IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Charles Walen, an individual, et al., Plaintiffs, vs. Doug Burgum, in his official capacity as Governor of the State of North Dakota, et al., Defendants, and Mandan, Hidatsa, & Arikara Nation, et al., Defendant-Intervenors.	Case No. 1:22-cv-31 **ORDER REGARDING DISCOVERY DISPUTE**

Plaintiffs challenge the 2021 redistricting of North Dakota's legislative districts. The parties dispute defendants' obligation to provide plaintiffs copies of transcripts of legislative committee hearings and floor sessions. Pursuant to Civil Local Rule 37.1, the court held an informal conference to discuss the dispute on December 20, 2022, but the dispute was not resolved during that conference. The parties had submitted position papers prior to the conference and were allowed to submit additional position papers subsequent to the conference in lieu of formal briefing. All position papers have now been incorporated into the docket. (Doc. 69-1; Doc. 69-2; Doc. 73; Doc. 74).

Background

On November 10, 2021, the North Dakota Legislative Assembly passed House Bill No. 1504, which altered the state's legislative districts. H.B. 1504, 67th Leg., Spec. Sess. (N.D. 2021). Governor Doug Burgum signed the bill into law the following day. Id.

Before the redistricting legislation, voters in each of North Dakota's 47 legislative districts elected one state senator and two representatives at-large. The redistricting legislation retained that procedure for 45 of the 47 districts. (Doc. 12-1).

Districts 4 and 9 are now different from the other 45 districts. Those two districts were subdivided into single-representative districts, denominated House Districts 4A, 4B, 9A, and 9B. Id. Voters in each of these subdivided districts elect one senator and one representative, instead of one senator and two representatives at-large. House District 4A traces the boundaries of the Fort Berthold Reservation of the Mandan, Hidatsa, and Arikara (MHA) Nation. House District 9A contains most of the Turtle Mountain Indian Reservation, with the remainder in House District 9B.

Plaintiffs—private citizens who reside in the subdistricts—allege a violation of the Equal Protection Clause, asserting race was the predominate factor behind the redistricting legislation and the redistricting resulted in illegal gerrymandering. (Doc. 1, p. 9). The MHA Nation intervened as a defendant.

Defendants arranged for preparation of transcripts of recordings of thirteen legislative committee meetings and two legislative floor sessions at a total cost of $24,181.45. (Doc. 69-2). Plaintiffs requested production of copies of the transcripts, and defendants asserted the transcripts are protected as work product.

Law and Discussion

The work product doctrine, originally adopted in Hickman v. Taylor, 390 U.S. 495 (1947), is now governed by Federal Rule of Civil Procedure 26(b)(3), which provides:

> (A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its

representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) *Protection Against Disclosure*. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) *Previous Statement*. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

In adopting the work product doctrine, the Hickman court described the rationale supporting it:

> 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. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways-aptly though roughly termed by the Circuit Court of Appeals in this case as the "Work product of the 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 clients and the cause of justice would be poorly served.

329 U.S. at 511 (citation omitted).

Work product is of two types—ordinary work product and opinion work product. As the Eighth Circuit has described:

> Ordinary work product includes raw factual information. Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories. Ordinary work product is not discoverable unless the party seeking discovery has a substantial need for the materials and the party cannot obtain the substantial equivalent of the materials by other means. In contrast, opinion work product enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud.

Baker v. General Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000) (citations omitted).

Here, there is no question the transcripts are relevant to issues in the case. As plaintiffs describe, "The transcripts contain the entire legislative record, including the discussions, testimony, evidence, and facts considered by the Legislative Assembly for its decision to implement the challenged subdistricts." (Doc. 73, p. 2). Nor is there an argument that production of the transcripts would be disproportionate to the needs of the case or that the exception of Rule 26(b)(3)(C) applies. Rather, the focus of the dispute is whether the transcripts meet the definition of work product.

Defendants argue the transcripts are ordinary work product because they are documents "prepared in anticipation of litigation and for [use at] trial" and further argue plaintiffs have not shown substantial need for the transcripts as would be required for application of the exception of Rule 26(b)(3)(A). (Doc. 69-2, pp. 1, 3). Defendants assert the transcripts were prepared at the express direction of counsel after this litigation had commenced, the transcripts have remained in the possession of defense

counsel, the substantial costs of transcript preparation were paid from a special state fund earmarked for litigation purposes, and plaintiffs are "equally able to create transcripts" from the recordings themselves. Id. at 3.

Plaintiffs assert transcripts of public hearings cannot be considered work product. They argue the transcripts contain only facts and no analysis of counsel. Further, they contend they cannot obtain a substantial equivalent of the transcripts by other means without the undue hardship of payment for preparation of second transcriptions. Plaintiffs also point to defendants having previously criticized their use of videos rather than transcripts during a hearing on a motion for a preliminary injunction, to the court having declined to take judicial notice of videos of the proceedings as the entire legislative record, and to it being advantageous to the court for the plaintiffs to cite to written transcripts rather than play the video recordings at trial.[1]

Because defendants assert work product protection, they bear the burden of demonstrating that the transcripts are covered by that doctrine. PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP, 305 F.3d 813, 817 (8th Cir. 2002).

[1] Plaintiffs also argue defense counsel earlier agreed to produce copies of the transcripts. But defense counsel denies there was an agreement. Because resolution of that factual dispute is not appropriate at this time, the court does not address that argument. Moreover, it is unnecessary to address that argument in light of the court's decision.

Plaintiffs also point to defendants' objection to their request for production having referred to the transcripts having been obtained "for use at trial in this case" as another reason production should be required. (Doc. 73, p. 3). Defendants respond that "for use at trial" is "essentially a term of art and is not a concession the transcripts will actually be used at trial." (Doc. 69-2, p. 3). In light of the court's decision, it is not necessary to address this argument.

Defendants rely on language of Eighth Circuit cases focusing solely on whether documents were prepared in anticipation of litigation. (Doc. 69-2, p. 2) (citing Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987)); (Doc. 74, p. 1) (citing Baker, 209 F.3d at 1054). Simon dealt with a corporation's risk management documents, and Baker involved notes defendant's attorney had taken during an interview of one of defendant's employees. Neither case discussed facts similar to those of this case, where existing information—recordings of public hearings—was transferred from a video record to a written record. Nor did Regents of the University of Minnesota v. United States, which defendants also cite, involve facts similar to those of this case. 340 F.R.D. 293, 309 (D. Minn. 2021).

The parties cite several cases dealing with assertions of work product over transcripts. Defendants cite Gulf Group General Enterprises Co. W.L.L. v. United States, which discussed a claim of work product over a transcript of the plaintiff's attorney's pre-deposition interview of a witness. 96 Fed. Cl. 64, 68 (2011). Because the defendant also had opportunity for a pre-deposition interview of the witness and because the transcript "effectively [sought] access to plaintiff's counsel's mental impressions and work product," the court denied the request for a copy of the transcript. Id. at 69.

Both sides argue Riddell Sports Inc. v. Brooks supports their position. There, the plaintiff's counsel possessed recordings of telephone conversations an officer of the plaintiff had had with the defendant. 158 F.R.D. 555, 558 (S.D.N.Y. 1994). The defendant requested unedited versions of all such tapes as well as transcripts of the recordings. In ordering production of the tapes and transcripts, the court stated:

> [T]he collection of evidence, without any creative or analytic input by an attorney or his agent, does not qualify as work product. . . . "At its core, the work-product doctrine exists to shelter the attorney's preparation and

> analysis of the case. . . .” [T]he transcription process . . . is entirely devoid of analysis or synthesis and so is beyond the work product doctrine.

Id. at 559 (quoting Bohannon v. Honda Motor Co., 127 F.R.D. 536, 540 (D. Kan. 1989)). Defendants point to that part of the opinion stating, “Under appropriate circumstances, tape recordings may be created in anticipation of litigation or in preparation for trial and so be exempt from disclosure.” Id. While that is an accurate restatement of one sentence of the Riddell opinion, it does not support defendants’ position. The recordings of the Legislative Assembly’s proceedings were not created in anticipation of litigation; they were created to memorialize public proceedings.

H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc., another case defendants cite, discussed tape recordings of conversations between a former employee of a defendant and two non-party witnesses. 108 F.R.D. 686, 687-88 (S.D.N.Y. 1985). The court found the tape recordings were likely protected under the work product doctrine. Id. at 690. But, like in Riddell, the tape recordings were not created to memorialize public proceedings.

Plaintiffs cite Biben v. Card, which involved a request for production of transcripts of testimony given before the Securities and Exchange Commission in connection with an SEC investigation. 119 F.R.D. 421, 424 (W.D. Mo. 1987). The court ordered production, finding Rule 26(b)(3)(C)’s previous statement exception applied. As to the assertion the transcripts were work product because they were obtained because of the existence of the case, the court stated, “The work product rule exists to protect ‘written statement[s], private memoranda and personal recollections prepared or formed by an adverse party’s counsel in the course of his legal duties’” and the “transcripts simply do not fit this description and are, therefore, not shielded from

discovery under the attorney work-product rule." Id. at 428-29 (quoting Hickman, 329 U.S. at 510).

Some courts have described the work product doctrine as intending to protect against disclosure of only an attorney's strategies and legal impressions. Kushner v. Buhta, 322 F.R.D. 494, 498 (D. Minn. 2017); Carlson v. Freightliner LLC, 226 F.R.D. 343, 366 (D. Neb. 2004). There is no real dispute that protection of an attorney's mental impressions and strategies is the primary purpose of the work product doctrine. And there is no conceivable argument that the transcripts at issue here reveal attorneys' mental impressions or strategies. The transcripts exist because of defense counsel's decision to transform the record of the Legislative Assembly's proceedings from video to written form. In this court's opinion, the transcripts are not protected from disclosure under the work product doctrine.[2]

Substantial Burden

If the transcripts were considered to be work product, plaintiffs argue that it would be a substantial burden for them to obtain second transcriptions of the proceedings and that as two private citizens claiming a violation of their constitutional rights they should not be required to bear that cost. This court agrees. Even if the transcripts were work product, plaintiffs have established they would be substantially burdened by bearing the cost of obtaining second transcriptions.

[2] The court is also mindful of Rule 1's directive that the Rules of Civil Procedure are to be "construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." (Emphasis added). To require plaintiffs to secure second transcriptions of the proceedings would be inconsistent with that directive. Further, any discrepancies between the two transcriptions could prove troublesome for the court.

Costs of Defendants' Production of the Transcripts

In their post-conference position statement, defendants propose as an alternative resolution that plaintiffs pay half the costs of the transcriptions.[3] (Doc. 74, p. 3). They argue it would be "manifestly unfair and inequitable" to allow plaintiffs to obtain the transcripts without sharing in the cost, citing Rule 26(c)(1)(B)'s provision giving the court discretion to protect a party from undue expense in the discovery process. Id. Defendants liken their proposal for cost-sharing to agreements or rulings for cost-sharing in procurement and production of electronically stored information, though those rulings or agreements typically precede search for and production of ESI. In this court's opinion, defendants have not shown sufficient reason to require that plaintiffs share in the costs of preparation of the transcripts.

Citing Kirschenman v. Auto-Owners Ins., 280 F.R.D. 474, 487 (D.S.D. 2012), plaintiffs contend the general rule of a producing party bearing the cost of production should apply. The court may, however, for good cause order an allocation of expenses of production pursuant to Rule 26(c)(1)(B). Defendants have not provided information about the number of pages in the transcripts or the cost of reproducing them and so have not shown good cause to require plaintiffs to bear those costs.

Conclusion

The transcripts are not protected from disclosure under the work-product doctrine and, even if they were considered to be work product, plaintiffs have shown they would be substantially burdened by bearing the cost of obtaining second

[3] Defendants acknowledge they had earlier proposed cost sharing to resolve the dispute but, at the time of the Rule 37.1 conference, stated that offer was no longer available. (Doc. 69-2, p. 2).

transcriptions. And Defendants have not shown good cause to require plaintiffs to bear production costs. Defendants must produce the transcripts to plaintiffs by January 13, 2023.

IT IS SO ORDERED.

Dated this 3rd day of January, 2023.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge