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## iii. Evidence

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Similarly, Martin Marietta wanted to prevent production of the data underlying the documents, as defense counsel in *Nobles* attempted to withhold the investigator's written report.

The Supreme Court in *Nobles* made clear that the salient feature of the implied waiver is counsel's attempt to use the work-product material in testimony. The Fourth Circuit determined that Martin Marietta's disclosure of the documents to the DOD constituted testimonial use. The court relied on three factors in reaching its determination. First, the *Martin Marietta* court held that Martin Marietta's interests and the DOD's interests were sufficiently adverse. Second, the Fourth Circuit noted that Martin Marietta expressly assured the government of complete disclosure of the documents. Finally, the court found that Martin Marietta disclosed the documents to the government to induce a settlement. The Fourth Circuit held that Martin Marietta's disclosure of documents to the government was a testimonial action and, consequently, that Martin Marietta had impliedly waived any work-product privilege as to work-product material contained in the disclosed documents.

The *Martin Marietta* court last addressed the issue of the extent of the implied waiver of Martin Marietta's work-product privilege. After noting that the Fourth Circuit previously had placed documents into opinion work-product and nonopinion work-product categories, the court determined that the implied waiver should not apply to the former classification of documents. The Fourth Circuit reasoned that courts traditionally have protected opinion work product, which includes an attorney's pure mental impressions and legal theories. The court also indicated that an attorney's legal theory has little relevance in determining the facts of a case, the primary purpose of discovery.

The Fourth Circuit, therefore, upheld the district court's ruling on the documents that Martin Marietta claimed to be under attorney-client privilege and vacated the district court's decision as to the documents that Martin Marietta classified as work product. Upon remand, the Fourth Circuit ordered the district court to hold an *in camera* hearing at which Martin Marietta will have the burden of distinguishing between the opinion work-product documents and the nonopinion work-product documents. According to the Fourth Circuit, if Martin Marietta can convince the district court of the existence of opinion work product, the district court must protect those documents from disclosure.

#### EVIDENCE

In *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652 (4th Cir. 1988), the Fourth Circuit considered whether statements that attorneys make in the course of settling prior related litigation between parties are admissible under FEDERAL RULE OF EVIDENCE 408 as statements made in the course of settlement negotiations.

Fiberglass Insulators, Inc., a company that Krauss owned, sued Dupuy in an antitrust suit, alleging that Dupuy attempted to eliminate Fiberglass as a competitor in the insulation business by such activities as predatory pricing. Krauss and Dupuy had been involved in five or six lawsuits since