# STATE OF INDIANA

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June 12, 2012

W.C. Blanton
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4801 Main Street, Suite 1000
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*Re: Informal Inquiry 12-INF-22; Disclosure of records pursuant to the Access to Public Records Act*

Dear Mr. Blanton:

I am in receipt of your request for reconsideration of Informal Opinion 12-INF-22 issued on May 5, 2012 in response to an informal inquiry submitted by the Indiana Department of Environmental Management ("IDEM"). It is my opinion that I.C. § 5-14-3-4(b)(2) would not apply to the permittee's draft briefs ("Briefs"), as the permittee is not representing a public agency, the state, or an individual, *pursuant* to either state employment or an appointment by a public agency. However, I would agree that 12-INF-22 failed to address the applicability of the common interest doctrine to the attorney work product exception, which is distinct from the attorney-client privilege, and properly analyze Ind. Trial Rule 26(B)(3) in relation to the APRA and I.C. § 5-14-3-4(a)(8).

The issue presented is whether the Briefs are exempt from disclosure as protected attorney work product under I.C. § 5-14-3-4(a)(8) and Ind. Trial. Rule 26(b)(3). I.C. § 5-14-3-4(a)(8) provides that records declared confidential by or under the rules adopted by the supreme court of Indiana are excepted from disclosure pursuant to the APRA. Ind. Trial Rule 26(b)(3) provides:

> (3) Trial preparation: materials. -- Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (B)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the

> materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.
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> A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(A)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is:
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> (a) a written statement signed or otherwise adopted [or] approved by the person making it, or
> (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

Ind. Trial Rule 26(B)(3) is derived from the federal rule and the work product doctrine developed in the federal courts. *Indiana State Bd. of Public Welfare v. Tioga Pines Living Center, Inc.*, 592 N.E.2d 1274, 1276 (Ind. Ct. App. 1992) (citing *American Buildings Co. v. Kokomo Grain Co.*, 506 N.E.2d 56, 58 (Ind. Ct. App. 1987) and *Newton v. Yates*, 353 N.E.2d 485, 490 (Ind. Ct. App. 1976). "The policy behind the rule of *Hickman v. Taylor*, 329 U.S. 495 (1947)[1], and its progeny, now codified in Fed.R.Civ.P. 26(b)(3), the federal counterpart to our own trial rule, is to protect the integrity of the adversary process, not to protect all recorded opinions, observations and impressions an attorney or his advisors have made in connection with a legal problem." *Id.* (citing *Coastal Corp. v. Duncan* (D. Del., 1980), 86 F.R.D. 514, 522). "Documents are work product because their subject matter relates to the preparation, strategy, and appraisal of

[1] "[I]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusions by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories, and plan his strategy without undue and needless interference. . .This work is reflected of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly thought roughly termed by the Circuit of Appeals in this case (153 F.2d 212, 223) as the 'work product of a lawyer.' Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the client sand the cause of justice would be poorly served. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947).

the strengths and weaknesses of an action, or to the activities of the attorneys involved. *Id.* at 1277. (citing Moore's Federal Practice § 26.64[1] at 26-349 (1970). Even upon a showing that a party seeking discovery has substantial need of the material, the court shall protect against disclosure of the mental impression, conclusions, opinions, or legal theories. *Id*. at 1278. So long as the material can fairly be said to have been prepared in anticipation of litigation or for trial, the material can be considered work product. *Id. at 1276.*[2]

In the limited previous advisory opinions issued the Public Access Counselor regarding Trial Rule 26, counselors have opined that it was not apparent that Indiana Trial Rule 26 declared any record confidential and that issuing an opinion regarding the applicability of Ind. Trial Rule 26(B)(3) was beyond the scope of the authority of the Office.[3] *See Opinions of the Public Access Counselor 04-FC-235 and 07-FC-129.* The rules of discovery are separate and distinct from the APRA. *See Opinions of the Public Access Counselor 08-FC-234 and 11-FC-314.* The issue of attorney work product regarding Ind. Trial Rule 26(B)(3) does not generally arise in formal complaints filed with the Public Access Counselor's Office in light of I.C. § 5-14-3-4(b)(2). However, as provided *supra*, it is my opinion that (b)(2) does not apply to the Briefs, as the permittee is not representing a party pursuant to either state employment or an appointment by a public agency. After reviewing the applicable state and federal case law, contrary to advisory opinion 07-FC-129, it is my opinion that attorney work product is considered to be confidential pursuant to Ind. Trial Rule 26(B)(3). The rule outlines certain parameters to which a party seeking the records may be granted access before the court; however until the appropriate showing is made, documents that are prepared in anticipation of litigation may with withheld. Ind. Trial Rule 26(B)(3); *CIGNA-INA/Aetna v. Hamerman-Shambaugh*, 473 N.E. 2d 1033, 1037 (Ind. Ct. App. 1985). Even if a proper showing has been made before the court, the court "shall protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* You provide that the Briefs that have been sought would encompass the mental impressions, conclusions, opinions, or legal theories of an attorney.

As applicable here, in order for the Ind. Trial Rule 26(B)(3) to be cited in a denial of a request for the Briefs, the common interest doctrine must apply. The attorney-client and work product privileges may be waived. *BASF Aktiengesellschaft v. Reilly Industries, Inc.*, 224 F.R.D. 435, 441-42 (S.D. Ind. 2004). Perhaps the most common instance of waiver is where an otherwise privileged communication is disclosed to a third party outside the scope of the privilege." *Id.* (citing *Beneficial Franchise Co. v. Bank One, N.A.*, 212, 215 (N.D. Ill. 2001)). There is no dispute that the Brief's were disclosed by the permittee to IDEM. The work product doctrine is distinct and broader than the attorney-client privilege. *BASF*, 224 F.R.D. at 440, 440-41. Trial Rule 26 is patterned after the Federal Rules of Civil Procedure relating to discovery; therefore, authorities on the latter are relevant in construing our Indiana rule. *Coster v. Coster*, 452 N.E.2d 397,

[2] There has been no claim that the Briefs were not prepared in anticipation of litigation.

[3] Advisory Opinion 07-FC-202 addressed the applicability of the common interest doctrine to the attorney-client privilege.

400 (Ind. Ct. App. 1983) (citing *Rembold Motors, Inc. v. Bonfield*, 293 N.E.2d 210 (Ind. Ct. App. 1973).

The common interest doctrine provides that "disclosure of a document to third persons does not waive the work-product immunity unless it has substantially increased the opportunities for potential adversaries to obtain the information." *BASF*, 224 F.R.D. at 441-42 (citing 8 C.A. Wright, A.R. Miller & R. L. Marcus, Federal Practice and Procedure § 2024 (2d ed. 1994); Vardon Golf Co., Inc. v. Karsten Mfg. Corp., 213 F.R.D. 528, 534 (N.D. Ill. 2003) Tronitech, Inc. v. NCR Corp., 108 F.R.D. 655, 657; *See also Coachman Industries v. Kemlite*, 2007 U.S. Dist. LEXIS 82196 (N.D. Ind. Nov. 2, 2007) and *Reginald Martin Agency, Inc. v. Conseco Medical Ins.*, 460 F. Supp.2d 915, 918 (S.D. Ind. 2006). The purpose of the work product doctrine exists to prevent a legal party from gaining an unfair advantage over another party by learning the strategies and legal theories of another party. *Coachman Industries*, 2007 U.S. Dist. LEXIS 82196.

In order for the common interest to apply, the party must show that the disclosure has not substantially increased the likelihood that an adversary would obtain the information or that the third party shares a 'common interest' with it. *Id.* (citing *BASF*, 224 F.R.D. at 442). Factors to be considered include whether the common interest shared is a legal interest; whether the parties are or anticipate being engaged in litigation, against a common adversary; regarding the same or similar issues; whether the parties have expressed intent to cooperation, such as by a written agreement; whether the parties have the same legal counsel; and whether it is in the interests of justice and fairness to preventing the disclosure of the information. *Id*. (citing *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979).

Based on the applicable analysis from the 7th Circuit, it is my opinion that if the permittee can demonstrate the disclosure of the record to IDEM did not substantially increase the likelihood that an adversary would obtain the information or show that it shares a common interest with IDEM, IDEM may deny a request for the Briefs by citing to I.C. § 5-14-3-4(a)(8) and Ind. Trial Rule 26(B)(3). The question of whether the permittee's disclosure increased the likelihood that an adversary would obtain the information or whether the permittee and IDEM share a common interest would be a question of fact. The public access counselor is not a finder of fact. Advisory opinions are issued based upon the facts presented. If a party would dispute that the permittee's demonstration, the public access counselor would opine based on both potential outcomes. *See Opinion of the Public Access Counselor 11-FC-80.* However as a threshold matter, it is my opinion that the common interest doctrine would be applicable to the attorney work product exception found in Ind. Trial Rule 26(B)(3).

If I can be of any further assistance, please do not hesitate to contact me.

Best regards,

Joseph B. Hoage
Public Access Counselor

cc: Stan Rorick