

Work Product in the Federal Discovery Procedure

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COMMENTS

WORK PRODUCT IN THE FEDERAL DISCOVERY PROCEDURE

I. INTRODUCTION

Under the Federal Rules of Civil Procedure, information in the hands of an adverse party may be obtained by depositions, interrogatories, or production of documents.¹ Of particular significance is Rule 26 which determines the scope of discovery permissible under these devices. This rule provides that a deponent may be examined regarding any matter not privileged, which is relevant to the issues involved in the pending action. It expressly states the matter need not be admissible at the trial if it's reasonably calculated to lead to the discovery of admissible evidence.

In *Hickman v. Taylor*,² the United States Supreme Court laid down a broad rule in regard to obtaining information from the opponent's files under the wide scope stated in Rule 26. In that case the court labeled as a lawyer's "work product" his preparation for trial as reflected in memoranda, interviews, statements, correspondence, mental impressions, personal beliefs, and in many other tangible and intangible ways, and held that the general policy against invading the privacy of an attorney, in his preparation for trial, was so strong and well recognized and essential to an orderly working of our system of legal procedure, that this work product was not, without more, subject to discovery and that a burden rests on one who would invade an attorney's privacy to establish adequate reasons to justify production of this work product.

In the interpretation and application of the Hickman rule several principles have developed. First, to be within the classification of work product the requested matter must have been gathered in preparation for trial or at least in anticipation of litigation.³ Likewise it must have resulted from the attorney's legal skill and talent.⁴ For this latter rea-

¹ Fed. R. Civ. P. 26, 33, 34.

² *Hickman v. Taylor*, 329 U.S. 495 (1947).

³ *Royal Exchange Assur. v. McGrath*, 13 F.R.D. 150, (S.D. N.Y. 1952); *Park & Tilford Distillers Corporation v. United States of America*, 20 F.R.D. 404 (S.D. N.Y. 1957); *Rediker v. Warfield*, 11 F.R.D. 125 (S.D. N.Y. 1951); *McManus v. Harkness*, 11 F.R.D. 402 (S.D. N.Y. 1951); *Tobacco and Allied Stocks v. Transamerica Corp.*, 16 F.R.D. 534 (D. Del. 1954); *Snyder v. United States*, 20 F.R.D. 7 (E.D. N.Y. 1956) "For purposes of rule protecting, from compulsory disclosure to adversary, the work product of an attorney, a distinction should be made between airplane accident investigations made for purposes of improving flight safety and those made for purpose of acquiring information for use in connection with claims or litigation against government."

⁴ *United States v. Deere and Company*, 9 F.R.D. 523 (D. Minn. 1949); *United States v. Certain Parcels of Land Etc.*, 15 F.R.D. 224 (S.D. Cal. 1953) report herein involved concerned only factual information.

son photos taken by the attorney usually will not be work product,⁵ but diagrams and drawings might well be as they illustrate the counsel's notion of the accident.⁶

The work product doctrine does not apply to information sought as to whether there is such work product, but only to the information, if any, contained therein.⁷

The work product of an attorney is not privileged in the technical sense⁸ and can be obtained upon a proper showing of cause. Failure to file objections to the interrogatories does not waive the work product privilege.⁹ Also work product does not lose its immunity even if disclosed to other counsel,¹⁰ if found in the possession of employees who are not lawyers,¹¹ or if the documents are from time to time in the control of the party himself.¹² In *Thompson v. Hoitsma*,¹³ the court said that since the purpose of this work product privilege was to protect the legal craftsman in the product of his labors, this privilege would continue until the confidential nature of such work product is destroyed by public use, as in court, or until the ends of justice otherwise require its termination. A decision that seems to be contra to the above stated general principle, is *United States v. Kelsey-Hayes Wheel Company*,¹⁴ where the court held that for the memos in question to be entitled to the protection of the work product rule they must presently be part of the work files of an attorney; and that since in this particular case the cloak of privacy had been voluntarily lifted, there was no longer any reason to invoke the rule. This decision, however, seems to stand alone, and the majority rule probably is that the so-called work product privilege is not forfeited in the same manner as is material within the attorney-client privilege.

Several other questions, unresolved by the Hickman decision, and answered differently by the lower courts, will now be considered.

II. WHAT IS THE SCOPE OF THE WORK PRODUCT CONCEPT?

a) Does Work Product include Statements taken by Claim Agents or Investigators for the Use of Trial Counsel?

The Hickman case dealt with a situation in which the statements

⁵ *Shields v. Sobelman*, 64 F. Supp. 619, (E.D. Pa. 1946).

⁶ *Brush v. Harkins*, 9 F.R.D. 681 (S.D. Mo. 1950); *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55 (N.D. Ohio 1953).

⁷ *McCall v. Overseas Tankship Corporation*, 16 F.R.D. 467 (S.D. N.Y. 1954).

⁸ *Carpenter-Trant Drill Co. v. Magnolia Petroleum Corp.* 23 F.R.D. 257 (D. Neb. 1959).

⁹ *Bohlin v. Brass Rail*, 20 F.R.D. 224 (S.D. N.Y. 1957).

¹⁰ *Vilastor-Kent Theatre Corp. v. Brandt*, 19 F.R.D. 522 (S.D. N.Y. 1956); *Connecticut Mut. Life Ins. Co. v. Shields*, 16 F.R.D. 5 (S.D. N.Y. 1954).

¹¹ *Fey v. Stauffer Chemical Company*, 19 F.R.D. 526 (D. Neb. 1956).

¹² *Slifka Fabrics v. Providence Washington Insurance Company*, 19 F.R.D. 374 (S.D. N.Y. 1956).

¹³ *Thompson v. Hoitsma*, 19 F.R.D. 112 (D. N.J. 1956).

¹⁴ *United States v. Kelsey-Hayes Wheel Co.*, 15 F.R.D. 461 (E.D. Mich. S.D. 1954).

being sought were obtained by the trial counsel personally in anticipation of forthcoming litigation. Whether or not the rule laid down there should be extended to cover statements obtained by others for trial counsel's use is a question in which the decisions are in definite conflict.

In *Alltmont v. United States*,¹⁵ the court held there was no valid distinction between statements of witnesses secured by a trial counsel personally and those obtained by others for use of a party's trial counsel. The need was said to be the same in both cases; thus the rationale of the Hickman case required the same showing of good cause be made for the production of statements of witnesses which were not secured by the attorney himself. This decision has been followed in several of the more recent cases,¹⁶ though it seems to ignore, to some extent at least, the legal skill and training which supposedly is a requisite in obtaining work product material, unless it can be said this skill is exercised in choosing the person who is to acquire this information, or possibly in directing his efforts.

The majority view appears to interpret the Hickman case more strictly, and the courts following this view, rule that the fact that a claim agent or investigator operates under general instructions of an attorney of a party is not sufficient to constitute their work a part of the work product of the attorney.¹⁷ Under these decisions, it is likewise insufficient to bring their work within the work product concept because the investigator happens to be a lawyer¹⁸ or member of a legal department.¹⁹ To make this material work product these courts hold the agent must be in a basic professional relationship with his employer,

¹⁵ *Alltmont v. United States*, 177 F. 2d 971 (3d Cir. 1950) *cert. denied*, 339 U.S. 967 (1950).

¹⁶ *Scourtes v. Fred W. Albrecht Grocery Co.*, 15 F.R.D. 55 (N.D. Ohio 1953); *Marks v. Gas Service Company*, 168 F. Supp. 487 (W.D. Mo. 1958); *Snyder v. United States*, *supra* note 3; *Hanke v. Milwaukee Electric Ry. & Transport Co.*, 7 F.R.D. 540 (E.D. Wis. 1947); *Thompson v. Hoitsma*, 19 F.R.D. 112 (D. N.J. 1956) "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."

¹⁷ *Thomas v. Pennsylvania R. Co.*, 7 F.R.D. 610 (E.D. N.Y. 1947) "I do not agree with this effort to give this claim agent the immunity properly belonging to an attorney as distinctly limited in *Hickman v. Taylor*; *Hughes v. Pennsylvania R. Co.*, 7 F.R.D. 737 (E.D. N.Y. 1948). It should be noted these latter two cases are contra to the *Snyder* case cited in note 16. *United States v. Certain Parcels of Land Etc.*, *supra* note 4; *Szymanski v. New York, N.H. & H.R. Co.*, 14 F.R.D. 82 (S.D. N.Y. 1952); *Panella v. Baltimore & O. R. Co.*, 14 F.R.D. 196 (N.D. Ohio 1951) opposite *Scourtes* case note 16; *Durkin v. Pet Milk Co.*, 14 F.R.D. 385 (W.D. Ark. 1953) "*Hickman* case purports to apply only to the work product of the lawyer."

¹⁸ *Virginia Metal Products Corporation v. Hartford Accident & Indemnity Co.*, 10 F.R.D. 374 (S.D. N.Y. 1950); *O'Neill v. United States*, 79 F. Supp. 827 (E.D. Pa. 1948); *Newell v. Capital Transit Co.*, 7 F.R.D. 732 (D. D.C. 1948); *Reiss v. British General Ins. Co.*, 9 F.R.D. 610 (S.D. N.Y. 1949).

¹⁹ *Brown v. New York, New Haven, & Hartford Railroad Company*, 17 F.R.D. 324 (S.D. N.Y. 1955); *Szymanski v. New York, N.H. & H.R.*, *supra* note 17.

requiring the training, skill, and knowledge of a lawyer and the essential integrity implicit in the lawyer-client relationship.²⁰

b) Statements of Witnesses Obtained by Trial Counsel.

It is almost universally held that statements of witnesses, taken by counsel personally, in anticipation of litigation, are within the work product concept. This ordinarily applies whether the statements are written or oral, and if written, whether signed or unsigned. That this is sound seems evident from the Hickman decision.²¹

In *Wild v. Payson*,²² a decision handed down shortly after the Hickman case, the court held that a statement obtained by the plaintiff himself from a witness and then recorded verbatim in the lawyer's office, by his stenographer, was not work product because it had not been obtained by the attorney. The intervention of the attorney had formed no essential step in obtaining the statement. Again in *Lundberg v. Wells*,²³ the court found that the statements were mere factual accounts related by the witnesses, and could not be considered as having been obtained as an aspect of the attorney-client relationship.

In *Blanchet v. Colonial Trust Company*,²⁴ the plaintiff concealed a tape recorded on his person and had conversations with the defendant. The court allowed discovery of the recording, even though the plaintiff had already given the defendant the substance of the recording by deposition, holding it was not privileged as work product.

The requisite that the attorney's legal skill and talent be used in gathering work product material is lacking in such cases.

c) Statements Taken in Ordinary Course of Business—Accident Reports.

Most courts hold that statements gathered or taken in the ordinary

²⁰ Connecticut Mut. Life Ins. Co. v. Shields, *supra* note 10; Lundberg v. Welles, 11 F.R.D. 136 (S.D. N.Y. 1951) "The work product of an attorney concept embraces matter representing work done by the attorney in his professional capacity in the course of attorney-client relationship."

²¹ Hickman v. Taylor, 329 U.S. 495 at 508 (1947) "Petitioner has made more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel. He has sought discovery as of right, of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired." . . . at page 510 "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 area of discovery and contravenes the public policy underlying the orderly presentation and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquires into the files and mental impressions of an attorney". *contra*; see *Scourtes v. Fred Albrecht Grocery Co.*, 15 F.R.D. 55 (N.D. Ohio 1953) "The 'work product' of an attorney consists only of impressions, observations and opinions which he has recorded and transferred to his file. The written statement of a witness, whether prepared by him and later delivered to the attorney, or drafted by the attorney and adopted by the witness is not properly considered the work product of an attorney."

²² Wild v. Payson, 7 F.R.D. 495 (S.D. N.Y. 1946).

²³ Lundberg v. Wells, *supra* note 20.

²⁴ Blanchet v. Colonial Trust Company, 23 F.R.D. 118 (D. Del. 1958).

course of business are not included in the work product concept and therefore freely discoverable.²⁵ The person taking such statement must be acting as an attorney and not something else, such as merely an insurance adjuster.²⁶

In *Scourtes v. Fred Albrecht*,²⁷ the court held that while work done by a third person for an attorney would be work product, reports of accidents whether or not they include statements of persons who ultimately might become witnesses, when made in the regular course of business of a corporate party, are not made in preparation for trial and are therefore not protected as work product. A similar situation arises where statements are made by a party's employees in the regular course of business or according to company rules, and not solely to aid trial counsel. Such statements are not work product and therefore not protected as such.²⁸

d) Reports of Experts

Whether or not the work and conclusions of an expert, retained by a party or his attorney, is to be classified as work product again is a question on which there is definite conflict. Some courts, following the Alltmont rule, considered above, hold that the work performed and the reports submitted by an expert in behalf of an attorney is protected as work product.²⁹ Other courts have refused discovery simply on the

²⁵ *Brown v. New York, New Haven, & Hartford Railroad Company*, *supra* note 19; *Herbst v. Chicago, Rock Island & Pacific R. Co.*, 10 F.R.D. 14 (S.D. Iowa 1950); *Bifferato v. United States Marine Corp. of Delaware*, 11 F.R.D. 44 (S.D. N.Y. 1951).

²⁶ *Newell v. Capital Transit Co.*, *supra* note 18; *Reiss v. British General Ins. Co.*, 9 F.R.D. 610 (S.D. N.Y. 1949) "It is reasonable to assume that at least some of Bergers services were not those rendered or expected to be performed by an attorney, but were rather work ordinarily done by an insurance adjuster and investigator. Such acts are not protected by privilege and are not embraced in an attorney-client relationship, nor, can they be said to be the 'work product' of an attorney or part of his preparation for defense of the action."

²⁷ *Scourtes v. Fred Albrecht Grocery Co.*, 15 F.R.D. 55 (N.D. Ohio 1955).

²⁸ *Tower v. Southern Pacific Co.*, 11 F.R.D. 174 (N.D. Cal. 1951); *Viront v. Wheeling & Lake Erie Ry. Co.*, 10 F.R.D. 45 (N.D. Ohio 1950); *Browner v. Firemens Ins. Co. of Newark, New Jersey*, 9 F.R.D. 609 (S.D. N.Y. 1949); *Portman v. American Home Products Corporation*, 9 F.R.D. 613 (S.D. N.Y. 1949); *Panella v. Baltimore & O. R. Co.*, *supra* note 17.

²⁹ *Carpenter-Trant Drill Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959) "This court, however, feels that when experts in an extremely technical field have been retained to advice counsel in the case as to proper technical interpretation of certain facts, and of the state of technical information, that this partakes of the counsel's work product. . . . Under the rationale of the Hickman case, it is the opinion of this court that a blanket request for the reports which an expert has submitted to counsel in preparation of the case for trial is a request for the attorney's work product. The court does not believe that the attorney for one party should be entitled to the fruits of his opponents labor in this regard without a strong showing of good cause." *Kluchenac v. Oswald & Hess Company*, 20 F.R.D. 87 (W.D. Pa. 1957); *Lundberg v. Wells*, 11 F.R.D. 136 (S.D. N.Y. 1951); *Scourtes v. Fred*, *supra* note 27; *Smith v. Washington Gas Light Co.*, 7 F.R.D. 735 (D. D.C. 1948); *Colden v. R. J. Schofield Motors*, 14 F.R.D. 521 (N.D. Ohio 1952); *Schuyler v. United Air Lines*, 10 F.R.D. 111 (M.D. Pa. 1950); *Sachs v. Aluminum Co. of America*, 167 F. 2d 570 (6th Cir. 1948).

ground of public policy,³⁰ namely, that one party should not be allowed to take advantage of information gained through the expenditures of the other.³¹ In *Leding v. U.S. Rubber Co.*,³² the court held that an analysis made by an expert, who was engaged by the defendant, for the benefit of counsel, was not work product; but at the same time recognized the general policy of not allowing one party to use the fruits of the others labor. The court said such a policy didn't apply in this instance because the plaintiffs had hired other experts or had obligated themselves to make their own analysis also.

In *Walsh v. Reynolds*,³³ the court found that the report an expert made to the attorney probably was not, in itself, work product, but could well be considered a statement of a prospective witness, and therefore would be work product. In this case the court also found good cause and allowed discovery of the facts contained in the report but held that there was no good cause present to allow discovery of the expert conclusions contained in the report since he could get his own expert conclusions on the facts he discovered. This same result, allowing discovery of the factual findings only, has also been reached in other instances where the court decided that such reports were not work product at all.³⁴

In *Cold Metal Process Co. v. Aluminum of America*,³⁵ the court, recognizing that possibly the work of an expert employed by an attorney could be work product, nevertheless ordered him to answer questions on deposition on the theory he could be called as a witness and then would have to answer anyway by direction of the court. The same reasoning was followed in *Bergstrom Paper Co. v. Continental Insurance Co.*,³⁶ where it was held that opinions of expert witnesses, based upon investigations made by them in the employ of any one of the parties, may be the subject of discovery, one of the applicable tests being whether or not testimony elicited upon the examination would be properly receivable as evidence at the trial, since discovery merely

³⁰ *Lewis v. United Air Transport Corporation*, 32 F. Supp. 21 (W.D. Pa. 1940); *Cold Metal Process Co. v. Aluminum Co.*, 7 F.R.D. 684 (D. Mass. 1947); *Hickey v. United States*, 18 F.R.D. 88 (E.D. Pa. 1952); *United States v. 6.82 Acres of Land Etc.*, 18 F.R.D. 195 (D. N.M. 1955).

³¹ *Roberson v. Graham Corp.*, 14 F.R.D. 83 (D. Mass. 1952); *Moran v. Pittsburgh-Des Moines Steel Co.*, 6 F.R.D. 594 (W.D. Pa. 1947); *Boynton v. R. J. Reynolds Tobacco Co.*, 36 F. Supp. 593 (D. Mass. 1941).

³² *Leding v. United States Rubber Company*, 23 F.R.D. 220 (D. Mont. 1959).

³³ *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D. N.J. 1954).

³⁴ *United States v. Certain Parcels of Land Etc.*, *supra* note 4; *Julius Hyman & Company v. American Motorists Insurance Company*, 17 F.R.D. 386 (D. Colo. 1955) expert's investigation and report were not made at request of counsel.

³⁵ *Cold Metal process Co. v. Aluminum Co. of America*, 7 F.R.D. 425 (N.D. Ohio 1947).

³⁶ *Bergstrom Paper Company v. Continental Insurance Company*, 7 F.R.D. 548 (E.D. Wis. 1947). In this case however, the one who engaged the expert was not counsel but the court still used that analogy.

advances the stage at which disclosure can be compelled. The court also followed this reasoning as to the expert's work sheets and calculations since he might refer to these as the basis of his conclusions upon cross-examination at the trial. However, the court found that since there had already been extensive examination, any further examination would be burdensome and unnecessary so further discovery was not allowed. The opinion goes on to draw an analogy between the expert's work and the attorney's preparation in the Hickman case and says the requesting party here had not sustained the burden of showing adequate reasons for a further examination of this witness.

There are other cases where the work product theory was discarded with respect to the work of experts and discovery allowed,³⁷ but clearly the general rule would seem to be that the work and reports of experts will not be discoverable without a showing of cause. It appears to make little difference whether this rule is based on the work product theory, which several courts have applied, or merely a general public policy basis of not allowing a party the benefit of expenditures made by an opponent, which at present seems to be the more widely applied basis.

e) Discovery of Defenses and Witnesses to be Used at the Trial.

It is not entirely clear whether interrogatories questioning the basis of an affirmative defense are permissible or not. The courts seem to draw a distinction between a request for the factual basis of the adversary's position and a request for the legal theory underlying the adversary's position; the former being held to be freely discoverable, while the latter is said to constitute work product material and therefore protected.

In *Tobacco & Allied Stock v. Trans America*,³⁸ it was held that an interrogatory asking what evidence in the form of persons and acts forms the basis of the defendant's affirmative defenses need not be answered. It was there stated that these were tangible examples of an attorney's work product as they are the attorney's mental impressions, theories and beliefs. However, in *Forsythe v. Baltimore*,³⁹ the interrogatory objected to read, "State on what conduct, course of conduct, acts of omission or commission on the part of the plaintiff you base the allegations of contributory negligence as you set forth in your answer;" and the court there held such a demand did not elicit the conclusions or work product of an attorney. It seems that the latter case presents a sound approach, and that either party should be entitled to secure information by interrogatory of acts averred as constituting negligence.⁴⁰

³⁷ *Sachs v. Aluminum Co. of America*, 167 F. 2d 570 (6th Cir. 1948).

³⁸ *Tobacco and Allied Stocks v. TransAmerica Corp.*, 16 F.R.D. 534 (D. Del. 1954).

³⁹ *Forsythe v. Baltimore & O. R. Co.*, 15 F.R.D. 191 (W.D. Pa. 1954).

⁴⁰ *McNeice v. Oil Carriers Joint Venture*, 22 F.R.D. 14 (E.D. Pa. 1958) "As

In *Clemenshaw v. Beech Aircraft Corporation*,⁴¹ an interrogatory questioning whether or not the party was relying on *res ipsa loquitur*, was denied as requesting work product. The court there held that only counsel would have thought of this and only a client learned in the law would have a knowledge of it. In *B & S Halliburton Oil Well Cementing Co.*,⁴² the court allowed an interrogatory asking what the plaintiff was contending and from what witnesses he had obtained the information on which he based his contention, distinguishing it from the *Clemenshaw* case saying that the defendant was exploring contentions regarding matters of fact, rather than legal theory, and concerning facts that the ordinary person would understand and consider relevant to his case.

Under Rule 26B the names and addresses of potential witnesses, as such, are freely discoverable. However, discovery of names of witnesses who gave statements, studied, or investigated the situation have been denied where such information was equally available to both parties, or the request was merely an attempt to invade the other party's files and appropriate the attorney's work product.⁴³ In all cases it seems clear that where the interrogatory asks what witnesses and evidence is to be used or is intended to be used at the trial, the question need not be answered.⁴⁴ To allow this would effectively deny an attorney opportunity to introduce evidence in accordance with his judgment during the course of the trial.

III. WHAT CONSTITUTES "GOOD CAUSE"

Under the *Hickman* decision work product is protected unless good cause for discovery is shown. It's evident from an examination of the decisions that no hard and fast rule as to what circumstances will constitute good cause has evolved. Each case has to be determined upon its particular facts,⁴⁵ and is largely within the discretion of the trial court.⁴⁶ It has been said, "A stringent standard of good cause is applied

enunciated in many decisions the party moving for discovery should be entitled to know upon what facts the other party is basing his allegations or defenses." *Contra—State of Md. v. Baltimore & O. R. Co.*, 7 F.R.D. 666 (E.D. Pa. 1947).

⁴¹ *Clemenshaw v. Beech Aircraft Corporation*, 21 F.R.D. 300 (D. Del. 1958).

⁴² *B. & S. Drilling Co. v. Halliburton Oil Well Cementing Co.*, 24 F.R.D. 1 (S.D. Tex. 1959).

⁴³ *United States v. Bennett*, 14 F.R.D. 166 (E.D. Tenn. 1953); *O'Brien v. Equitable Life Assur. Soc. of United States*, 13 F.R.D. 475 (W.D. Mo. 1953).

⁴⁴ *Central Hide & Rendering Co. Inc., v. B.-M.-K.- Corporation*, 19 F.R.D. 294 (D. Del. 1956); *Aktiebalaget Vargos v. Clark*, 8 F.R.D. 635 (D. D.C. 1949); *Cogdill v. Tennessee Valley Authority*, 7 F.R.D. 411 (E.D. Tenn. 1947).

⁴⁵ *Hudalla v. Chicago M., S.P. & P. R.R. Co.*, 10 F.R.D. 363 (D. Minn. 1950); *Hanke v. Milwaukee Electric Ry. & Transport Co.*, 7 F.R.D. 540 (E.D. Wis. 1947).

⁴⁶ *New York Central Railroad Company v. Carr*, 251 F. 2d 433 (4th Cir. 1957); *Reynolds v. United States*, 192 F. 2d 987 (3d Cir. 1951) (*revd.* on another ground, 345 U.S. 1 (1952)); *Marks v. Gas Service Company*, 168 F. Supp. 487

commensurate with the significance of the policy against the invasion of an attorney's freedom in the preparation of his case."⁴⁷ This statement exemplifies the latitude in which the lower court may act in either denying or allowing discovery.

Probably what would be the closest to a general rule would be to say that good cause is equivalent to necessity.⁴⁸ Practical difficulties in investigating is not enough to justify discovery of information which the adverse lawyer has in his possession.⁴⁹

In *Herbst v. Chicago, Rock-Island and Pacific R. Co.*,⁵⁰ the court held the statements involved were not work product, but, even if they were, good cause would still exist because an interrogation of the witnesses presently, may not be identical with statements taken shortly after the accident, also time had elapsed and memories would be dimmed with reference to specific details, and these statements made immediately after the accident may and undoubtedly would lead to the discovery of material and relevant facts. The dicta in this case hasn't been generally followed however, and good cause does not exist merely because statements taken then and those taken now may not be the same,⁵¹ or some witness may not remember what he originally said.⁵² Likewise good cause does not exist because a witness may be hostile or may refuse to make a statement,⁵³ nor is it sufficient to justify inspection of statements upon the adversary's surmise or suspicion that he might find impeaching material therein.⁵⁴ However, it has been said

(W.D. Mo. 1958); *Brauner v. United States*, 10 F.R.D. 468 (E.D. Pa. 1950).

⁴⁷ *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).

⁴⁸ *Hickman v. Taylor*, 329 U.S. 495 at 511 (1947). "Where relevant and non-privileged facts remain hidden in an attorney's file and where production of these facts is essential to the preparation of one's case, discovery may properly be had;" *Helverson v. J. J. Newberry Company*, 16 F.R.D. 330 (W.D. Mo. 1954); *Connecticut Mut. Life Ins. Co. v. Shields*, *supra* note 47; *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D. N.J. 1954); *Allmont v. United States*, 177 F. 2d 971 (3d Cir. 1949) (*cert. denied* 339 U.S. 967, 1950); *Wilson v. Capital Airlines*, 19 F.R.D. 263 (E.D. N.C. 1956).

⁴⁹ *United States v. Deere & Co.*, 9 F.R.D. 523 (D. Minn. 1949); *Tandy & Allen Construction Co. v. Peerless Casualty Co.*, 20 F.R.D. 223 (S.D. N.Y. 1957); These cases seem to indicate however, if the disparity in opportunity of investigation is great enough, discovery may be allowed.

⁵⁰ *Herbst v. Chicago, Rock-Island & Pacific R. Co.*, 10 F.R.D. 14 (S.D. Iowa, 1950).

⁵¹ *Helverson v. J. J. Newberry Company*, *supra* note 48. The court here in denying discovery, found that maybe the one taking the statements wasn't a lawyer but said it didn't matter; evidently meaning there wasn't even sufficient cause to satisfy Rule 34 without the added burden of the Hickman rule.

⁵² *United States v. Deere & Co.*, *supra* note 49.

⁵³ *Ibid.* *Tandy & Allen Construction Co. v. Peerless Casualty Co.*, *supra*, note 49. *Portman v. American Home Products Corporation*, 9 F.R.D. 613 (S.D. N.Y. 1949); *Hanke v. Milwaukee Electric Railway and Transport Company*, 7 F.R.D. 540 (E.D. Wis. 1947).

⁵⁴ *Hudalla v. Chicago, M., S.P. & P. R. Co.*, 10 F.R.D. 363 (D. Minn. 1950); *Hauger v. Chicago, Rock Island & Pacific Railroad Co.*, 216 F. 2d 501 (7th Cir. 1954) "A court is not justified in ordering a litigant to permit his adver-

that if the witnesses deny the purport of their alleged statements the work product privilege would cease to be effective.⁵⁵ In all these situations it has been held that if after diligent effort the party could not obtain the statements, he could again apply to the court for assistance,⁵⁶ or if the petitioner can show that he has reasonable grounds to believe that impeaching material is in fact contained in the statements it may be reached.⁵⁷

The circumstances, alleged as constituting good cause, must always be shown by the petitioner, and the court will not find it from a party's mere allegation thereof.⁵⁸

Inequality of facilities of investigation is not enough to have discovery of work product ordered, nor is hardship of investigation, financial, or otherwise such as difficulty in finding the witnesses.⁵⁹

As was said in the Hickman case, production might be justified where the witnesses are no longer available.⁶⁰ This has not been construed to include absence from the state by a witness. Such a witness is not unavailable within the rule, and his absence is not good cause for production of work product statements.⁶¹ In *McCall v. Overseas Tankship Corporation*,⁶² all the passengers aboard a plane were killed, thus rendering it impossible to produce the testimony of anyone who witnessed the crash or the operation of the plane. The court held this to be sufficient cause for the production, inspection, and taking of testimony as to the attorney's professional activities in gathering information of the surrounding circumstances.

The good cause present in unavailability of the witness has been extended by analogy to unavailability of the evidence in its original state. In *Walsh v. Reynolds Metals Co.*,⁶³ a propane heater exploded

sary to inspect witness statements, which he has procured in preparing for trial, upon the adversary's mere surmise or suspicion that he might find impeaching material in the statements. In such a situation the rights of a litigant in the work-product of his lawyers and agents are not required to give way to an adversary's right of discovery. At 508. *Burns v. Mulder*, 20 F.R.D. 605 (E.D. Pa. 1957); *Carpenter-Trant Drill Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959).

⁵⁵ *Thompson v. Hoitsma*, 19 F.R.D. 112 (D. N.J. 1956).

⁵⁶ *Tandy & Allen Construction Co. v. Peerless Casualty Co.*, *supra* note 49. *Portman v. American Home Products Corporation*, *supra* note 53.

⁵⁷ *United States v. Great Northern Railway Company*, 18 F.R.D. 357 (N.D. Cal. S.D. 1955).

⁵⁸ *Ibid.* *Tandy & Allen Construction Co. v. Peerless Casualty Co.* *supra* note 49. *Martin v. Capital Transit Co.* 170 F.2d 811 (D.C. Cir. 1948); *Carpenter-Trant Drill Co. v. Magnolia Petroleum Corp.*, *supra* note 54.

⁵⁹ *Portman v. American Home Products Corporation*, *supra* note 53; *United States v. Deere & Co.*, 9 F.R.D. 523 (D. Minn. 1949); *Lester v. Isbrandtsen Co.*, 10 F.R.D. 338 (S.D. Tex., 1950).

⁶⁰ *Hickman v. Taylor*, 329 U.S. 495 at 511, (1947).

⁶¹ *Tandy & Allen Construction Co. v. Peerless Casualty Co.*, *supra* note 49; *Lester v. Isbrandtsen Co.*, *supra* note 59; *Berger v. Central Vermona Ry. Inc.*, 8 F.R.D. 419 (D. Mass. 1948).

⁶² *McCall v. Overseas Tankship Corporation*, 16 F.R.D. 467 (S.D. N.Y. 1954).

⁶³ *Walsh v. Reynolds Metals Co.*, 15 F.R.D. 376 (D. N.J. 1954).

killing the plaintiff's intestate. An inspection by defendant's experts and plumbers ensued, during which the equipment was disconnected, and some of it removed by the plumbers and then returned. The court held that under such circumstances the best evidence of the condition in which this equipment was right after the explosion was the notes made of such condition by the expert and incorporated into his report, which was the subject of the motion. Thus they said the "necessity" or "justification" existed to obtain discovery of the otherwise protected work product of the lawyer. The same result was reached in *Colden v. R. J. Schofield Motors*,⁶⁴ in which the automobile involved had been disassembled during the course of the investigation and examination, upon which the expert's statement was based. This latter case is also of interest on another point. The rule is stated in the *Hickman* case and often times repeated that discovery of an attorney's files will not be allowed where the information sought is available elsewhere or through other means.⁶⁵ Here however, it was held that even though possibly the information might be secured by taking the deposition of the expert, in the interest of time and the expedition of the litigation, the statement or a true copy thereof should be produced and furnished the requesting party.

Marks v. Gas Service Company,⁶⁶ is one of the more liberal cases in finding good cause. The plaintiff's house had burned as a result of a leak in the defendant's gas pipe. The defendant had an investigation made and a written report was given to counsel. The court concluded that the complexity of the subject, the immediacy of the tests after the fire, the technical nature of the report, and the length of time elapsed since the investigation all combined to make it difficult if not impossible for the plaintiff to obtain the facts involved without recourse to the report; and discovery of this work product was allowed. However, none of the decisions upon which the court relied, in the above case, as supporting its position, and from which the court quoted, involved work product. The cited decisions all made it clear that, for various reasons, they were not dealing with work product.

In all of the above considerations the courts have been, in general, dealing with written material. Under the *Hickman v. Taylor* decision the cause for discovery of oral statements and mental impressions must be greater than that required when the request is for written statements.⁶⁷ No case has been found in which a court held that the excep-

⁶⁴ *Colden v. R. J. Schofield Motors*, 14 F.R.D. 521 (N.D. Ohio 1952).

⁶⁵ *State of Maryland v. Baltimore & O. R. Co.*, 7 F.R.D. 666 (E.D. Pa. 1947); *Tandy & Allen Construction Co. v. Peerless Casualty Co.*, *supra* note 49; *Helverson v. J. J. Newberry Company*, *supra* note 48.

⁶⁶ *Marks v. Gas Service Company*, 168 F. Supp. 487 (W.D. Mo. 1958).

⁶⁷ *Hickman v. Taylor*, 329 U.S. 495 (1947) at 512, "Rule 30(b) as presently written, gives the trial judge the requisite discretion to make a judgment as to whether discovery should be allowed as to written statements secured

tional circumstances or rare situation has existed, as required by the Hickman case, which would justify the production of mental impressions or oral statements.

The Hickman rule places upon a party, who attempts to invade the privacy of the opposing attorney's trial preparation, the burden of showing good cause. This is true whether discovery is sought under Rule 26, 33 or 34. Rule 34 by its own terms requires good cause be shown, but it is generally held that when work product material is sought under this rule the Hickman case places an additional burden on the proponent of production.⁶⁸

IV. CONCLUSION

While the *Hickman v. Taylor* has provided a fairly workable rule, there is much conflict in the lower courts due to its liberal interpretation by some and a strict interpretation by others. This conflict results from the attempt to strike a balance between full disclosure in the interests of justice, on the one hand, and the maintenance of the adversary character of law suits on the other. Though the scope of discovery is broad under the Federal Rules it would seem that the strict interpretation is the sounder one. As Justice Jackson aptly stated:⁶⁹

But a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.

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from witnesses. But in the instant case there was no room for that discretion to operate in favor of the petitioner. No attempt was made to establish any reason why Fortenbaugh should be forced to produce the written statements. There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved. That was insufficient to justify discovery under these circumstances and the court should have sustained the refusal of the tug owners and Fortenbaugh to produce.

"But as to oral statements made by witnesses to Fortenbaugh, whether in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances of this case so as to justify production. . . . If there should be a rare situation justifying production of these matters, petitioners case is not of that type."

⁶⁸ *Marks v. Gas Service Company*, 168 F. Supp. 487 (W.D. Mo. 1958); *Brauner v. United States*, 10 F.R.D. 468 (E.D. Pa. 1956). Justice Jackson stated in the concurring opinion of the Hickman case that the production of signed written statements was governed by Rule 34 and upon a showing of good cause therefore the court could order their inspection, copying or photographing. This appears to be opposite the generally accepted rule of the Hickman case.

⁶⁹ *Hickman v. Taylor*, 329 U.S. 495 at 516 (1947).