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., Defendants-Intervenors.	Case No. 1:22-cv-31 **ORDER DENYING STAY**

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. On January 3, 2023, this court determined the transcripts were not work product and directed defendants to produce them to plaintiffs by January 13, 2023. Defendants move for a stay of the January 3, 2023 order pending appeal. (Doc. 79).

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.

After the complaint was filed, defendants arranged for transcriptions of publicly available recordings of thirteen legislative committee meetings and two legislative floor sessions at a total cost of $24,181.45. (Doc. 81). During discovery, plaintiffs requested copies of the transcripts, but defendants asserted the transcripts were protected as work product. (Doc. 69-3, p. 34). On January 3, 2023, this court determined the transcripts were not protected by the work product doctrine and ordered defendants to produce the transcripts to plaintiffs by January 13, 2023. (Doc. 77). On January 12, 2023, defendants moved for a stay pending appeal to the presiding judge. (Doc. 79). That same day, this court extended defendants' deadline to produce the transcripts until a decision on the motion to stay. (Doc. 83).

Law and Discussion

When considering a motion for a stay pending appeal, courts generally consider four factors: (1) likelihood of the moving party's success on the merits, (2) irreparable

harm to the moving party absent a stay, (3) whether a stay would substantially injure the non-moving party, and (4) potential harm to the public interest. James River Flood Control Ass'n v. Watt, 680 F.2d 543, 544 (8th Cir. 1982); Walmart Inc. v. Synchrony Bank, No. 5:18-CV-05216-TLB, 2020 WL 475829, at *1 (W.D. Ark. Jan. 29, 2020). The party seeking a stay pending appeal bears the burden on each of the factors. Of the four factors, likelihood of success on the merits and irreparable harm are the "most critical." Pablovich v. Rooms to Go La. Corp., No. CV 20-617, 2021 WL 928030, at *2 (E.D. La. Mar. 11, 2021). Issuance of a stay is left to the court's discretion, with the court's judgment to be guided by sound legal principles. Nken v. Holder, 556 U.S. 418, 434 (2009).

Though perhaps applied more often in the context of an appeal to a circuit court, courts generally apply the same four factors to a motion to stay a magistrate judge's order regarding discovery pending an appeal to a presiding judge. See, e.g., Ad Astra Recovery Servs., Inc. v. Heath, No. 18-1145, 2020 WL 3163199, at *4 (D. Kan. June 12, 2020); Express Homebuyers USA, LLC v. WBH Marketing, Inc., No. 18-60166-CIV, 2018 WL 1814198, at *2 (S.D. Fla. March 1, 2018); Nat'l Union Fire Ins. Co. of Pittsburgh, Penn. v. Fed. Ins. Co., No. 13-cv-00079, 2016 WL 9735734, at *2 (D. Colo. June 9, 2016); Jenkins v. Robotec, Inc., No. 1:09cv150, 2009 WL 5166252, at *2 (S.D. Miss. Dec. 29, 2009); Adams v. Gateway, Inc., No. 02-106, 2004 WL 733990, at *2 (D. Utah Jan. 5, 2004).

1. Likelihood of Success on the Merits

In the absence of the parties' consent to jurisdiction of a magistrate judge, Federal Rule of Civil Procedure 72(a) and Civil Local Rule 72.1(D)(2) authorize a magistrate judge to decide nondispositive matters in civil cases and permit any party to

appeal a magistrate judge's determination to the presiding judge. On appeal, a presiding judge may modify or set aside any portion of a magistrate judge's order that is clearly erroneous or contrary to law. A decision in this district recently articulated the standard governing a presiding judge's review:

> A magistrate judge's decision in a discovery dispute is entitled to substantial deference, and will not be disturbed unless the "clearly erroneous" or "contrary to law" standards are met. A magistrate judge's finding is clearly erroneous when, although there may be some evidence to support it, the reviewing court, after considering the entirety of the evidence, is "left with the definite and firm conviction that a mistake has been committed." The burden of showing a ruling is clearly erroneous or contrary to law rests with the party filing the appeal.

Jacam Chem. Co. 2013, LLC v. Shepard, No. 1:19-cv-093, 2020 WL 6263747, at *2 (D.N.D. Aug. 18, 2020) (citations omitted). This court therefore considers the likelihood its January 3 order will be found clearly erroneous or contrary to law.

The primary dispute between the parties is whether defendants' transcripts constitute work product. The work product doctrine is governed by federal law, as codified in Federal Rule of Civil Procedure 26(b)(3). See Hanna v. Plumer, 380 U.S. 460, 473 (1965). Rule 26(b)(3) protects two types of work product—ordinary work product and opinion work product. Ordinary work product "includes raw factual information" gathered in anticipation of litigation. Baker v. Gen. Motors Corp., 209 F.3d 1051, 1054 (8th Cir. 2000). Ordinary work product is discoverable only upon a showing of "substantial need for the materials" and inability to obtain a substantial equivalent without "undue hardship." Fed. R. Civ. Pro. 26(b)(3). Opinion work product is defined as the "mental impressions, conclusions, opinions, or legal theories of a party's

attorney." Id. Opinion work product "enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances."[1] Baker, 209 F.3d at 1054.

Defendants argue they are likely to succeed on the merits because this court erred by (1) not determining the transcripts constituted ordinary work product; (2) determining that, if the transcripts were work product, plaintiffs would be unduly burdened in obtaining a substantial equivalent; and (3) denying defendants' request that if production of the transcripts were ordered, plaintiffs pay half the costs of transcription.

First, defendants take issue with the court's statement that "[t]he recordings of the Legislative Assembly's proceedings were not created in anticipation of litigation; they were created to memorialize public proceedings." (Doc. 77, p. 7). Defendants' counsel stated in an affidavit that "the decision to have the transcripts made [was] in anticipation of litigation or for use at trial, and for no other purpose." (Doc. 81, p. 3). Relatedly, defendants argue the court failed to distinguish ordinary work product from opinion work product such that "the lack of attorney mental impressions in the transcripts was fatal to their protection as trial preparation materials under the Rule." (Doc. 80, p. 2). Defendants argue the transcripts constitute ordinary work product. Id. at 6.

Second, defendants argue the court erred by finding that even if the transcripts constituted work product, plaintiffs would be unduly burdened in obtaining equivalent

[1] Those rare circumstances, such as an "attorney engaged in illegal conduct or fraud," are not relevant here. See Baker, 209 F.3d at 1054.

transcripts. Defendants point out that recordings of the proceedings are publicly available and therefore plaintiffs can obtain their own transcripts. Id. at 9.

Third, defendants argue this court erred by not ordering plaintiffs to pay half the costs of the transcripts. Defendants contend plaintiffs "have made no showing they cannot afford" to pay for half the transcription costs if production is ordered and "if [plaintiffs] prevail, those costs will be recouped." Id. at 10.

Plaintiffs, for their part, argue defendants "fail to cite any additional caselaw to support their argument or to contradict the cases relied upon" by the court. (Doc. 82, p. 4). Plaintiffs assert defendants' argument "is one of semantics" and defendants have not demonstrated "the transcripts at issue reveal the mental impressions or strategies of [d]efendants' counsel." Id.

The Supreme Court's decision in Hickman v. Taylor, which laid the foundation for Rule 26(b)(3), recognized the work product doctrine as protecting the "attorney's file" because "it is essential that a lawyer work with a certain degree of privacy." 329 U.S. 495, 510 (1947). With that background, courts describe the work product doctrine as "'intended only to guard against divulging the attorney's strategies and legal impressions.'" Kushner v. Buhta, 322 F.R.D. 494, 498 (D. Minn. 2017) (quoting Resol. Tr. Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995)). As the Supreme Court has stated, "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." United States v. Nobles, 422 U.S. 225, 238 (1975). This court therefore

joined other courts in stating that "protection of an attorney's mental impressions and strategies is the primary purpose of the work product doctrine."[2] (Doc. 77, p. 8).

In light of the work product doctrine's purpose, the January 3 order stated the recordings of the Legislative Assembly's proceedings—not the transcripts—were created to memorialize public proceedings. Id. at 7. Defendants fail to recognize that sentence as referring to creation of the recordings rather than creation of the transcripts. The transcription of those public proceedings changed their form—from audio to text—but not their substance. The transcripts contain only public information, and no attorney strategy would be implicitly or explicitly revealed through disclosure. In other words, the transcripts did not constitute work product because they revealed nothing about the mental processes of the attorney. See Baker, 209 F.3d at 1054; see also Riddell Sports Inc. v. Brooks, 158 F.R.D. 555, 559 (S.D.N.Y. 1994) ("The same is true of the transcription process: it is entirely devoid of analysis or synthesis and so is beyond the work product doctrine."). Nor does the fact defense counsel arranged for preparation of the transcripts lead to the transcripts being considered work product.

[2] This purpose is applicable to both ordinary and opinion work product. Even though ordinary work product covers factual information, its protection is premised on the concern disclosure would inferentially reveal an attorney's strategy. See Hickman, 329 U.S. at 511 ("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."). Indeed, Rule 26(b)(3) anticipates a substantial overlap between ordinary and opinion work product. Rule 26(b)(3)(A) protects ordinary work product, which is discoverable upon a showing of substantial need. Rule 26(b)(3)(B) states that if a court orders production of "those materials," referring to ordinary work product, "it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney."

Next, the January 3 order held that "[e]ven if the transcripts were work product, plaintiffs have established they would be substantially burdened by bearing the cost of obtaining second transcriptions." (Doc. 77, p. 8). As defendants point out, records of the proceedings are public and available to plaintiffs. But as the January 3 order recognized, plaintiffs would likely have to expend thousands of dollars to obtain a substantial equivalent. Plaintiffs established a "substantial need for the materials" under Rule 26(b)(3)(A)(ii). And as referenced in the January 3 order, Federal Rule of Civil Procedure 1 directs the parties and the court to work toward the inexpensive determination of every case. Id. at 8 n.2.

Finally, the January 6 order determined defendants had not provided sufficient information about "the number of pages in the transcript and the costs of reproducing them" to allocate expenses under Rule 26(c)(1)(B). (Doc. 77, p. 9). Defendants provided additional information in their motion for a stay, but the court finds good cause to require payment by plaintiffs has not been established. See, e.g., Oxbow Carbon & Mins. LLC v. Union Pac. R.R. Co., 322 F.R.D. 1, 11 (D.D.C. 2017) ("[C]ourts and parties should continue to assume that a responding party ordinarily bears the costs of responding.").

For those reasons, defendants have not shown it is likely the January 3 order will be found clearly erroneous or contrary to law, and this factor weighs against granting a stay.

2. Irreparable Harm to Defendants and Injury to Plaintiffs

The court next considers the possibility of irreparable harm to defendants absent a stay and whether a stay would substantially injure plaintiffs. Defendants assert "forcing production of the transcripts prior to [d]efendants having recourse to an

appeal" will remove their "Rule 72 appeal rights." (Doc. 80, p. 12). Plaintiffs respond that there is "no irreparable harm in disclosing public documents." (Doc. 82, p. 5).

Defendants' appeal will be considered regardless of whether a stay is granted. Nor will denial of a stay reveal confidential information. Defendants cite cases that recognize the interests at stake in disclosing confidential information. See W. Horizons Living Centers v. Feland, 853 N.W.2d 36, 39 ("[O]nce the disclosures ordered by the district court are made, they cannot be unmade."). But the transcripts contain only public information, which is already available to plaintiffs in another form. Further, any financial burden imposed on defendants by the absence of a stay could be remediated if they prevail on appeal.

Defendants contend plaintiffs will not be injured by a stay because recordings of the Legislative Assembly's proceedings "remain fully available for plaintiffs to use for summary judgment or other purposes." Id. Plaintiffs respond that "the transcripts will be the critical piece of evidence for the [p]laintiffs' summary judgment motion." (Doc. 80, p. 5). Dispositive motions are due February 28, 2023. (Doc. 70). If a stay is granted but defendants do not prevail on appeal, plaintiffs would have less time to utilize the transcripts to prepare their dispositive motion. And any inconsistencies between the two transcripts could lead to additional litigation. Accordingly, these factors weigh against a stay.

3. Public Interest

The last factor considered is whether a stay would be in the public interest. Plaintiffs note "[p]roduction of the transcripts in [d]efendants' possession would put all the relevant facts, evidence, and testimony directly before the court." (Doc. 82, p. 7). Defendants contend "[a]ll of the legislative hearings and sessions records and videos

continue to be publicly available and will remain so during the pendency of the brief appeal." (Doc. 80, p. 13). As this court stated in its January 3 order:

> 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.

(Doc. 77, p. 8 n.2). Granting a stay would potentially prolong this litigation, increase its cost, and be inefficient. Accordingly, this factor weighs against granting of a stay.

Conclusion

The court has considered each of the factors discussed above. The motion to stay the January 3, 2023 order pending a decision on the appeal to the presiding judge, (Doc. 79), is **DENIED**. Defendants are directed to produce the transcripts by January 31, 2023.

IT IS SO ORDERED.

Dated this 24th day of January, 2023.

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