction, the basic framework announced by *Hickman* and later codified in the Federal Rules of Civil Procedure has remained mostly intact.

The Work Product Doctrine in Colorado

The Colorado Supreme Court codified the work product doctrine at CRCP 26(b)(3), effective April 1, 1970.[15] This rule allows discovery for information "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative."[16] The rule qualifies this access by requiring a showing of "substantial need" of the materials requested and that the substantial equivalent of the desired materials is unable to be obtained without "undue hardship."[17] To obtain information from materials otherwise protected as work product, the information sought must "(1) be relevant to the subject matter involved in the pending action [and] (2) not be privileged;" further, "an attorney's work product is not discoverable except upon a showing of substantial need and inability to obtain the information elsewhere."[18] Nevertheless, the rule precludes the discovery of "mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation."[19]

Thirty-five years after *Hickman*, the Colorado Supreme Court addressed the work product doctrine in *Hawkins v. District Court*.[20] *Hawkins* did not address the work product doctrine as applied to an attorney, but rather to the records of an insurance company adjuster. The Court ruled that the trial court abused its discretion by denying a motion to compel discovery requesting the notes and investigative reports of an insurance adjuster regarding his interviews with several individuals and any statements taken from these persons.[21] Justice Quinn distinguished between materials prepared in anticipation of litigation and documents prepared in the "ordinary course of business."[22] He explained that the work of claims adjusters is "part of the normal business activity of the company and that reports and witness' statements compiled by or on behalf of the insurer in the course of such investigations are ordinary business records as distinguished from trial preparation materials."[23] The Court held that those denying production have the burden of demonstrating that the document was

> [p]repared or obtained in order to defend the specific claim which already had arisen and, when the documents were prepared or obtained in order to defend the specific claim which already had arisen and, when the documents were prepared or obtained, there was a substantial probability of imminent litigation over the claim or a lawsuit had already been filed.[24]

Similar to *Hawkins*, the Colorado Supreme Court in *Compton v. Safeway, Inc.* held that statements recorded by a claims adjuster a month before litigation became imminent were not protected because the withholding party must meet its burden "of showing a substantial probability of imminent litigation."[25]

Relatively few Colorado cases have discussed the work product doctrine. Despite this, general guidelines have been established as to what attorney work product is protected. In *A v. District Court*, the Colorado Supreme Court followed the precedent set by the US Court of Appeals for the Eighth Circuit extending work product protection to in-house attorneys working for corporations.[26] In *Quintana v. Lujan*, the Colorado Court of Appeals focused on the requirement of a showing of "substantial need and inability to obtain the material contained . . . by other means."[27] In that case, given that opposing counsel did not perform any other activity to acquire the information

aside from a bare request for production of documents, refusal to compel production was appropriate.[28] In *National Farmers Union v. District Court*, the Colorado Supreme Court recognized its holding in *Hawkins* in ruling that a memorandum prepared by attorneys was not protected because they performed a factual investigation that mirrored the work a claims adjuster would normally perform.[29] The Court held that a party "may not avail itself of the protection afforded by the work product doctrine simply because it hired attorneys to perform the factual investigation into whether the claim should be paid."[30]

Kay Laboratories v. District Court examined whether the work product doctrine applies to a hospital incident report.[31] In *Kay*, a nurse filled out an incident report form that was routinely provided by the hospital's insurer. The Colorado Supreme Court held that even though a report was created in response to an injury caused by negligence, there was no way for the hospital to anticipate specific litigation merely from the fact that the injury occurred.[32] A claim against it had yet to be initiated, and the hospital conceded that it had no notice of the claim when the incident report was completed, so the work product doctrine did not protect the incident report from disclosure.[33] The *Kay* Court determined that the incident report was "prepared in accordance with hospital routine."[34] The *Kay* holding illustrates the importance of preparing documents in anticipation of specific litigation for them to qualify for protection under the work product doctrine.

To obtain a proper understanding of what "in anticipation of litigation" means, a return to *Hawkins* is necessary. The *Hawkins* Court contemplated the challenges of establishing a bright-line rule to mark the decision between ordinary business activity and conduct taking place in anticipation of litigation. It held that "a showing by the insurance company that reports and statements were compiled by or under the direction of the insured's legal counsel for use in specific litigation about to be filed or for use in an upcoming trial would be conclusive evidence that these documents are trial preparation materials."[35] Thus, for materials to be protected, there must be a "substantial probability of imminent litigation over the claim."[36]

> "The Court observed that '[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney.'"

The "Substantial Need" Exception

Under CRCP 26, information prepared in anticipation of litigation is discoverable "only upon showing that the party seeking discovery has substantial need of the materials."[37] *Cardenas v. Jerath* provides guidance on what "substantial need" a party seeking materials must demonstrate to obtain work product that would normally be protected.[38] The Colorado Supreme Court in *Cardenas* recognized that "a party is unable without undue hardship to obtain the substantial equivalent of the materials by other means when the requested materials are not available by any other source."[39] Demonstrating substantial hardship requires the moving party to show that "the facts contained in the requested documents are essential elements of the requesting party's prima facie case."[40]

The plaintiff in *Cardenas* sought production of notes containing present sense impressions prepared by an attorney for a hospital immediately following a childbirth involving neurological injuries. As the notes sought were unique and the substantial equivalent could not be obtained due to the significant lapse of time, the Court held that the notes were discoverable, but it ordered the trial court to redact the attorney's mental impressions, conclusions, opinions, and legal theories.[41] In support of its order, the Court pointed to the fact that the attorney notes represented the only investigative report of what occurred before, during, and after the childbirth as a critical factor.[42]

Addressing the undue hardship prong of the test, the Court elaborated that it is "particularly difficult for a party to obtain the substantial equivalent of statements taken from witnesses at about the time of the incident" because of the present sense nature of the impressions held within the statements.[43] The Court additionally observed that the production of witness statements taken by attorneys can often be justified by a mere lapse of time.[44] Had the requesting party been able to obtain this type of information in any other manner, the Court would have denied the request for production, but given the showing of substantial need and undue hardship in obtaining the equivalent of the attorney's notes, production was appropriate in this setting.

The standard for discovery of work product for the requesting party is high. The Court's holding in *Cardenas* demonstrates that documents protected by work product are discoverable only when they are necessary to prove the plaintiff's case *and* the plaintiff is unable to obtain the requested information by any other means.[45] And even with this high burden met, the Court directed the trial court to shield "mental impressions, conclusions, opinions,

or legal theories" from discovery to uphold this aspect of work product protection.[46]

In reaching its decision in *Cardenas*, the Court relied on its decision in *Watson v. Regional Transportation District* 20 years earlier.[47] There, RTD's counsel created a videotape in an attempt to recreate the details of an accident to determine whether the accident could have occurred as the plaintiff described it. In determining the discoverability of the video, the Court turned to the two-prong *Hawkins* test, holding that the plaintiff demonstrated a substantial need for the videotape because it was a critical part of arguing her case and she was unable to obtain the tape's substantial equivalent because she could not feasibly recreate it.[48]

The Crime-Fraud Exception

The work product doctrine does not apply to documents that may establish wrongful conduct, which are carved out by the crime-fraud exception. Interestingly, the earliest Colorado decision to address the crime-fraud exception to the work product doctrine came before *Hawkins* explicitly established the doctrine itself. In *A v. District Court*, the Colorado Supreme Court considered whether documents prepared by counsel for specific civil litigation were protected from discovery under the work product doctrine in grand jury proceedings.[49] The Court noted that the nature of civil and grand jury proceedings was vastly different, and the alignment of parties in such proceedings was not similar.[50] Based on this, the Court held that "the civil litigation in which the work-product was gathered is not so closely related to the grand jury investigation as to require the application of the work-product exemption."[51]

The next Colorado case to address the crime-fraud exception was *Caldwell v. District Court*.[52] There, the petitioners accused the defendants, including the underlying attorney, of fraudulently concealing information and misrepresenting facts in an earlier personal injury action. The petitioners requested any of the defendants' "memoranda, documents, notes or any other writing or item which in any way discusses or concerns any of the defendants' opinions, ideas, or comments" concerning a witness who was at the center of the alleged fraud.[53] The Colorado Supreme Court held that applying the attorney work product doctrine to protect the perpetration of wrongful conduct would be a perversion of the privilege's "legitimate purpose and scope" and ordered production of the documents.[54] The Court also made absolute the rule proposed in *A v. District Court* that a court, "in its discretion and without prior establishment of a foundation in fact that the crime or fraud exception applies, may order the production of relevant documents for an in camera inspection to determine whether that exception is applicable."[55]

In *Law Offices of Bernard D. Morley, P. C. v. Macfarlane*, the Colorado Supreme Court further refined the crime-fraud exception.[56] There, the Court ruled that the trial court did not abuse its discretion by releasing documents claimed to fall under work product protection without an adversary hearing.[57] The Court held that documents seized pursuant to a search warrant were not entitled to be subject to an adversary hearing, nor the work product doctrine, because the warrant was issued specifically to obtain evidence of criminal activity.[58]

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The crime-fraud exception has remained largely unchallenged since its establishment and allows for discovery of attorney work product without redaction for mental thought processes, legal theories, conclusions, or opinions.

Work Product Protection for Expert Witnesses

The 2015 amendments to the Colorado Rules of Civil Procedure clarified the scope of discovery regarding expert witness-related communications and draft reports.[59] Previously, the rules did not provide express protections for draft reports of and communications with experts. CRCP 26(b)(4)(D) now expressly protects drafts of any report and "communications between the party's attorney and any witness disclosed under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications" relate to compensation, facts, or data provided by the attorney and considered by the expert, or identify assumptions that the party's attorney provided.[60] The amendments provided clarification and significant additional protection to attorneys in their consultation with expert witnesses. This amendment followed

substantially similar changes to the Federal Rules of Civil Procedure protecting expert reports and communications.[61]

Comparing the Work Product Doctrine with the Attorney-Client Privilege

The attorney-client privilege and the work product doctrine are sometimes confused. The attorney-client privilege is similar to, yet distinct from, the work product doctrine, and the differences are important. The attorney-client privilege aims to protect confidential communications between the attorney and the client for the purpose of maximizing full disclosure.[62] The privilege belongs to the client, can only be waived by the client, and protects the client from "unauthorized revelations" concerning the client's communications with their attorney.[63] Litigation need not be anticipated for the privilege to apply.

In contrast, the work product doctrine is "not so much a privilege as it is an exemption for material prepared by or for the attorney of a party in anticipation of litigation."[64] The purpose of the work product doctrine is to protect the attorney's privacy during preparation for trial;[65] it is a qualified exemption that must "yield in the face of necessity."[66] Work product receives conditional protection, allowing the court to order disclosure if good cause is shown. The circumstances regarding the disclosure of attorney-client communications are generally more limited. Notably, to invoke its protections, the work product doctrine must be asserted separately from the attorney-client privilege.[67]

Conclusion

The application of the work product doctrine and any potential disclosure of work product remain factually intensive questions that vary from one situation to the next. In applying the doctrine, courts must assess, according to relevant case law, whether litigation is truly imminent, whether a substantial need for the work product exists, the presence of an undue hardship in otherwise obtaining the information sought, and the purpose and scope of the production of facts contained within the work product. Generally, the work product doctrine will shield an attorney's mental impressions, conclusions, opinions, and legal theories and thus ensure that counsel's trial strategy will not be compromised in the discovery process. In addition to the attorney-client privilege, the work product doctrine will persist for the foreseeable future to protect the integrity of legal representation.


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NOTES

1. *Hickman v. Taylor*, 329 U.S. 495 (1947).
2. *Id.* at 497.
3. *Id*. at 498.
4. *Id*. at 499–500.
5. *Id*. at 511.
6. *Id*. at 510.
7. *Id*. at 511.
8. *Id*. at 514.
9. *Id*. at 511–12.
10. Fed. R. Civ. P. 26(b)(3).
11. *F.T.C. v. Grolier Inc.*, 462 U.S. 19 (1983).
12. *Id*. at 25.
13. *Id*. at 29–30.
14. *Id*.
15. CRCP 26(b)(3). While the work product doctrine also applies in criminal proceedings and to the production of public records under the Colorado Open Records Act, this article focuses solely on the work product privilege as applied to civil litigation.
16. *Id*.
17. *Id*.
18. Hess et al., 1B *Methods of Practice* (*Colorado Practice Series*) § 31:4 Scope, work product, and privilege (Thomson West 7th ed. 2020).
19. *Id*.
20. *Hawkins v. Dist. Court*, 638 P.2d 1372 (Colo. 1982).
21. *Id*. at 1374–75.
22. *Id*. at 1377.
23. *Id*.
24. *Id*. at 1378.
25. *Compton v. Safeway, Inc.*, 169 P.3d 135, 138 (Colo. 2007). *See also Lazar v. Riggs*, 79 P.3d 105 (Colo. 2003), which examined the ordinary nature of insurance claims and relied on standards from *Hawkins* to determine whether documents were prepared in anticipation of litigation.
26. *A v. Dist. Court*, 550 P.2d 315, 328 (Colo. 1976).
27. *Quintana v. Lujan*, 540 P.2d 351, 354 (Colo. App. 1975).
28. *Id*.
29. *Nat'l Farmers Union Prop. and Cas. Co. v. Dist. Court*, 718 P.2d 1044, 1048 (Colo. 1986).
30. *Id*.
31. *Kay Labs., Inc. v. Dist. Court*, 653 P.2d 721 (Colo. 1982).
32. *Id*. at 722–23.
33. *Id*.
34. *Id*. at 722.
35. *Hawkins v. Dist. Court*, 538 P.2d at 1379.
36. *Id.*
37. CRCP 26(b)(3).
38. *Cardenas v. Jerath*, 180 P.3d 415 (Colo. 2008).
39. *Id.* at 422.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. *Id*. at 423.
45. *Id*.
46. *Id*.
47. *Watson v. Reg'l Transp. Dist.*, 762 P.2d 133 (Colo. 1988).
48. *Id*. at 142.
49. *A*, 550 P.2d at 326–29.
50. *Id*. at 328.
51. *Id*.
52. *Caldwell v. Dist. Court*, 644 P.2d 26 (Colo. 1982).
53. *Id*. at 34.
54. *Id*.
55. *Id*. at 33.
56. *Law Offices of Bernard D. Morley, P.C. v. MacFarlane*, 647 P.2d 1215 (Colo. 1982).
57. *Id*. at 1222.
58. *Id*.
59. CRCP 26(b)(4).
60. *Id*.
61. *See* Fed. R. Civ. P. 26(b)(4).
62. Hyatt, 23 *Colorado Evidence Treatise* (*Colorado Practice Series*) § 501:4 Work product distinguished (Thomson West 2020).
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*.
67. *See Fox v. Alfini*, 2018 CO 94 at ¶¶ 34–38.