

# Wisconsin's New Discovery Statute

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## WISCONSIN'S NEW DISCOVERY STATUTE

## INTRODUCTION

Passage of Chapter 113 of the Laws of 1961 repealed and recreated Section 326.12 of the Wisconsin Statutes and thereby brought Wisconsin discovery procedure into harmony with the more liberal federal practice as prescribed in Rule 26 of the Federal Rules of Civil Procedure. The significance of the present trend towards the expansion of pre-trial procedural devices in both federal and state courts is closely related to the parallel trend toward liberalization of the rules governing pleading. Under the older, less liberal practice, the principal burden of formulating issues and disclosing facts rested primarily on the pleadings. Under modern federal practice, and its counterpart in an increasing number of states, the function of the pleadings has been restricted to giving notice of the general issues; the means for determining precise issues and relevant information are provided by the discovery procedure. The basic philosophy of the modern 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 in some way privileged.<sup>1</sup> The new Wisconsin statute makes two substantial changes in the former state practice relating to discovery examinations: there is an expansion with respect to the persons who may be examined,<sup>2</sup> and the scope of the examination itself has been expanded.<sup>3</sup>

## II

Under the former practice, discovery examination was limited to a party, his assignor, officer, agent or employee. The new statute provides that the testimony "of any person including a party" may be taken for purposes of discovery. The effect of this expansion is to create two distinct classes of witnesses now subject to discovery: parties to the action or their agents, and what might be termed the ordinary witness. This latter classification may for some purposes be further subdivided to distinguish between expert and non-expert witnesses.

The significance of the former distinction lies in the manner of examination. Subsection (9) of Section 326.12 of the new act provides that "the examination and cross-examination of deponents shall proceed as permitted at the trial." This in turn leads us to Section 325.14 which provides for the adverse examination at the trial of a party or of his or its officer, agent or employee or of persons who were in such capacity

<sup>1</sup> See 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §641, at 8-13; *Hickman v. Taylor*, 329 U.S. 495, 500-501 (1947).

<sup>2</sup> Wis. LAWS, ch. 113 (1961), *repealing and recreating*, WIS. STAT. §326.12(1) (1959).

<sup>3</sup> Wis. LAWS, ch. 113 (1961), *repealing and recreating*, WIS. STAT. §326.12(2) (1959).

at the time of the occurrence of the facts subject to examination. Thus such party-witnesses, called adversely, may be examined as if under cross-examination, they may be freely led on all issues and are subject to impeachment if the party presently examining does not intend to make the witness his own thereafter. Further, they may be re-examined only to explain or qualify testimony already given.

The method of examination of the ordinary witness is also the same as that permitted during trial, i.e., by direct examination. Such witnesses cannot be led unless hostile or unwilling. They, too, can probably be impeached since Subsection (10) of 326.12 provides specifically that "a party shall not be deemed to make a person his own witness for any purpose by taking his deposition."

### III

The second substantial change effected by the new Wisconsin statute is an expansion of the scope of the matter which may properly be made the subject of discovery proceedings. Subsection (2) of the new 326.12 provides that, "A deponent shall be examined regarding any matter not privileged, which is relevant to the controversy." And further, "But it shall not be ground for objection that the testimony will be inadmissible at the trial, if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." Inasmuch as these provisions are taken verbatim from Federal Rule 26, inquiry into the history and interpretation of this rule by the Federal Courts should cast some light on possible development of the Wisconsin law. While the Wisconsin Court will, of course, not be bound by such interpretations, they will nonetheless be persuasive.

The Supreme Court Advisory Committee note to this broadening amendment of Rule 26 states :

The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. . . . In such a preliminary inquiry, admissibility at trial should not be the test as to whether the information sought is within the scope of proper examination. Such a standard unnecessarily curtails the utility of discovery practice. Of course, matters entirely without bearing either as direct evidence or as aiding in the discovery of admissible evidence are not within the scope of inquiry. To the extent, however, that the examination develops useful information, it functions successfully as an instrument of discovery, even if it produces no testimony directly admissible.<sup>4</sup>

It is well to note, however, that a clear distinction must be observed between the right to take depositions, which is now largely unrestricted by Rule 26(b), and the right to use such depositions in court which is

<sup>4</sup> Advisory Committee Note, vol. 3A, pp. 456-57.

very definitely restricted by Rules 26(d) and (e);<sup>5</sup> and substantially the same restrictions upon use are incorporated into the new Wisconsin statute by subsection (7) of 326.12.

Concerning the scope of the federal procedure, the United States Supreme Court has said:

We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise. But discovery, like all matters of procedure, has ultimate and necessary boundaries. As indicated by Rules 30(b) and (d), limitations inevitably must be imposed when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy, embarrass or oppress the person subject to the inquiry. And as Rule 26(b) provides, further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.<sup>6</sup>

#### IV

The most troublesome question to arise under the broadened scope of the federal discovery procedure is the extent to which a party may use discovery devices to gain access to materials developed in the course of his opponents' preparation for trial—i.e., to the writings, statements of witnesses, reports, etc., obtained or prepared by the adverse party or by his attorneys, agents or insurers, in anticipation of litigation or in preparation for trial.

It has been generally held that reports made by employees to their employers in the regular course of business are subject to discovery.<sup>7</sup> While there have been some differences as to the requisite showing of cause, most courts have agreed that statements made by one party to the adverse party are subject to discovery.<sup>8</sup> There seems little doubt that this is a sound result and Wisconsin, in actions for personal injuries, where the problem is most likely to arise, has settled the matter by a

<sup>5</sup> See Pike and Willis, *The New Federal Deposition-Discovery Procedure*, 38 COLUM. L. REV. 1179, 1187 (1938); Drum v. Town of Tonawanda, 13 F.R.D. 317 (D.N.Y. 1952); 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §646, at 59.

<sup>6</sup> Hickman v. Taylor, 329 U.S. 495, 507 (1947).

<sup>7</sup> Humphries v. Pennsylvania Railroad Co., 14 F.R.D. 177 (N.D. Ohio 1953); Panella v. Baltimore & Ohio R. Co., 14 F.R.D. 196 (N.D. Ohio 1953); Pennsylvania Railroad Co. v. Julian, 10 F.R.D. 452 (D. Del. 1950). See also McCORMICK, EVIDENCE §100, at 204-05 (1954); 8 WIGMORE, EVIDENCE §§2318, 2319 (3d ed. 1940).

<sup>8</sup> 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §6523 at 140-44.

statute requiring production.<sup>9</sup> There has also been substantial agreement that the identity of witnesses with knowledge of relevant facts must be disclosed even though such information may have been acquired solely in preparation for trial.<sup>10</sup>

But on questions as to other materials gathered in preparation for trial there has been little agreement among the lower federal courts. A number of district courts have gone so far as to hold that the results of investigations and all other matters prepared by the adversary or his representative in contemplation of litigation were entirely immune from discovery. Some of these decisions followed the English view and held that such matter fell within the attorney-client privilege.<sup>11</sup> Other courts in denying discovery emphasized the essential unfairness of letting one party obtain free of charge material gathered by his adversary, stating that to permit such a course "would penalize the diligent and place a premium on laziness."<sup>12</sup>

At the same time other courts were going to the opposite extreme and holding that similar materials obtained in preparation for trial or in anticipation of litigation were freely discoverable with little, if any, limitation.<sup>13</sup> The attitude of these courts was well summed up by Judge Frank in *Hoffman v. Palmer*,<sup>14</sup> in which he commented that:

Some lawyers also grumble, saying that it is 'unfair' that a lawyer who has diligently prepared his case should be obliged to let counsel for the adversary scrutinize his data. But the reformers are surely right in replying that 'unfairness' to a diligent lawyer is of no importance as against much-needed improvement in ju-

<sup>9</sup> Wis. Stat. §325.28 (1959).

<sup>10</sup> *Maryland for use of Montvila v. Pan-American Bus Lines, Inc.*, 1 F.R.D. 213 (D. Md. 1940) (insurance adjuster may be examined as to identity and location of persons having knowledge of relevant facts, since these facts are within his knowledge); *Stern v. Exposition Greyhound, Inc.*, 1 F.R.D. 696 (E.D.N.Y. 1941); In the Matter of Examination of Citizens Casualty Co. of New York, 3 F.R.D. 171 (S.D.N.Y. 1942) (plaintiff may obtain names of eye witnesses to accident in examination before trial; fact that the names of witnesses may be contained in a report prepared by an employee of and attorney for insurance company does not make the information privileged); *Ryan v. Lehigh Valley R. Co.*, 5 F.R.D. 399 (S.D.N.Y. 1946) (names of witnesses are not privileged, although their statements might be). *Contra*: *Poppino v. Jones Store Co.*, 1 F.R.D. 215 (W.D. Mo. 1940) (not admissible evidence); *Cortese v. British Ministry of War Transport Representative*, 8 F.R. Serv. 30a.22, Case 4 (S.D.N.Y. 1945) (party may not inquire as to names of witnesses acquired by independent effort of insurer in natural course of its duties in preparing defense of action).

<sup>11</sup> *McCarthy v. Palmer*, 29 F. Supp. 585 (E.D.N.Y. 1939). See, also, *Connewary v. City of New York*, 32 F. Supp. 54 (E.D.N.Y. 1940); *Maryland for Use of Montvila v. Pan American Bus Lines*, 1 F.R.D. 213 (D. Md. 1940); *Piorowski v. Socony Vacuum Oil Co.*, 1 F.R.D. 407 (M.D. Pa. 1940); *Courteau v. Interlake S.S. Co.*, 1 F.R.D. 525 (W.D. Mich. 1941); *Hercules Powder Co. v. Rohm & Haas Co.*, 3 F.R.D. 328 (D. Del. 1944).

<sup>12</sup> *McCarthy v. Palmer*, 29 F. Supp. 585 (E.D.N.Y. 1939).

<sup>13</sup> *Dugger v. Baltimore & Ohio R. Co.*, 5 F.R.D. 334 (E.D.N.Y. 1946); *Price v. Levitt*, 29 F. Supp. 164 (E.D.N.Y. 1939); *Blank v. Great Northern Ry. Co.*, 4 F.R.D. 213 (D. Minn. 1943).

<sup>14</sup> 129 F.2d 976 (2d Cir. 1942).

dicial ascertainment of the 'facts' of cases; the public interest in such ascertainment is paramount. . . .<sup>15</sup>

## V

It was with this varied background of lower court decisions that the United States Supreme Court in 1947 considered the matter for the first and only time in the leading case of *Hickman v. Taylor*.<sup>16</sup> In that case five of the nine crewmen, including Norman Hickman, were drowned in the sinking of a tugboat. Three days after the drowning Fortenbaugh, an attorney, was retained by the tug-owners and the underwriters to defend them in whatever litigation might arise. Fortenbaugh took written signed statements from the four surviving crewmen, who had been previously examined before a public hearing conducted by the United States Steamboat Inspectors. He also interviewed other persons believed to have some information relating to the accident and in some cases he made memoranda of what they told him. Seven months after the sinking Hickman's administrator brought suit against the tug-owners under the Jones Act and one year thereafter the administrator sought discovery of both the written signed statements and the lawyer's memoranda and mental impressions of the oral statements. The District Court ordered production of all these materials, though it did provide that the memoranda could first be submitted to the Court for a determination of those portions which should be revealed to the plaintiff.<sup>17</sup>

Fortenbaugh and the tug-owners refused to comply and appealed their convictions for criminal contempt of court to the Court of Appeals for the Third Circuit. The Third Circuit reversed, holding that discovery could not be had because the matter was privileged.<sup>18</sup> While conceding that the material being sought was not within the attorney-client privilege as it is applicable to testimony sought to be introduced in the courtroom, the Court held that the term "privilege" as it is used in the Federal Rules is not identical with the term as used in the rules of evidence; and that the scope of the attorney-client privilege at the discovery stage must be expanded to include what it termed the "work product of the lawyer."

The United States Supreme Court after once denying certiorari granted review on the basis of the importance of the problem and the great divergence of views in the lower courts.<sup>19</sup> It unanimously affirmed the Third Circuit's holding that the discovery herein sought was improper, but did so on a different basis than that of the Circuit Court. While summarily rejecting the concept of the attorney-client privilege

<sup>15</sup> *Id.* at 997.

<sup>16</sup> 329 U.S. 495 (1947).

<sup>17</sup> *Hickman v. Taylor*, 4 F.R.D. 479 (E.D. Pa. 1945).

<sup>18</sup> *Hickman v. Taylor*, 153 F. 2d 212 (3d Cir. 1945).

<sup>19</sup> *Hickman v. Taylor*, 329 U.S. 495 (1947).

as a rationale for denying discovery, the Court held that there is a broad public policy protecting an attorney's "work product" against unwarranted invasions of privacy:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his client. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion 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. 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 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.<sup>20</sup>

But the Court went on to say that this did not mean that all written materials obtained or prepared by an attorney with an eye toward litigation are necessarily immune from discovery in all cases:

Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty.<sup>21</sup>

Further, it was pointed out that the burden rests on the party seeking discovery of the lawyer's "work product" to establish adequate reasons to justify production through a subpoena or court order.

The language used by Justice Murphy throughout his opinion gives rise to the inference that the cause for discovery of memoranda and mental impressions of oral statements must be greater than that required for the production of written statements. There is repeated em-

<sup>20</sup> *Id.* at 510-11.

<sup>21</sup> *Id.* at 511.

phasis on the additional dangers inherent in compelling an attorney to subject his mental processes to the scrutiny of his adversary, and the Court states that,

If there should be a rare situation justifying production of these matters, petitioner's case is not of that type.<sup>22</sup>

Nor has this writer been able to find any subsequent case which has held that such a rare situation did, in fact, exist. The concurring opinion of Justice Jackson makes a pointed analysis of the demoralizing effects likely to result from the practice of making a lawyer's impressions a proper subject of discovery.

It can be said that *Hickman v. Taylor* adopted a middle position by giving the lawyer's work product a qualified immunity from discovery. Such material is discoverable, but only on a substantial showing of "necessity or justification," with the further distinction that, for practical purposes, the mental impressions or opinions of the lawyer are absolutely immune from discovery.

## VI

One of the major problems left unresolved by the Supreme Court in *Hickman v. Taylor* is that of establishing limits to determine what is properly includible within the category of attorney's work product. One question of practical importance is whether the work product immunity is applicable only to statements and other material obtained by the trial counsel himself, or whether the qualified protection extends also to statements obtained by claims agents or investigators, which may ultimately be used by counsel. Here there is conflict among the lower federal courts.

The Third Circuit in *Allmont v. United States*<sup>23</sup> held that even though the *Hickman* case was, on its facts, limited to statements obtained directly by the defendant's lawyer,

. . . its rationale has a much broader sweep and applied to all statements of prospective witnesses which a party has obtained for his trial counsel's use. For since, as the Court held, statements of prospective witnesses obtained by a lawyer are not protected by the historic privilege inherent in the lawyer-client relationship and are only protected against disclosure if the adverse party cannot show good cause for their production, we can see no logical basis for making any distinction between statements of witnesses secured by a party's trial counsel personally in preparation for trial and those obtained by others for the use of the party's trial counsel. In each case the statements are obtained in preparation for litigation and ultimately find their way into trial counsel's files for his use in representing his client at the trial. . . . Certainly no valid distinction can be based on the fact that

<sup>22</sup> *Id.* at 513.

<sup>23</sup> 177 F. 2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

in the one case trial counsel does all the work of preparation for trial, including the interviewing of witnesses, while in the other case he is assisted by others employed by him or by his client. Indeed to make such a distinction would discriminate in favor of the party whose lawyer himself does all the work of preparation for trial and against the one whose counsel delegates part of that task to others.<sup>24</sup>

The logic of the *Allmont* case is compelling. A similar view was taken by the District Court for the Eastern District of Wisconsin in *Hanke v. Milwaukee Electric Railway & Transport Co.*<sup>25</sup> In that case the discovery sought related to written and oral statements obtained from witnesses by the defendant's claims department. The Court followed the prescription of the *Hickman* case and held that in order to succeed, the plaintiff, as the party seeking production of such statements, must first meet his burden of showing the necessity thereof, or clearly establish that the denial of such production would unduly prejudice the preparation of his case causing hardship or injustice.

Though a number of other cases have subscribed to the doctrine of the *Allmont* and *Hanke* cases,<sup>26</sup> the majority view seems to be that the work product immunity does not extend to statements obtained by a claims agent or investigator.<sup>27</sup> This result is apparently reached by interpreting the *Hickman* decision as stating a policy that is designed to preserve the unique role of the attorney in the adversary system.

## VII

Once it has been determined that a particular matter is properly categorized as work product of the attorney, it is nevertheless still subject to discovery only upon a sufficient showing of necessity or justification. As might be expected under such a highly subjective test, the decisions on what constitutes such sufficiency span a broad range.

The most liberal view is that the mere existence of a lapse of time between the taking of the statement sought to be discovered and the time at which the same witness became available for interview by the opposing party is sufficient to require production. These courts reason that statements taken from witnesses close to the time of the occurrence are unique in that they provide an immediate impression of the facts and are most likely accurately to reflect the impression of the witness.<sup>28</sup>

<sup>24</sup> *Id.* 177 F. 2d at 976.

<sup>25</sup> 7 F.R.D. 540 (D. Wis. 1947).

<sup>26</sup> *Raudenbusch v. Reading Co.*, 9 F.R.D. 670 (E.D. Pa. 1950); *Snyder v. U.S.*, 20 F.R.D. 7 (E.D.N.Y. 1956); *Floe v. Plowden*, 10 F.R.D. 514 (E.D.S.C. 1950); *Adams v. U.S.*, 260 F. 2d 467 (5th Cir. 1958), *cert. denied*, 359 U.S. 934 (1959).

<sup>27</sup> *Supra* note 8, §652.2, at 131.

<sup>28</sup> See *Henderson v. Southern R. Co.*, 17 F.R.D. 349 (E.D. Tenn. 1955); *Pennsylvania R. Co. v. Julian*, 10 F.R.D. 452 (D. Del. 1950); *Cairns v. Chicago Exp. Inc.*, 25 F.R.D. 169 (N.D. Ohio 1960).

It was on this basis that the court in *DeBruce v. Pennsylvania R. Co.*<sup>29</sup> held that the party seeking discovery of statements obtained by a claims department need show no more than that the accident had occurred a year before, that the defendant's claims department had immediately interviewed the witnesses and taken their statements and that the plaintiff was not in a position to do so until the bringing of the suit. The court considered the statement of a witness taken immediately after the accident to be a "catalyst of unique value in the development of the truth through the judicial process," which should be available to both parties, no matter which one obtained it.

The more generally accepted view, however, is that necessity of justification for production cannot be shown where the identity of witnesses is known and where the party can obtain the information sought by taking their depositions.<sup>30</sup> The cases are divided on whether increased expense to the moving party is a sufficient justification to require production of statements taken from witnesses who are otherwise available.<sup>31</sup> Where the witness is for one reason or another no longer available, so that the moving party cannot obtain his version of the facts, production will ordinarily be required. But the mere fact that the witnesses are in another state has been held insufficient to constitute such unavailability.<sup>32</sup>

## VIII

A problem closely related to that of the immunity to be given materials gathered by claims agents and investigators is that of determining what limitations, if any, are imposed on the right to take the depositions of experts, to obtain production of their reports and to inquire into the foundation of such reports.

It is interesting to note that among the proposed amendments to the Federal Rules recommended by the Advisory Committee in 1946 was a restriction upon the discovery of writings obtained or prepared by the adverse party, his attorney, surety, indemnitor or agent in anticipation of litigation or in preparation for trial except upon a showing that denial of such a discover would be unfairly prejudicial causing undue hardship or injustice to the moving party. And further that there be an

<sup>29</sup> 6 F.R.D. 403 (E.D. Pa. 1947).

<sup>30</sup> *Cogdill v. T.V.A.*, 7 F.R.D. 411 (E.D. Tenn. 1947); *Diniero v. United States Lines Co.*, 21 F.R.D. 316 (S.D.N.Y. 1957); *McDonald v. Pennsylvania R. Co.*, 15 F.R.D. 145 (E.D. Pa. 1951); *McSparran v. Bethlehem-Cuba Iron Mines Co.*, 26 F.R.D. 619 (E.D. Pa. 1960).

<sup>31</sup> For cases holding expense to constitute justification, *see*: *Durkin v. Pet Milk Co.*, 14 F.R.D. 385 (W.D. Ark. 1953); *Naylor v. Isthmian S. S. Co.*, 10 F.R.D. 128 (S.D.N.Y. 1950); *Jones v. Westinghouse Electric Supply Co.*, 128 A. 2d 808 (1957). *Contra*: *Berger v. Central Vermont R. Co.*, 8 F.R.D. 419 (D. Mass. 1948); *Lester v. Isbrandtsen Co.*, 10 F.R.D. 338 (S.D. Tex. 1950); *Gebhard v. Isbrandtsen Co.*, 10 F.R.D. 119 (S.D.N.Y. 1950).

<sup>32</sup> *Lester v. Isbrandtsen Co.*, 10 F.R.D. 338 (S.D. Tex. 1950); *Reeves v. Pennsylvania R. Co.*, 8 F.R.D. 616 (D. Del. 1949); *Berger v. Central Vermont R. Co.*, 8 F.R.D. 419 (D. Mass. 1948).

absolute prohibition on the production or inspection of any writings reflecting an attorney's mental impressions, conclusions, opinions or legal theories, or, except as provided in Rule 35,<sup>33</sup> the conclusions of an expert.<sup>34</sup> Though the Supreme Court gave no explanation of its failure to adopt this amendment, it has been generally assumed that it preferred to deal with the problem by case decisions rather than by rule making—*Hickman v. Taylor* being *sub judice* at that time.<sup>35</sup>

The extent to which the expert witness and the materials which he may prepare are subject to discovery again presents an area of broad divergence and conflicts of authority. Some cases have taken the strict view that it is unfair to allow one party to obtain free the opinion of an expert who has been paid by his adversary. A typical statement of this position is found in *Lewis v. United Air Lines Transport Corp.*:

To permit a party to take the deposition of an expert of the opposite party to whom the latter has obligated himself to pay a considerable sum of money, would be equivalent to taking another's property without compensation therefor.<sup>36</sup>

Other courts have refused to allow unlimited discovery of the reports of experts on the theory that such reports are prepared to assist counsel and hence are entitled to the same protection as the attorney's work product. These courts apply the limitations of *Hickman v. Taylor* and require that a showing of necessity or justification be made before discovery involving experts is allowed. In *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*<sup>37</sup> a blanket request for reports which an expert had submitted to counsel on technical facts to be used in the preparation for trial was held to be a request for the attorney's work product. Discovery was denied on the ground that an attorney for one party is not entitled to the fruits of his opponent's labor in this regard without a strong showing of good cause:

This Court, however, feels that when experts in an extremely technical field have been retained to advise counsel in the case as to proper technical interpretation of certain facts, and the state of technical information, that this partakes of the counsel's work product. The same protection accorded to lawyers' other work as necessary to 'prepare his legal theories and plan his strategy without undue and needless interference' must be accorded to his technical information and strategy in the use of experts.<sup>38</sup>

<sup>33</sup> Providing discovery of medical examinations in cases involving personal injuries.

<sup>34</sup> Report of Proposed Amendments, June, 1946, pp. 39-40.

<sup>35</sup> *Supra* note 8, §652 at 122-23.

<sup>36</sup> 32 F. Supp. 21 (W.D. Pa. 1940). See, also: *Walsh v. Reynold Metals Co.*, 15 F.R.D. 376 (D. N.J. 1954); *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941); *Roberson v. Graham Corp.*, 14 F.R.D. 83 (D. Mass. 1953).

<sup>37</sup> 23 F.R.D. 257 (D. Neb. 1959).

<sup>38</sup> *Id.* at 261.

The *Hickman v. Taylor* test was also applied in *Colden v. R. J. Schofield Motors*,<sup>39</sup> but there the court found the requisite showing to have been made and discovery was allowed. In that case the automobile in question had been disassembled for inspection by the plaintiff's expert, so that the defendant could no longer have its own examination made and production of a copy of the report of plaintiff's expert was ordered.

Similarly, in a complicated infringement suit, where it was impossible for the plaintiff to establish infringement or for the defendant to attack the validity of the patent except by opinion testimony of experts, such opinions were held to be, from a practical point of view, the facts of the case, and discovery was permitted.<sup>40</sup>

The diversity of judicial opinion on the matter of discovery re the expert is pointedly illustrated by the history of one litigation in which examination of two expert witnesses regarding the same information was sought in two District Courts. A Massachusetts District Court held that an expert employed by the attorneys to make metallographic x-rays was immune from discovery about his conclusions or anything else relating to his work, as such information was privileged as a matter of public policy.<sup>41</sup> On the other hand, an Ohio District Court,<sup>42</sup> in a decision upheld by the Sixth Circuit,<sup>43</sup> permitted the discovery examination of another expert in x-ray metallography who had been similarly employed. In the opinion of the Sixth Circuit, the obvious purpose of the Rules of Civil Procedure is to broaden the scope of inquiry of adverse witnesses and thus gainsays the thought that the privilege protecting the work product of the lawyer should be liberally extended to cover information sought of one who is not a lawyer, but who has merely been retained by an attorney as an expert in a scientific field.

Courts taking this latter view commonly permit such discovery without any offer to pay part of the fees likely to have been paid the expert by the adverse party. They arrive at this result by analogy to the rule that an expert may be compelled to testify at the trial on matters of expert opinion upon tender of the ordinary witness fee. The general American position is that, in the absence of statute, an expert stands on the same footing as any other witness and may be compelled to testify without the payment of special compensation, even though his knowledge of the facts may have been acquired through scientific study and professional practice. The expert cannot, however, be required to con-

<sup>39</sup> 14 F.R.D. 521 (N.D. Ohio 1952).

<sup>40</sup> *E. I. Du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 24 F.R.D. 416 (D. Del. 1959).

<sup>41</sup> *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 684 (D. Mass. 1947).

<sup>42</sup> *Cold Metal Process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D. Ohio 1947).

<sup>43</sup> *Sachs v. Aluminum Co. of America*, 167 F.2d 570 (6th Cir. 1948).

duct experiments, make special examinations, or do anything other than testify. Some of such courts also reason that since the expert is subject to cross-examination on his conclusions during trial, discovery before trial is proper on the theory that such procedure "simply advances the stages at which disclosure can be compelled from the time of trial to the period preceding it."<sup>44</sup>

## IX

The Wisconsin Supreme Court, in its first interpretation of the liberalized Wisconsin discovery procedure under the new Wis. Stat. 326.12 has, in *State ex rel. Reynolds v. Circuit Court for Waukesha County*<sup>45</sup> squarely aligned itself with those courts taking the most liberal view of the scope of the pre-trial discovery system so far as discovery of experts is concerned.<sup>46</sup> That case was a proceeding in which the State sought a writ of prohibition requiring the Circuit Court of Waukesha County to vacate an order requiring expert appraisers employed as consultants to the State Highway Commission to give certain depositions before a Court Commissioner. The plaintiffs seeking such discovery owned land which had been taken by the State Highway Commission as condemnor and for which an award was made. Plaintiffs appealed to the Circuit Court and a first trial before Judge Voss ended in a mistrial. Pursuant to an order of the court, apparently entered as part of pretrial procedure, it was disclosed that the damages estimated by the State's appraisers averaged just under \$46,000, while those estimated by plaintiff's appraisers averaged over \$111,000. Prior to the second trial, scheduled before Judge Gramling, plaintiff-owners subpoenaed the Highway Commission's expert appraisers to a discovery examination and counsel attempted to question them concerning their appraisal of plaintiff's property. The experts refused to answer whereupon the matter was certified to the Circuit Court. Judge Gramling ordered that the experts be compelled to state (a) the facts they observed in appraising the property; (b) the information they obtained; (c) their opinion as to value; and (d) the method used in arriving at their valuation. The Supreme Court took jurisdiction over the alternative writ of prohibition obtained by the State and after reviewing the merits of the case issued a writ of consultation authorizing the examination of the experts to proceed as ordered by Judge Gramling.

In his analysis of the case, Justice Fairchild, writing for the Court, held that the general discovery statute 326.12 was applicable to condemnation cases, in spite of the specialized procedures of Chapter 32 dealing particularly with condemnation proceedings. He pointed out that

<sup>44</sup> *Bergstrom Paper Co. v. Continental Insurance Co.*, 7 F.R.D. 548, 550 (E.D. Wis. 1947).

<sup>45</sup> 15 Wis. 2d 311, 112 N.W. 2d 686 (1961).

<sup>46</sup> See *Sachs v. Aluminum Co. of America*, *supra* note 43.

at the time Chapter 32 was enacted it provided more liberal discovery than did the General Statutes, but that the recent enactment of 326.12 enlarged the rights of all litigants to discovery as a general policy of the state. Hence it was held that there was no inconsistency of policy in applying 326.12 to appeals under Chapter 32.

Turning next to the State's claim of the attorney-client privilege, the Court called attention to the narrow wording of the relevant Wisconsin Statute<sup>47</sup> which prohibits disclosure of *communications* made by clients to their attorneys. A distinction was drawn between compelling a witness to disclose knowledge or information of relevant facts and compelling him to disclose a communication of such knowledge or information, or the fact of such communication, to his attorney:

As a general principle we conclude that a claim of privilege may properly be interposed if one of these experts is asked to disclose a communication which he has made as a consultant employed by the highway commission to the commission or its staff or counsel in connection with the condemnation of plaintiff's property, but the attorney-client privilege does not preclude these experts from disclosing the relevant opinions they have formed, whether reported or not, and the observations, knowledge, information and theories on which the opinions are based.<sup>48</sup>

While recognizing that some federal courts have held that the qualified immunity granted to a lawyer's work product is applicable to the work and conclusions of experts, Justice Fairchild squarely rejected this view. Citing the opinion of the Sixth Circuit in the *Sachs* case,<sup>49</sup> he reiterated that, "The primary concern of our courts of justice is to elicit truth essential to correct adjudication."<sup>50</sup>

The question then remains what about statements of witnesses garnered by an attorney and similar statements not garnered by the attorney himself. So far as statements garnered by an attorney are concerned, our court has already held that they are not within the attorney-client privilege. In *Tomek v. Farmers Mutual Automobile Insurance Co.*,<sup>51</sup> it was held that Sec. 325.22 Stats., in providing that an attorney at law shall not be allowed to disclose a communication "made by his client to him," does not preclude an attorney from testifying as to transactions had with or communications made to him by third persons even though these matters came to his knowledge in consequence of his retainer as an attorney.<sup>52</sup> However, the Wisconsin Court has never

<sup>47</sup> WIS. STAT. §325.22 (1959), which provides in part: "An attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon in the course of his professional employment."

<sup>48</sup> *Supra* note 45, at 690.

<sup>49</sup> *Supra* note 43.

<sup>50</sup> *Supra* note 45, at 691.

<sup>51</sup> 268 Wis. 566, 68 N.W. 2d 573 (1955).

<sup>52</sup> *Id.* at 569.

passed upon the question of whether the non-privileged nature of this information conclusively allows discovery without limitation, or whether good cause must first be shown. There is nothing in the *Reynolds* decision to indicate that our Court will not classify such material as "work product" and thus subject to the requirement of a showing of necessity or justification as imposed by *Hickman v. Taylor*.<sup>53</sup>

A concluding paragraph of the *Reynolds* decision states:

In enacting sec. 326.12, Stats., in its present form, the legislature has decided to liberalize our discovery procedure. Such decision must be based upon the belief that trials will be more likely to accomplish justice between the parties, and may at times be avoided or shortened in the public interest as well, if material relevant testimony is made available to all parties before trial.<sup>54</sup>

An application of this reasoning to the question of discovery of statements of witnesses garnered by persons other than the attorney himself would seem to indicate that the Wisconsin Court will there also adopt the view of the liberal federal courts.

#### CONCLUSION

The Wisconsin Court in its interpretation of the liberalized discovery procedure has placed primary emphasis on the need for improvement in the judicial ascertainment of facts. While some commentators have interpreted decisions in this vein as tending to impair the adversary nature of the common law system, the effect on our state practice remains to be seen. It may be worthy of note that many states<sup>55</sup> which, like Wisconsin, have adopted the federal discovery rules have further seen fit by special rules to impose some modifications limiting discovery examinations of claims agents, investigators and experts. The alternative solution in Wisconsin may perhaps be found in dealing with the problem by rule, or by amendment of the Statute after study by the Judicial Council.

GILDA B. SHELLAW

<sup>53</sup> *Supra* note 6.

<sup>54</sup> *Supra* note 45, at 324, 112 N.W. 2d at 692.

<sup>55</sup> Including: IDAHO R.C.P. §26(b); KY. R.C.P. §37.02; LA. C.C.P. ART. §1452; ME. R.C.P. §26(b); MINN. R.C.P. §26.02; NEV. R.C.P. §30(b); N.J. R.R. §4:16-2; PA. R.C.P. §4011(d); TEX. R.C.P. §167; UTAH R.C.P. §30(b); WASH. R. PLEADING, PRACTICE & PROCEDURE §26(b); W. VA. R.C.P. §34(b).