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unless a person can come within the *Kintner* rule,⁹² the new act does afford certain tax advantages so as to justify its use by those individuals who would otherwise be unable to establish a qualified pension or profit-sharing plan.

ATTORNEY'S WORK PRODUCT RULE—AN AREA OF CONFUSION

I. THE FEDERAL RULES CONCERNING PRETRIAL DISCOVERY

The Federal Rules of Civil Procedure evidence an attitude¹ more liberal than the restrictive common-law rule towards pretrial discovery.² The scope of the deposition-discovery mechanism is determined by rule 26(b).³ Although this rule specifically refers merely to depositions,⁴ it is basic to the entire deposition-discovery mechanism⁵ in that it is incorporated by reference into all of the other federal procedural rules.

Rule 26(b) provides for discovery of information, books, papers, documents and other tangibles. The term, "work product"⁶ of a lawyer, would normally connote these discoverable items. However, they are discoverable only if they are relevant and not privileged.⁷ The limitations set out in Federal Civil Rule 30(b) and (d),⁸ which qualify rule 26(b), do not clarify the effect of the latter on the "work product" privilege, since they merely indicate that a court can exercise discretion, upon a showing of good cause, in limiting the extent, time and place of discovery and the taking of depositions.

This situation has produced confusion. The normal tangible manifestations of trial preparation were seemingly included within the permissible scope of discovery, yet the material was not susceptible to discovery if "privileged."

92. See notes 4-7 *supra* and accompanying text.

1. "The basic philosophy of the present federal procedure is that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged." 2A Barron & Holtzoff, *Federal Practice and Procedure With Forms* § 641, at 13 (Rules ed. 1961).

2. Fed. R. Civ. P. 26-37.

3. "Rule 26. Depositions Pending Action

(b) Scope of Examination. Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. . . ." Fed. R. Civ. P. 26.

4. *Ibid.*

5. 2A Barron & Holtzoff, *Federal Practice and Procedure With Forms* § 641 (Rules ed. 1961).

6. The term "work product" has been defined as "the results of the lawyer's use of his tongue, his pen, and his head, for his client." *Hickman v. Taylor*, 153 F.2d 212, 223 (3d Cir. 1945).

7. See note 3 *supra*.

8. Fed. R. Civ. P. 30(b), (d).

The precise meaning of "privileged," as used in the rules, was not made clear. Rule 34,⁹ dealing more particularly with the production and copying of designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters. . .¹⁰

within the scope of permissible discovery¹¹ offered no clarification. Production was based upon a showing of good cause, and the order requiring it was expressly limited to a party and to things in his or her custody.¹²

The present construction of these rules that, absent a showing of good cause, the work product of an attorney should be privileged from disclosure to adverse parties,¹³ has strong roots in the common law. However, no distinction was drawn between materials personally prepared by the attorney; those provided for him by his client¹⁴ and, materials compiled by others at his suggestion.¹⁵ Nor would there seem to be any reason for observing such a distinction.¹⁶ This privilege was not predicated on mere membership in the bar, but rather for it to accrue, the lawyer must have been acting in his capacity as an attorney, *i.e.*, giving legal advice on a particular matter.¹⁷ In addition, it would appear that the attorney had to be engaged in preparation for litigation.¹⁸

Application of the privilege was not restricted to statements and other trial materials personally compiled by counsel but extended to materials gathered by agents of the client for litigation purposes,¹⁹ and even to statements taken by agents of a corporation in the regular course of business.²⁰ Thus, at common

9. Fed. R. Civ. P. 34.

10. *Ibid.*

11. As set out in rule 26(b), see note 3 *supra*.

12. See note 9 *supra*.

13. See *Hickman v. Taylor*, 329 U.S. 495 (1947).

14. The latter involves the attorney-client privilege.

15. *Southwark & Vauxhall Water Co. v. Quick*, [1873] 3 Q.B. 315.

16. See Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 456 (1946) [hereinafter cited as Proposed Amendment].

17. *Avery v. Lee*, 117 App. Div. 244, 102 N.Y. Supp. 12 (1st Dep't 1907) (attorney acting as broker—no privilege).

18. See *Crosby v. Berger*, 11 Paige (N.Y.) 377 (Ct of Ch. 1844) (information obtained from a third party by an attorney acting in a general capacity as counsellor—not privileged). Compare, *Peck v. Williams*, 13 Abb. Pr. 68 (N.Y. Super. Ct. 1861) which held, on similar facts, that there was no privilege because there "must be at least a controversy anticipated between the parties in relation to the subject of which the communications were made to counsel. . ." for a privilege to apply. *Id.* at 71.

19. *Wise v. Western Union Tel. Co.*, 36 Del. 456, 178 Atl. 640 (1935). "There seems to be no doubt that reports or statements submitted by an agent to his principal for the purpose of being laid before an attorney for guidance in . . . impending litigation are privileged." *Id.* at 461, 178 Atl. at 642.

20. *Ex parte Schoepf*, 74 Ohio St. 1, 77 N.E. 276 (1906). Reports made in anticipation of a possible litigation and in possession of counsel for use in the suit are privileged, and

law the attorney's "work product" privilege was given broad sweep and, as a necessary consequence, pretrial discovery was severely restricted.

The policy underlying the restrictions on discovery, which seems harsh in light of present day federal practice, was an implicit faith in the efficacy of the adversary system as a means of ascertaining truth and the belief that the "fishing expedition" was not to be tolerated. Thus, each litigant was to prepare his case independently, and without scrutiny of his opponent's preparations. Since the Federal Rules of Civil Procedure²¹ were, at best, unclear regarding their intended effect on the "work product" privilege, the courts were faced with the task of striking a balance between the common-law policy calling for protection of the attorney and his work and, the newer policy, calling for extensive pretrial discovery. This has been said to be the most vexatious problem to have arisen under the federal rules.²²

II. DECISIONS UNDER THE FEDERAL RULES AS ORIGINALLY INTERPRETED

Indicative of the conflict between the restrictive discovery policies of the adversary system and the liberal policies of the federal rules was *Bough v. Lee*.²³ There, the court ordered production of statements and photographs relating to a contested accident. These materials had been acquired by the defendant's insurer and turned over to its attorney for use in defending the action. Although the court ordered production, it recognized the existence of a "work product" privilege in basing its decision on the fact that the materials were prepared by the insurance company and "[were] not obtained by the attorney in preparation for, nor in anticipation of, this action."²⁴ A similar result was reached in *Price v. Levitt*,²⁵ where the materials in question had been procured by the insurer before retention of counsel and, therefore, were not the fruits of an investigation by an attorney or one acting in his behalf.²⁶ Likewise in *Kulich v. Murray*,²⁷ insurer's reports were not granted a privilege

there is no reason to modify that rule because defendant is a corporation and obtained the memoranda and reports through the usual agencies of a corporation. *Id.* at 15, 77 N.E. at 279. The matter in issue was the standard report made by conductors in the event of accident.

21. Fed. R. Civ. P. 26-37. These are the rules relating to pretrial discovery.

22. 2A Barron & Holtzoff, *Federal Practice and Procedure With Forms* § 652 (Rules ed. 1961). "Probably the most troublesome question relating to the scope of discovery is the extent to which a party may inspect documents developed in the course of his opponents' preparation of the case, that is, the writings, statements of witnesses, etc., obtained or prepared by the adverse party, his attorneys, agents or insurers, in anticipation of litigation or in preparation for trial." *Id.* at 118.

23. 29 F. Supp. 498 (S.D.N.Y. 1939).

24. *Id.* at 501.

25. 29 F. Supp. 164 (E.D.N.Y. 1939).

26. The common-law rule drew no such distinctions. See, e.g., *Southwark & Vauxhall Water Co. v. Quick*, [1878] 3 Q.B. 315.

27. 28 F. Supp. 675 (S.D.N.Y. 1939). See also *Seligson v. Camp Westover Inc.*, 1 F.R.D. 733 (S.D.N.Y. 1941) holding that the location of the material in the files of an insurance company or its attorney does not make it privileged.

because their production would not constitute an invasion of an attorney's files, but only those of an insurance company. While these decisions expand the scope of discovery allowed at common law, they are all careful to point out, at least impliedly, that the materials which comprise an attorney's trial preparation are to be privileged. It would appear that the reasoning of these cases has been influenced on the one hand by the dictates and policies of the new procedural rules, and on the other, by a reluctance to open the gates to unlimited discovery. This is the only feasible explanation for the refusal to grant protection from disclosure merely because an insurance company was involved. In practice, preparing the defense of negligence actions is carried on almost exclusively by the defendant's insurer. Moreover, most liability policies make such a procedure mandatory. Where lies the distinction between the disclosure of preparation in these cases and cases where the attorney for the defendant personally prepares the defense? In both instances the party defending has prepared his defense.

Another line of cases declined to apply the privilege to situations where the statements had been taken in the normal course of business even though they were obtained with a view towards litigation, and were, in fact, so used. These cases, too, attempted to maintain, to some extent, the policy of according protection to trial preparations. *Murphy v. New York & Porto Rico S.S. Co.*,²⁸ held that statements of witnesses procured in the regular course of business were discoverable. That court, however, qualified its decision by saying that it is not to be supposed that the Court would direct the disclosure to the plaintiff's attorney of information gathered by the defendant's attorney after the . . . accident in preparation for the defense of the action.²⁹

*Colpak v. Hetterick*³⁰ followed this result regarding statements made in the course of business, but based its holding on the ground that the discovery rules were to be used to uncover only evidence on any matter involved in the action. *Kane v. News Syndicate Co.*³¹ granted discovery of similar statements which had become part of the attorney's file on the case. This represents the extreme to which the common law "work product" privilege had been restricted.

It is not to be supposed, however, that the cases which granted a privilege were any more certain of their basis than those compelling disclosure. In *Poppino v. Jones Store Co.*,³² the court found reports, witnesses' statements, and photographs, gathered by insurance investigators and placed in the custody of the insurance company's counsel, to be privileged on the ground that those items were immaterial as evidence and, therefore, not subject to discovery. The rationale supporting this determination was that the federal rules were intended

28. 27 F. Supp. 878 (S.D.N.Y. 1939).

29. Id. at 880.

30. 40 F. Supp. 350 (E.D.N.Y. 1941). Accord, *Corbett v. Columbia Transp. Co.*, 5 F.R.D. 217 (W.D.N.Y. 1946).

31. 1 F.R.D. 738 (S.D.N.Y. 1941).

32. 1 F.R.D. 215 (W.D. Mo. 1940).

to be used only to obtain evidence, and not to ascertain an opponent's position.³³ Nevertheless, the court discussed, in great detail, its deep concern for the attorney's freedom from discovery in his trial preparations,³⁴ and this seems to have been a very real consideration in the determination of the matter.

One test for determining discoverability, therefore, was the materiality of the items sought to be discovered. This rule was expressly set down in *Condry v. Buckeye S.S. Co.*,³⁵ where production of written memoranda, prepared in anticipation of litigation was denied since the memoranda were not evidence as such, but were only intended for use at the trial if the witnesses concerned were called to testify.

Still other cases took the position that the results of preparation for litigation were sacrosanct. *McCarthy v. Palmer*³⁶ held that although the new rules were intended to facilitate liberal pretrial examination and discovery, to allow them to be used to appropriate the opponent's preparation of his case "would penalize the diligent and place a premium on laziness. It is fair to assume that, except in the most unusual circumstances, no such result was intended."³⁷ Following this rationale, *Courteau v. Interlake S.S. Co.*³⁸ held that statements of witnesses made to an attorney were simply not subject to discovery. Likewise, in *Piorkowski v. Socony-Vacuum Oil Co.*,³⁹ the court refused to allow one party to profit by the other's investigation where statements of witnesses were concerned. Interrogatories calling for an opinion were also held privileged on the authority of the *McCarthy* case.⁴⁰

This theory found its fullest expression in *Stark v. American Dredging Co.*,⁴¹ which might be described as the precursor to the Supreme Court's apparent solution⁴² of the problem in *Hickman v. Taylor*.⁴³ The *Stark* court was called upon to decide the susceptibility to discovery of signed statements of the defendant's employees made to its insurance carrier. The court decided that: The statements were obtained in anticipation of a suit being brought . . . and must be considered as part of the defendant's preparation of its case. No line of demarcation in this respect can logically be drawn between statements obtained before a suit is actually begun and those obtained thereafter.⁴⁴

33. This theory is no longer valid. Rule 26(b) has been amended to the effect that the materiality and relevancy of the material sought is no longer determinative of the propriety of its discovery. Fed. R. Civ. P. 26(b).

34. 1 F.R.D. at 219.

35. 4 F.R.D. 310 (W.D. Pa. 1945).

36. 29 F. Supp. 585 (E.D.N.Y. 1939).

37. *Id.* at 586.

38. 1 F.R.D. 525 (W.D. Mich. 1942).

39. 1 F.R.D. 407 (M.D. Pa. 1940).

40. *Byers Theatres Inc. v. Murphy*, 1 F.R.D. 286 (W.D. Va. 1940).

41. 3 F.R.D. 300 (E.D. Pa. 1943).

42. The problems presented, the final results, and the supporting rationale are quite similar in each of the cases.

43. 329 U.S. 495 (1947).

44. 3 F.R.D. at 301.

In discussing those decisions where production was allowed, the court characterized them as cases where "special considerations seem to have controlled."⁴⁵ Then, having established a rule, the court qualified it:

The rule should not and has not been made an absolute one so as to work injustice or unnecessarily impede the production of material evidence. . . . A request to produce statements of witnesses taken by the other party in preparation for trial "should be predicated upon good cause shown."⁴⁶

Between these two positions are cases typified by *Matthies v. Peter F. Connolly Co.*,⁴⁷ which held that

reports, statements and affidavits taken by the company *before* the matter is submitted to its attorney can properly be examined but statements and affidavits taken by the attorney for the Insurance Company, in preparation for trial, are privileged.⁴⁸

Perhaps the most apt characterization of the entirety of judicial opinion on the point would be that there was a vacuum that could be filled⁴⁹ only by the definitive pronouncement of a higher court or by amendment of the rules specifically covering the point.

III. PROPOSED SOLUTIONS

A. *Proposed Amendment of the Rules*

In June of 1946, after a four year study of the problems precipitated by the federal rules, the Advisory Committee on the Rules for Civil Procedure proposed to the Supreme Court a slate of amendments.⁵⁰ Included in the proposed revision was the following addition to rule 30(b) specifically covering discovery of matters obtained in preparation for litigation.⁵¹

The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or

45. *Ibid.*

46. *Id.* at 302.

47. 2 F.R.D. 277 (E.D.N.Y. 1941).

48. *Ibid.* (Emphasis added.)

49. There has been no definitive appellate decision on the point due to the lack of effective means of appellate review of discovery orders. One can decline to comply with a discovery order and take an appeal from a contempt citation if one is handed down. Alternatively, he may appeal the dismissal of the action, if it is dismissed for failure to comply, but this is a very hazardous course of action. The court may, however, issue some nonappealable order, such as a stay of further proceedings until the production order is complied with. (The prospective appellant is seemingly at the mercy of the district court.) Denial of discovery is only appealable after a judgment on the merits, at which point the damage is already done. 4 Moore, *Federal Practice* ¶ 26.37[7] (2d ed. 1962).

50. Proposed Amendment, 5 F.R.D. 433 (1946).

51. *Id.* at 456.

injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35,^{52]} the conclusions of an expert.⁵³

Unlike a judicial determination of the point, this rule was not set in, nor colored by, any particular set of circumstances and the considerations of substantial justice surrounding them. This form of clarification could and would have answered the question with regard to all situations since it would not have been subject to distinctions based on factual situations.

The amendments were submitted to the Supreme Court after it had granted certiorari in what was to become the landmark case on the point—*Hickman v. Taylor*.⁵⁴ Obviously preferring to deal with the matter by decision, the Court did not adopt the proposed amendment.

B. *Hickman v. Taylor*

This case arose out of a death action brought under the Jones Act.⁵⁵ A tug boat sank and four of her crew died in the accident. As was customary, the Steamboat Inspectors conducted a hearing during which the statements of the surviving crewmen were taken. The attorney for the tug company, anticipating a possible lawsuit, then took statements of the survivors immediately after the hearing. Eight months later, the plaintiff brought an action in which thirty-nine interrogatories were filed. Defendant refused to answer the request to:

"State whether any statements of the members of the crews of the Tugs '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.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."⁵⁶

The defendants claimed that this interrogatory called for "'privileged matter obtained in preparation for litigation.'"⁵⁷ They also declined to answer supplemental interrogatories, calling for memoranda and further specifics concerning the statements, on the same ground.

The district court distinguished the *Stark* case⁵⁸ (which it had decided three years earlier) on the ground that no hard and fast rule had been laid down there, and ordered production.⁵⁹ The defendants declined, and took an appeal from the district court's determination that they were in contempt of court.⁶⁰

52. Rule 35 provides for physical and mental examinations and that reports of the results thereof be made available to both parties. Fed. R. Civ. P. 35.

53. Proposed Amendment, 5 F.R.D. at 456-57. (Emphasis omitted.)

54. 328 U.S. 876 (1946). Certiorari had been previously denied. 327 U.S. 808 (1946).

55. Act of June 5, 1920, ch. 250, 41 Stat. 988 (codified in scattered sections of 46 U.S.C.).

56. *Hickman v. Taylor*, 4 F.R.D. 479, 480 (E.D. Pa. 1945).

57. *Ibid.*

58. See note 41 *supra*.

59. 4 F.R.D. at 481-82.

60. "(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the

The court of appeals reversed⁶¹ and the plaintiff appealed to the Supreme Court.⁶²

The Supreme Court⁶³ considered the basic question to be whether any of the devices in the deposition-discovery mechanism⁶⁴ might be used to inquire into materials collected by an adverse party's lawyer in preparing for anticipated litigation. To solve this, there necessarily had to be a determination of whether the attorney-client privilege is dispositive of the "work product" difficulty; and, if not, whether that privilege is the sole exemption to discovery under the "privilege" exemption in the federal rules.

The court summarily held the attorney-client privilege to be inapplicable to the facts of the case.⁶⁵ Therefore, if protection from discovery were to be accorded to the attorney's "work product," the "privilege" exemption had to encompass more than the traditional attorney-client exemption.

In its decision, the Court adopted the spirit, if not the letter, of the proposed amendment.⁶⁶ The Supreme Court felt that in this case a full and complete disclosure by defendant's counsel would necessarily include all the pertinent information garnered, as well as the evaluations and conclusions drawn therefrom. The Court did not approve of such an attempt to secure the opposition's files without a showing of sufficient reason. Since the petitioner was free to examine the testimony of the witnesses taken at the public hearings conducted by the Steamboat Inspectors, there could be no good reason for requiring the defendant to produce the statements of these same witnesses.

Due to these circumstances, the Court indicated a balance that should prevail between the conflicting policies of legal freedom and full pretrial disclosure:

In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in these rules. Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. *Not even the most liberal of discovery*

deposition is being taken, the refusal may be considered a contempt of that court." Fed. R. Civ. P. 37(b)(1). (Emphasis omitted.)

61. *Hickman v. Taylor*, 153 F.2d 212 (3d Cir. 1945).

62. After once denying certiorari, the Supreme Court finally agreed to hear the matter. See note 54 supra.

63. *Hickman v. Taylor*, 329 U.S. 495 (1947).

64. Fed. R. Civ. P. 26-37.

65. 329 U.S. at 507. The attorney-client privilege does not apply to: a) information secured from witnesses by an attorney acting on behalf of his client in anticipation of litigation; b) memoranda, briefs, communications, etc., prepared by counsel for his own use in prosecuting his client's cause; or, c) writings reflecting his mental impressions, opinions, or legal theories. *Id.* at 508.

66. Clark, *Experience Under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497, 502 (1949).

*theories can justify unwarranted inquiries into the files and the mental impressions of an attorney. . . . In performing his various duties . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.*⁶⁷

The opinion clarifies the underlying equities, and the scope of the privilege. The adversary system, it was felt, required counsel to marshal and sift the facts involved, determine their relevancy, and prepare strategy accordingly. Since this effort is naturally reflected in statements, memoranda, and the like, they must be protected from discovery. To deny these tangible items protection would only force them to be collected unwritten. The Court saw this result as a disastrous one, productive of sharp practice, inefficiency, and a general demoralization of the legal profession.⁶⁸

The import of this decision is not, however, a bestowal of absolute privilege upon trial preparations. Throughout its opinion, the Court was careful to indicate that the immunity conferred was, at best, a quasi-privilege conditioned on the absence of a showing of good cause by the movant.⁶⁹ In its consideration of this requirement, the majority indicated that where a witness was unavailable, or could be reached only with great difficulty, discovery would be proper. The burden of proving the need for discovery was placed upon the party seeking production and was considered to be implicit in the federal rules.⁷⁰

IV. PROBLEMS REMAINING AFTER *Hickman v. Taylor*

Hickman clarified the position of the federal rules with respect to the privilege safeguarding trial preparation. However, the proper application of the rule was left to future decisions.

A. *Materials Prepared by Third Parties*

The first case under the *Hickman* rule dealt with the problem of statements, reports and photographs compiled by claims agents⁷¹ for the use of counsel in defense of an action. The rule was held to be applicable only to attorneys.⁷²

67. 329 U.S. at 509-11. (Emphasis added.)

68. *Id.* at 511.

69. The impact of the *Hickman* rule has been expressed as follows: "(1) Information as to facts of the case and statements of witnesses obtained by the adverse party's attorney are not within the common-law attorney-client privilege; (2) Even the broader policy against invasion of the attorney's privacy and freedom in the preparation of the case does not make them absolutely immune, but (3) The party asking for disclosure is bound to show that the situation is a rare one having exceptional features which make the disclosure necessary in the interests of justice; and (4) Where the party seeking discovery has obtained or is able to obtain the information asked for elsewhere, he has not met the burden." 4 Moore, *Federal Practice*, ¶ 26.23[8.-1], at 1381-82 (2d ed. 1962).

70. 329 U.S. at 512.

71. The fact that the person preparing the material in these cases was a claims agent does not seem to be the significant factor; rather the fact that the materials were prepared by third persons appears to be determinative.

72. *De Bruce v. Pennsylvania R.R.*, 6 F.R.D. 403 (E.D. Pa. 1947).

Another early case indicated that this was to be the rule of application since the claims agent or investigator was not within the narrow question presented in *Hickman*.⁷³ The basis of this position seems to lie not only in the difference in the questions, but also in the inherent dissimilarity of the functions of the claims agent and the attorney.⁷⁴ Exclusion of this sort of material from the "work product" immunity is still observed by many courts,⁷⁵ and has been considered a settled principle.⁷⁶

The additional factor of supervision by an attorney would not transform the fruits of such an investigation into "work product."⁷⁷ This position has even resulted in discovery of the results of, and methods used in, a public survey conducted under the supervision of attorneys preparing to prosecute a claim of trademark infringement.⁷⁸ Under this strict view, the fact that the claims agent happens to be an attorney does not immunize the results of his work, even though his efforts were in preparation for trial.⁷⁹ Seemingly, this reasoning is based on the theory that the hat worn by a particular individual at the crucial time is the determining factor. If some of the lawyer's services, therefore, were those of a claims agent, there would be no exemption.⁸⁰ Pursued to its logical conclusion, this results in a judicial reluctance to apply the privilege to statements taken by attorneys, since the usually discoverable work of investigators would then be performed by lawyers in an attempt to avoid discovery.⁸¹

It is difficult to extract a general rule from these decisions since they are not extensively reasoned.⁸² Possibly the rationale of the cases applying the "exercise of legal skill" test⁸³ to determine immunity under "work product" justifies the rule regarding information obtained through the offices of third parties. However, these cases are generally concerned with the nature of the material rather than its origin.

The position holding claims agents and other third parties who supply

73. *Thomas v. Pennsylvania R.R.*, 7 F.R.D. 610 (E.D.N.Y. 1947).

74. *Hughes v. Pennsylvania R.R.*, 7 F.R.D. 737 (E.D.N.Y. 1948). "What an attorney does to prepare his client's cause for trial, and what a Claim Agent does for his employer prior to institution of a lawsuit, and which may never be embodied in a lawyer's file, are thought to be diverse products." *Ibid.*

75. E.g., *Gulfport Nat'l Bank v. Southern Ry.*, 24 F.R.D. 493 (M.D.N.C. 1960).

76. *Szymanski v. New York, N.H. & H.R.R.*, 14 F.R.D. 82 (S.D.N.Y. 1952).

77. *United States v. Certain Parcels of Land*, 15 F.R.D. 224 (S.D. Cal. 1953); *Durkin v. Pet Milk Co.*, 14 F.R.D. 385 (W.D. Ark. 1953).

78. *Seven-Up Co. v. Get Up Corp.*, 30 F.R.D. 550 (N.D. Ohio 1962).

79. *Newell v. Capital Transit Co.*, 7 F.R.D. 732 (D.D.C. 1948).

80. *Reiss v. British Gen. Ins. Co.*, 9 F.R.D. 610 (S.D.N.Y. 1949).

81. *Caruso v. Moore-McCormack Lines, Inc.*, 196 F. Supp. 675 (E.D.N.Y. 1961).

82. 2A *Barron & Holtzoff, Federal Practice and Procedure With Forms* § 652.2 (Rules ed. 1961).

83. See, e.g., *Connecticut Mut. Life Ins. Co. v. Shields*, 16 F.R.D. 5 (S.D.N.Y. 1954); *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55 (N.D. Ohio 1953); *Biferato v. States Marine Corp.*, 11 F.R.D. 44 (S.D.N.Y. 1951); *Cogdill v. TVA*, 7 F.R.D. 411 (E.D. Tenn. 1947).

information to be used in litigation beyond the protection of the *Hickman* privilege is by no means universal. The contrary view arose almost simultaneously. In *Hanke v. Milwaukee Elec. Ry. & Transp. Co.*,⁸⁴ a court held that information, witnesses' statements, and memoranda were not discoverable from the general claims agent of the defendant. Under this rationale, it has been held, a fortiori, that preparation by third parties under the direction of counsel would be privileged.⁸⁵

The best reasoned apologia for this latter position (and treatment of the problem in general) is to be found in *Alltmont v. United States*.⁸⁶ This case is quite similar on its facts to *Hickman*. In *Alltmont*, however, the statements were taken by members of the Federal Bureau of Investigation, rather than by counsel personally. Based on this distinction, the district court denied defendant's claim to a "work product" exemption, and held that the privilege applied only where the attorney was acting in the capacity of a professional advisor. Therefore, the fact that some of the agents were lawyers did not immunize their work.⁸⁷

Although the language of the Supreme Court in *Hickman* was necessarily directed to statements personally obtained by counsel (since that was the situation at hand) the Third Circuit Court of Appeals felt that its rationale had a wider implication and was applicable to all statements of prospective witnesses obtained for use by trial counsel, regardless of who had obtained them. In support of this position, the court in *Alltmont* pointed out that since the basis of the immunity was not the attorney-client privilege, and since it arose only if good cause for production could not be shown, no valid distinction existed between materials prepared by counsel and those prepared for his use at trial. In each case, the information ultimately found its way into the lawyer's files on the matter. The adverse party could not possibly have a greater or different need for it based on the character of its origin and, therefore, his right to discovery should not rest on that distinction.⁸⁸

This seemingly well-reasoned approach to the problem in the light of *Hickman* has met with acceptance in some areas.⁸⁹ The criterion under this view is that

statements obtained for the purpose of litigation . . . are normally inadmissible as work product . . . if obtained by counsel, or even if obtained, not by counsel, but for counsel's use. . . .⁹⁰

This rule, however, is subject to the same inadequacies as that of *Hickman*,

84. 7 F.R.D. 540 (E.D. Wis. 1947).

85. *Berger v. Central Vt. Ry.*, 8 F.R.D. 419 (D. Mass. 1948).

86. 177 F.2d 971 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950).

87. *O'Neill v. United States*, 79 F. Supp. 827 (E.D. Pa. 1948), rev'd sub nom. *Alltmont v. United States*, supra note 86.

88. 177 F.2d at 976.

89. See *Snyder v. United States*, 20 F.R.D. 7 (E.D.N.Y. 1956) (information provided by a third party).

90. *Thompson v. Hoitsma*, 19 F.R.D. 112, 114 (D.N.J. 1956).

i.e., its dependence on the facts in question leaves room for contrary interpretation.

While some courts have accepted the *Allmont* rule at its face value,⁹¹ others have declined to do so. *United States v. Kelsey-Hayes Wheel Co.*,⁹² held that information gathered by agents of the Federal Bureau of Investigation, acting under the supervision of government lawyers, was protected by the "work product" theory because the agents, for all practical purposes, were in the position of junior members of a large law firm. In dicta, the court indicated that claims agents and investigators neither occupy this position, nor receive the privilege.⁹³ It would seem that a reading of the *Hickman* rule in the light of the *Allmont* interpretation would have resolved the difficulty with respect to trial materials prepared by third persons. It has not. The case and its position are considered to be expressions of a minority rule.⁹⁴ The point is, therefore, still open to argument although most courts favor production of such materials.⁹⁵

B. *Anticipation of Litigation*

The *Hickman* decision accorded protection to witnesses' statements taken in "anticipation of litigation." This qualification must be complied with in order for any given material to be considered as "work product." From a consideration of the facts in *Hickman*, it is apparent that the term was not intended to apply solely to materials gathered after the commencement of an action.⁹⁶ This circumstance has left open to conjecture the exact scope of the term in "anticipation of litigation," and its effect on the administration of the rule. Here too, there is some disagreement.

Of course, if the material has been acquired before the accrual of the cause of action, it is not considered privileged.⁹⁷ In *Park & Tilford Distillers Corp. v. United States*,⁹⁸ materials prepared by a government agency for general purposes of litigation were not considered "work product." These materials had not been assembled for use in any litigation that might arise out of a particular incident as were those in the *Hickman* case, but rather for use in "litigation wherein the OPA might be a party."⁹⁹ This point of distinction was felt sufficient to warrant a denial of protection. Based on ratiocination of this sort, materials which had been prepared for use in a prior controversy have also been con-

91. See 2A Barron & Holtzoff, Federal Practice and Procedure With Forms § 652.2 (Rules ed. 1961).

92. 15 F.R.D. 461 (E.D. Mich. 1954).

93. *Id.* at 462-63.

94. Cf. 2A Barron & Holtzoff, Federal Practice and Procedure With Forms § 652 (Rules ed. 1961).

95. *Ibid.*

96. The statements in *Hickman* had been taken eight months previous to the commencement of the action. 329 U.S. 495, 498 (1947).

97. *McManus v. Harkness*, 11 F.R.D. 402 (S.D.N.Y. 1951).

98. 20 F.R.D. 404 (S.D.N.Y. 1957).

99. *Id.* at 406.

sidered to be outside the "anticipation of litigation" requirement.¹⁰⁰ The rule as drawn from these holdings is that the materials must have been prepared with an eye towards the particular litigation at hand. *Hickman*, however, granted immunity to materials prepared for use in any controversy which might have arisen out of the one accident. One wonders exactly what the Supreme Court's decision might have been had more than one action arisen out of the situation in that case (five people died in the accident, yet only one estate chose to sue). Would the statements have been privileged in the first action and discoverable in any subsequent suit that might have been brought?

While the *Hickman* Court, in setting forth the rule, determined that the preparations were made in anticipation of litigation even though the statements had been taken before the bringing of the action, many district courts have not always been as generous. In *Dusha v. Pennsylvania R.R.*,¹⁰¹ it was held that all materials prepared prior to the filing of a claim were discoverable; but there could be no free discovery of those acquired after that point, since only the latter would have been directly prepared for trial purposes.

There is also a line of cases holding that statements taken in the normal course of business pursuant to company policy were outside the scope of the "work product" rule because they were not prepared in "anticipation of litigation."¹⁰² But in *Hickman* too, the statements were taken as a matter of company policy. The prospective defendants in *Hickman* instructed the attorney to take whatever action he deemed necessary for the defense of any litigation that might arise.¹⁰³ The statements in issue were those of the defendant's employees, which in effect were no more than reports. Under an *Allmont*¹⁰⁴ interpretation of the *Hickman* rule, the fact of an attorney's involvement in taking statements would not be determinative.

On the reverse side of the coin, a few district courts have held that where taking witnesses' statements by train crews was the policy of the defendant's general counsel, it was not violative of the "anticipation of litigation" requirement.¹⁰⁵

V. LOSS OF THE PRIVILEGE

A. Good Cause

The "work product" rule is not an absolute privilege. Both the *Hickman* decision and the proposed amendment qualified the protection accorded trial

100. *Tobacco & Allied Stocks, Inc. v. Transamerica Corp.*, 16 F.R.D. 534 (D. Del. 1954).

101. 10 F.R.D. 150 (N.D. Ohio 1950).

102. See, e.g., *Morrone v. Southern Pac. Co.*, 7 F.R.D. 214 (S.D. Cal. 1947) (accident reports).

103. 4 F.R.D. 479, 481 (E.D. Pa. 1945).

104. The fact that the materials were prepared by third parties for the use of an attorney does not, by itself, take it out of the "work product" exemption. 177 F.2d 971 (3d Cir. 1949).

105. *Berger v. Central Vt. Ry.*, 8 F.R.D. 419 (D. Mass. 1948). Where production was sought of materials prepared by both the defendant's attorneys and those of a third party

preparations upon an absence of a showing by the movant of valid and weighty reasons for production.¹⁰⁶ While the Supreme Court indicated what might constitute such a showing,¹⁰⁷ the tests and standards to be applied in determining whether the burden has been met have been, for the most part, left to the courts.¹⁰⁸ It is generally conceded that the requirement in a "work product" situation is more stringent than the normal "good cause" requirement for the production of documents.¹⁰⁹ What amounts to "good cause" depends, of course, on the facts of the particular case.¹¹⁰ The showing required in the face of a privilege should involve "rare situations having exceptional features which make the disclosures necessary in the interest of justice and where the party seeking discovery is not otherwise able effectively to secure the information."¹¹¹ Thus, discovery of an expert's notes, but not of his conclusions, was allowed where the machinery in question had been disassembled and was no longer available for inspection.¹¹² Most often, the need for discovery over privilege can be stated in two alternative requirements: (1) a need for the documents in original form; (2) a lack of independent means of discovery.¹¹³

Obviously, if the movant is ignorant of the identity of the witnesses or others who have supplied the desired information, or if they are unavailable to him, the privilege will not prevent discovery.¹¹⁴ Conversely, if the identity of the witness is known to the moving party, and is available to him, there is no good reason for a denial of the privilege.¹¹⁵ This has been held to be the rule even where the identity of the informant was known to the movant, but the witness lived a distance away;¹¹⁶ and where the witness was still alive, but an employee of an adverse party.¹¹⁷

Statements taken at the time of the incident out of which the action arose, or photographs of the scene, have been held discoverable even though they

who was not a party to the action, the "work product" immunity was applied even though some of the documents had been prepared by the attorneys of one not a party to the action. *Lichter v. Mellon-Stuart Co.*, 24 F.R.D. 397 (W.D. Pa. 1959).

106. 329 U.S. at 511; see also note 50 supra and accompanying text.

107. 329 U.S. at 511.

108. 2A Barron & Holtzoff, Federal Practice and Procedure § 652.4 (Rules ed. 1961).

109. Fed. R. Civ. P. 30(b).

110. *Tobin v. Gibe*, 13 F.R.D. 16 (D. Del. 1952). "What constitutes good cause [under *Hickman v. Taylor*] depends on the particular circumstances of each case and upon the consideration of practical convenience." *Id.* at 18. "What constitutes good cause takes into account considerations of practical convenience." *Roebling v. Anderson*, 257 F.2d 615, 620 (D.C. Cir. 1958).

111. *Colden v. R. J. Schofield Motors*, 14 F.R.D. 521, 522 (N.D. Ohio 1952).

112. *Ibid.*

113. *Uncle Ben's, Inc. v. Uncle Ben's Pancake Houses, Inc.*, 30 F.R.D. 506, 507 (S.D. Tex. 1962).

114. *Atlantic Greyhound Corp. v. Lauritzen*, 182 F.2d 540, 542 (6th Cir. 1950).

115. *Helverson v. J. J. Newberry Co.*, 16 F.R.D. 330 (W.D. Mo. 1954).

116. *Berger v. Central Vt. Ry.*, 8 F.R.D. 419 (D. Mass. 1948). The court said that the depositions could be taken by mail.

117. *Cleary Bros. v. Christie Scow Corp.*, 176 F.2d 370 (2d Cir. 1949).

constituted "work product," since it is felt that both parties should have access to a more or less contemporaneous account of the occurrence.¹¹⁸ However, it has been held that "good cause" has not been shown until the movant has submitted affidavits to the effect that a "memory lapse" prevented the witness from giving an accurate account in a deposition.¹¹⁹ Also, where the original depositions had been taken in a disorganized manner, production was not ordered since the court felt that a showing of "good cause" was not possible due to the manner in which the desired information had been acquired.¹²⁰

Generally, the question is to be decided by an exercise of judicial discretion based on factual considerations. The burden of proving the need must, in all cases, be met by the movant.¹²¹ The courts have been careful to note that a stringent standard, commensurate with the significance of the policy against unwarranted invasion of an attorney's files, is to be applied.¹²²

B. *Waiver*

The protection given to trial preparation under the "work product" doctrine may also be lost by a waiver. In *United States v. Swift & Co.*,¹²³ the fact that the Government had already revealed the information in part, and discussed it with the defendant precluded the assertion of a claim of privilege. In order to operate as a waiver, however, the disclosure of trial preparations must be to an adverse party. Merely disclosing information to parties sharing a common interest, even though such parties may not be involved in the action will not operate as a waiver.¹²⁴

VI. CONCLUSION

The decision in the *Hickman* case has established and recognized a policy of protecting legal efforts directed towards litigation. However, due to the nature and peculiar fact pattern of that case, the application of the policy has been the subject of confused and conflicting holdings. This difficulty is increased by the practical impossibility of effective appellate review of discovery orders,¹²⁵ and the resultant paucity of binding, definitive appellate clarification of the point. Had the proposed amendment been adopted, most of the difficulties

118. *Pennsylvania R.R. v. Julian*, 10 F.R.D. 452 (D. Del. 1950).

119. *Thomas v. Trawler Red Jacket, Inc.*, 16 F.R.D. 349 (D. Mass. 1954).

120. *Heiselmoyer v. Pennsylvania R.R.*, 17 F.R.D. 88 (E.D. Pa. 1954).

121. *Safeway Stores, Inc. v. Reynolds*, 176 F.2d 476 (D.C. Cir. 1949); *Martin v. Capital Transit Co.*, 170 F.2d 811 (D.C. Cir. 1948).

122. *Transmirra Prods. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572 (S.D.N.Y. 1960); *Connecticut Mut. Life Ins. Co. v. Shields*, 16 F.R.D. 5 (S.D.N.Y. 1954); *Vilastor-Kent Theatre Corp. v. Brandt*, 19 F.R.D. 522 (S.D.N.Y. 1956).

123. 24 F.R.D. 280 (N.D. Ill. 1959).

124. See note 122 *supra*. The fact of disclosure to a possible codefendant three years prior to the commencement of the action did not operate as a waiver. *Vilastor-Kent Theatre Corp. v. Brandt*, 19 F.R.D. 522 (S.D.N.Y. 1956).

125. See note 49 *supra*.