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DISCOVERABILITY OF WORK PRODUCT IN DIVERSITY ACTIONS

INTRODUCTION

In 1965 the United States District Court for the District of Delaware considered a significant problem of diversity litigation. The case of *Ortiz v. H. L. H. Products Co.*[1] presented to the court this question: Should a federal district court sitting in a diversity case apply state or federal law to the discoverability of an attorney's work product?

The plaintiff Ortiz, a nonresident, brought a tort action against H. L. H. Products Co., a citizen of Delaware. He asked the court pursuant to Federal Rule 34[2] to compel the defendant to produce specified photographs and a statement of a witness for the defendant. The plaintiff based his request on the assumption that the court should apply federal law to these items' discoverability (the leading federal case on discovery of the work product of an attorney, *Hickman v. Taylor,*[3] held the courts should allow work product discovery upon a showing of good cause). Contending that he had shown good cause,[4] the plaintiff completed his argument.

The defendant did not attack the *Hickman* holding, but argued that it was inapplicable. Federal jurisdiction in *Hickman* had been grounded in the "federal question" area, and in particular under the Jones Act.[5] Because federal courts are free to fashion their own substantive, as well as procedural, laws in "federal question" cases,[6] the problem of whether discovery was procedural or substantive was of purely academic significance in *Hickman* and accordingly the Supreme Court did not resolve it. *Ortiz,* however, was a diversity case, and the character of the discovery issue became determinative as to the applicable law. The defendant argued that the doctrine of *Erie R.R. v. Tompkins*[7] requires federal courts sitting in a diversity action to apply the law of the state in which they sit. The Supreme Court has consistently construed the *Erie* holding—vis-à-vis the *Erie* Doctrine —as embracing substantive law only, leaving the fed-

1. 39 F.R.D. 41 (D. Del. 1965).
2. FED. R. CIV. P. 34, for discovery and production of documents and things for inspection, copying, or photographing.
3. 329 U.S. 495 (1947).
4. Ortiz v. H. L. H. Prods. Co., 39 F.R.D. 41, 42 (D. Del. 1965). See generally 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 652.4 (Wright rev. 1961) [hereinafter cited as BARRON & HOLTZOFF]; *Developments in the Law—Discovery,* 74 HARV. L. REV. 940, 1033-39 (1961).
5. 46 U.S.C. § 688 (1959).
6. WRIGHT, FEDERAL COURTS 216-17 (1963).
7. 304 U.S. 64 (1938).

eral courts free to follow their own procedure.[8] The defendant in *Ortiz* contended that work-product immunity is a substantive question, and that consequently, the court must apply Delaware law, and that Delaware law prohibits an order for production of any material prepared for trial.

The *Ortiz* court, however, sustained plaintiff's motion and ordered that the defendant produce the materials. Although this decision comports with the modern trend of applying the Federal Rules and their gloss in diversity cases,[9] the *Ortiz* decision remains unsatisfying. The court referred to a number of cases in which state law was applied to prohibit discovery. Most of these cases involved the state law of privileged communications.[10] The *Ortiz* court agreed with the result in these cases prohibiting discovery, noting that privileged communications represent an "outgrowth of sound state policy." The court, pointing out that the instant facts concerned work-product immunity, not privileged communications, refused to apply the Delaware law. The court failed, however, to answer why state attorney work-product privileges were not an "outgrowth of sound state policy." Certainly there is no authority for the proposition that a federal court may refuse to apply state law whenever that court deems the particular law "unsound." To the contrary, the careful wording in *Erie* and the repeated attempts to sophisticate the *Erie* test dispel any impression that the federal courts may possess such unbridled discretion. Thus, the *Ortiz* question—whether state or federal

8. *Compare* Sibbach v. Wilson & Co., 312 U.S. 1 (1941), *with* Guaranty Trust Co. v. York, 326 U.S. 99 (1945), *and* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).

9. *E.g.,* Hanna v. Plumer, 380 U.S. 460 (1965).

10. Citation of cases at Ortiz v. H. L. H. Prods. Co., 39 F.R.D. 41, 43-44 (D. Del. 1965).

At common law the attorney-client privilege was based upon a confidential communication. 8 WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961). The underlying policy of this privilege was freedom of consultation between attorney and client without the apprehension of compelled disclosure. *Id.* at § 2291. Under the original theory of the privilege only confidential communications for the purpose of securing aid *in litigation* were protected. The privilege applied only to *that* litigation for which the aid was secured. But, modern theory has abolished this limitation. *Id.* at § 2294. Wigmore defines the general principle of the attorney-client privilege in the following form:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Id. at § 2292. However, Wigmore's statement of the general principle has been expanded in several states including Delaware to provide protection for what is commonly referred to as the attorney's work product. See Ortiz v. H. L. H. Prods. Co., *supra* at 45; 2A BARRON & HOLTZOFF § 652.2, at 128 n.13.16. These expanded privileges cannot meet the requisites of a confidential communication and thus cannot rely on the underlying policy of the attorney-client privilege which is the promotion of freedom of consultation between attorney and client.

law governs the discoverability of an attorney's work product in diversity actions—must be answered within the framework of *Erie* and its progeny.

ERIE R.R. v. TOMPKINS

One of the significant legal decisions of the twentieth century, *Erie R.R. v. Tompkins*[11] goes to the heart of federal-state relations. The Supreme Court declared in *Erie* that there was no federal general common law. The Court stated: "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or part of the law of torts."[12] The Court held that "except in matters governed by the Federal Constitution or by Acts of Congress the law to be applied in any case is the law of the state."[13]

These statements provide a point of embarkation for consideration of the problem of whether parties may utilize federal discovery practices in diversity cases under the *Erie* rule. Is discovery in general, and discovery of an attorney's work-product in particular, substantive or procedural in character? To determine the character of discovery one looks first to the acts authorizing discovery practices.

In 1934 Congress provided:

> The Supreme Court shall have the power to prescribe, by general rules, the forms of writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.
>
> Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution. . . .[14]

Seizing upon the Enabling Act's grant of power, the Supreme Court promulgated the Federal Rules of Civil Procedure in 1938. Chief Justice Hughes observed that the fundamental thrust of the Rules was to strip procedure of technicalities and advance causes to a decision on the merits with a minimum of procedural encumbrances.[15] Perhaps the section entitled "Depositions and Discovery" did more to advance the goal of decision on the merits than any other part of the Rules. The prior system which encouraged "surprising" opponents at trial and other clever

11. 304 U.S. 64 (1938).
12. *Id.* at 78.
13. *Ibid.*
14. 28 U.S.C. § 2072 (1964).
15. Address, Annual Meeting, American Law Institute, reprinted at 21 A.B.A.J. 340, 341 (1935).

practices was replaced with one in which all litigants could discover all essential facts before trial. The merit of the claim, not the merit of the advocate, became the determinative factor.[16]

The philosophy which predominated before the Rules supported the view that an attorney's plan of attack was not discoverable.[17] Many felt that an adversary system's effectiveness could be maintained in no other way.[18] But if there were any doubts that discovery under the Federal Rules could reach an attorney's so-called work-product,[19] the Supreme Court dispelled them in *Hickman v. Taylor*.[20] Although it disallowed discovery in that case, the Court made it clear that courts could compel production of materials within an attorney's work-product upon a showing of good cause. The Court asserted, moreover, that statements of witnesses, memoranda, statements and mental impressions of the discoveree's attorney in anticipation of litigation were not within the attorney-client privilege. The assertion's implication is obvious—such materials within the attorney-client privilege are not a proper subject of discovery, but those outside that privilege but within the attorney's work-product are discoverable.

The *Hickman* decision, however, recognized a general policy against the invasion of an attorney's privacy in preparing his client's case.[21] Thus, the Court pointed out that a presumption that work-product materials are not subject to discovery is implicit in the Federal Rules. A litigant must show good cause to overcome the presumption, and if he does so, the court will grant discovery.

Yet, under the *Erie* test, the crucial question remains unanswered—whether the susceptibility of an attorney's work-product to discovery is a matter of substance or procedure? The Enabling Act permitted the Court to promulgate procedural rules only. Thus, discovery, as authorized in the Federal Rules is a comprehensive *procedural* device for accelerating fact-finding.[22] Parties in a diversity case may avail themselves of these liberal discovery practices notwithstanding that pertinent state law has no similar provisions for such practice.[23] Discovery, itself, is not a substantive right—a party may not resist discovery merely because

16. See Hickman v. Taylor, 329 U.S. 495, 507 (1947).
17. See 2A BARRON & HOLTZOFF § 641, at 9.
18. See WRIGHT, FEDERAL COURTS 308 (1963).
19. 4 MOORE, FEDERAL PRACTICE ¶ 26.23(4) (2d ed. 1963) [hereinafter cited as MOORE].
20. 329 U.S. 495 (1947).
21. *Id.* at 512.
22. *Id.* at 506.
23. See Hanna v. Plumer, 380 U.S. 460, 465 (1965).

state law does not authorize its use.[24] The problem arises only when to permit discovery would frustrate an interest which state law affirmatively protects and federal law, in a purely federal context, denies—the interest of a client and his attorney to suppress materials which the attorney could use at trial. The problem is perplexing because *Erie* does not supply the formula for its solution.

To categorize work-product immunity as "substantive" or "procedural" is to oversimplify the issue. An example serves to illustrate the point. Assume that a United States district court in Minnesota, sitting in a diversity case, is presented with a situation substantially identical to *Ortiz*. A Minnesota statute provides:

> 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, or of any writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or except as provided in Rule 35 [Physical and Mental Examination of Persons], the conclusions of an expert, shall not be required.[25]

Hickman v. Taylor,[26] of course, expressed the federal viewpoint on the question of work-product immunity. *Erie* tells federal courts in diversity cases that they must predicate the choice between the Minnesota statute and *Hickman* on the basis of whether the interest is substantive or procedural. Yet *Erie* never provides a criterion for distinguishing "substance" from "procedure." Indeed it could not—"substance" and "procedure" are words of many shades and consequently are capable of varying constructions. Lawyers and judges can form persuasive arguments as to the "substance" of this immunity today, and tomorrow they may prove just as convincingly that it is merely a matter of "procedure." *Erie* did not answer the *Ortiz* question, it simply directed the *Ortiz* court to the crucial inquiry. Courts began not to apply an *Erie* test, but to answer the *Erie* question.

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24. See *ibid.* As a caveat it should be noted that under *Erie* there has been no recognition of the possibility that a party might resort to the federal courts to obtain more favorable procedural treatment under the Federal Rules.

25. MINN. R. CIV. P. 26.02. The Minnesota rule provides a more clear-cut expression of state work-product immunity than do the Delaware decisions in *Ortiz* since tangential issues are not present. Immunity almost identical with that in Minnesota is found in Missouri, Pennsylvania and Texas. *Compare* MINN. R. CIV. P. 26.02, *with* MO. R. CIV. P. 57.01(b), *and* PA. R. CIV. P. 4011, *and* TEX. R. CIV. P. 167, 186a. For detailed citation of state rules for discovery of an attorney's work product see 2A BARRON & HOLTZOFF § 652.2, at 128 n.13.16. See generally Comment, *The Work Product Doctrine in the State Courts,* 62 MICH. L. REV. 1199 (1964).

26. 329 U.S. 495 (1947).

The Supreme Court, recognizing its language in *Erie* provided no particularly determinative standard,[27] was not happy to leave lower federal courts with the task of answering this question on a case-to-case basis. The Court tried again to fashion a test which would resolve the federal-state conflict of laws in diversity cases. In doing so it cast new, interesting shadows over the *Ortiz* question.

ERIE'S PROGENY

Sibbach v. Wilson & Co.,[28] a case which arose two years after *Erie* forced the Supreme Court further to articulate its statement from *Erie*, specifically, that: "Congress has no power to declare substantive rules of common law. . . ."[29] The plaintiff in *Sibbach* contended that Federal Rules 35 and 37 [concerning mental and physical examinations] were substantive and, therefore, without the mandate of Congress to the Supreme Court in the Enabling Act, arguing that the right of the individual to be free from invasion of the person was too important a right to be classed as procedural. The Court, however, held these rules to be merely procedural and ordered plaintiff to submit to the examination.

The Court next dealt with plaintiff's suggested standard—that the "importance" of the right determined whether it was substantive in nature. First, the Court noted that the rights furthered by Federal Rules 35 and 37 may be just as "important" as the rights it denied, and thereby rejected the notion that the "importance" of the right is a relevant inquiry. "If we were to adopt the suggested criterion of the importance of the alleged right we should invite endless litigation and confusion worse confounded."[30] The Court went on to attempt to fashion another substantive-procedural rule.

> The test must be whether the rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.[31]

The *Sibbach* case resembles the *Ortiz* situation.[32] The privilege to be free from invasion of the person is analogous to a privilege to be free from invasion of property—for example, materials prepared for trial.

27. See Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).
28. 312 U.S. 1 (1941). See also Schlagenhauf v. Holder, 379 U.S. 104 (1964), where Federal Rule 35(a) is held to apply to defendants as well as plaintiffs for physical or mental examination, and as so applied the rule is authorized by the Enabling Act and is constitutional.
29. Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).
30. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).
31. *Ibid.*
32. See generally text accompanying notes 1-9 *supra*.

The direction of Supreme Court opinions in recent years seemingly supports the contention that the right to personal freedom is more fundamental than the right to hold property free from interference. Thus, if personal freedom can be deemed procedural, then *a fortiori,* the right to hold property can be deemed procedural. Yet such reasoning overlooks two important factors in *Sibbach.*

The *Sibbach* Court noted that the plaintiff failed to assert any specific state policy protecting an individual from physical or mental examination.[33] The defendant in *Ortiz,* however, rested on an articulated Delaware law protecting materials within the work product of an attorney.[34] This affirmative state policy creates the problem.

A contention that *Sibbach* dictates *Ortiz* because liberty of person must not be more procedural than liberty of property uses *Sibbach* to argue a point *Sibbach* itself states. Whether a right is more fundamental than another right is no way salient to determine whether it is more substantive. The *Sibbach* case clarifies the *Erie* holding, but it does not answer the *Ortiz* question.

In *Guaranty Trust Co. v. York,*[35] the Supreme Court modified the *Erie* doctrine once again, handing down a rule which has come to be denoted as the "outcome-determinative" test.[36] The problem in *Guaranty Trust* was whether a federal court in a diversity action must apply a state (New York) statute of limitations to bar plaintiff's action. Speaking for the Court, Mr. Justice Frankfurter admitted that the words "substance" and "procedure" were conceptual variables and virtually useless in determining the federal-state dichotomy in diversity cases. The Court decided that though federal courts may control the forms and modes of enforcing state rights, they must apply a state right if failure to do so would substantially change the outcome. The Court summarized its position.

> And so the question is not whether a statute of limitations is deemed a matter of "procedure" in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, *does it significantly affect the result of a litigation for*

33. See Sibbach v. Wilson & Co., 312 U.S. 1, 13 (1941).
34. Citation of Delaware cases at Ortiz v. H. L. H. Prods. Co., 39 F.R.D. 41, 42 (D. Del. 1965).
35. 326 U.S. 99 (1945).
36. WRIGHT, FEDERAL COURTS 208 (1963).

a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State court?[37] (Emphasis added.)

The New York statute of limitations would act as a complete bar in courts of New York. Its application, then, determines the outcome. Though the outcome-determinative test was a satisfactory explanation of the result in *Guaranty Trust* and has proved helpful in other contexts, it fails to resolve the *Ortiz* issue.

In *Guaranty Trust,* the Court could readily ascertain that the application of the New York statute of limitations would determine the outcome. It is hard to imagine an easier situation in which to employ this test—does the rule determine the outcome—than in litigation involving a statute of limitations. Yet, there are situations in which a court simply cannot tell whether application of a particular state rule of law will or will not determine the outcome. Included in this category are rules regarding the admissibility of evidence, and, generally, all questions pertaining to pre-trial discovery. Prophet, indeed, would be the court that could determine in advance whether immunizing work-product materials would affect the outcome of the case. Such determination of course, depends upon what there is to be discovered, and that information is not available until someone discovers it. The point is simple—the outcome-determinative test is satisfactory *only* where the court can determine whether or not application of that state law will substantially affect the outcome *before* making the determination of whether or not to apply that law.

The Supreme Court has recognized that the outcome-determinative test is inadequate to answer many diversity problems. Not only does the test contain the weakness described above, but it is fraught with another problem—how *substantial* must something be before it *substantially* affects the outcome? In *Byrd v. Blue Ridge Rural Electric Coop.,*[38] the Court added another chapter to the *Erie* doctrine.

In *Byrd,* the issue was whether a federal district court should apply a state law which directed the judge to be the trier of facts, or pertinent federal law which left all fact determinations to the jury. It was impossible for the Court to know whether the outcome depended upon this choice. The Supreme Court stated that the outcome-determinative test was not an absolute test,[39] and that even if a state law would determine the outcome, it would apply federal law where there are *affirmative*

37. Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945).
38. 356 U.S. 525 (1958).
39. *Id.* at 537.

countervailing considerations.[40] Mr. Justice Brennan noted that the federal courts comprise an *independent* system for administering justice.[41] The division of trial functions between judge and jury in civil common-law actions is an essential characteristic of the system.[42] The Court in *Byrd,* abandoned its search for a formula, and espoused that district courts consciously balance federal and state interests putting special emphasis on affirmative federal policies.

Balancing of State and Federal Interests

By analyzing the *Ortiz problem* in light of *Byrd,* courts will encounter the salient considerations and can devise a satisfactory solution. What are the various interests involved of a state recognizing work-product immunity and the federal courts with relation to the *Ortiz* question?

One of the states' interests arguably is that decisions of its own courts and those of a federal court hearing a diversity action within that state be uniform.[43] As an *independent* system of administering justice, the federal courts, on the other hand, seek uniformity of procedure among all the courts of that system.[44] These interests which conflict occasionally are present in all diversity actions. To attempt to weigh one interest in uniformity against another does not appear to be very helpful in resolving the problem.

It has been suggested that, as set forth in *Hanna v. Plumer,*[45] the "twin aims" of *Erie*—"discouragement of forum-shopping and avoidance of inequitable administration of the laws"[46]—constitute the basis for the current method of deciding the extent to which state law must be applied.[47] Yet, perhaps, the *Hanna* rationale is narrower than suggested. Specifically, the *Hanna* Court addressed itself to the problem of the applicability of a *particular* Federal Rule in diversity litigation. The Court summed up its holding by stating:

> When a situation is covered by *one of the Federal Rules,* the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima

40. *Id.* at 537-38.
41. *Id.* at 537.
42. *Ibid.*
43. See Guaranty Trust Co. v. York, 326 U.S. 99 (1945).
44. See Enabling Act, 28 U.S.C. § 2072 (1964).
45. 380 U.S. 460 (1965).
46. *Id.* at 468.
47. Recent Developments, *Federal Courts: Recognition of State Work Product Privileges in Diversity Suits,* 66 Colum. L. Rev. 1535, 1540 (1966).

facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.[48] (Emphasis added.)

In other words, the *Hanna* question is not one of determining whether *Erie* and its progeny requires the application of state law[49] or even whether there are "affirmative federal considerations" requiring the application of federal law.[50] Instead the question is whether a Federal Rule of Civil Procedure should *not* be applied—*i.e.,* whether it violates the Enabling Act or constitutional restrictions.

In contrast, the *Ortiz* question stands on different footing. The *Ortiz* court was not faced with opposition to the applicability of a particular Federal Rule. To the contrary, the parties did not question the applicability of the Federal Rules, rather, they disagreed as to the applicable law regarding the attorney's work product.[51] Consequently, the question was not one of voiding a particular Federal Rule as in *Hanna,* but it was one of choosing between federal or state law.

This choice of law then brings us back to the balancing of interests as suggested by *Byrd.*[52] For, under the traditional tests of *Erie* and *Guaranty Trust,*[53] Delaware work-product decisions may be considered substantive in character;[54] and federal law—*Hickman v. Taylor*[55]—may be considered procedural pursuant to the definition set forth in *Sibbach v. Wilson & Co.*[56]

As pointed out earlier,[57] the "soundness" or "propriety" of the state policy underlying a particular law should not be accorded any weight in determining the applicability of that state's law. The federal courts, though they must work with state law, may not refuse to apply it because they consider it unsound or improper.[58] Federal courts must give all state laws the same dignity for purposes of application in diversity suits.[59] *Byrd,* however, permits federal courts to refuse to apply state law when

48. Hanna v. Plumer, 380 U.S. 460, 471 (1965).
49. *Compare* Erie R.R. v. Tompkins, 304 U.S. 64 (1938), *with* Guaranty Trust Co. v. York, 326 U.S. 99 (1945).
50. See Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).
51. It is, however, arguable that *Hickman v. Taylor* should be accorded the status of a Federal Rule. Under this argument the *Hanna* case could then be applied.
52. See notes 38-42 *supra* and accompanying text.
53. See notes 35-37 *supra* and accompanying text.
54. See 4 MOORE ¶ 26.23(9) (2d ed. 1963).
55. 329 U.S. 495 (1947).
56. 312 U.S. 1 (1941).
57. See text accompanying note 10 *supra.*
58. See Erie R.R. v. Tompkins, 304 U.S. 64 (1938).
59. See *id.* at 78, where the Court makes no distinction between statutory and decisional law.

there are affirmative countervailing federal considerations.[60] This is the touchstone—the *federal* law and its policy.[61]

In *Ortiz* the court came close to answering the problem when it concentrated on *policy*.[62] However, the court inquired whether work-product immunity was an outgrowth of sound state policy.[63] It is suggested that the inquiry should have been: Does the case of *Hickman v. Taylor* announce a federal policy sound and important enough to countervail against Delaware's work-product privilege policy?

Initially, the policy of Delaware's work-product privilege must be delineated.[64] Those cases which have construed the extent of the Delaware work-product privilege do so on the ground that it is encompassed by the common law attorney-client privilege.[65] Nowhere do these cases show that the rationale of the common law attorney-client communication privilege—promoting freedom of consultation between attorney and client[66]—is being furthered by *absolutely* immunizing the attorney's work product. Nowhere do these cases even show that the rationale is at all applicable to an attorney's work product.

Though Delaware has no specific statement of its interests in immunizing an attorney's work product, it could be argued that the interests rest in preventing poor trial preparation were an attorney's files open to opposing counsel. Arguably, attorneys could become reluctant about writing out any of their strategy or theories. They might rely solely upon memory.[67] Unfair practices could develop to the point of subverting the adversary system. The foregoing arguments are those presented by the defendants in *Hickman*. There, the Court stated that these interests were protected by the implicit limitation of good cause. Thus, in one sense, in a majority of situations the state interests would be honored by application of *Hickman v. Taylor*.

On the other hand, there are affirmative federal considerations. Discovery practices have become an integral part of litigation in the

60. See Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 537-38 (1958).
61. Federal courts may not properly question state policy but they should assert and protect strong federal policies. *Compare* Erie R.R. v. Tompkins, 304 U.S. 64 (1938), *with* Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525 (1958).
62. See generally text accompanying note 10 *supra*.
63. *Ibid.*
64. See citation of cases in Ortiz v. H.L.H. Prods. Co., 39 F.R.D. 41, at 42 (D. Del. 1965).
65. *Compare* Wise v. Western Union Tel. Co., 36 Del. 456, 178 Atl. 640 (Super. Ct. 1935), *with* Hickman v. Taylor, 329 U.S. 495 (1947).
66. See 8 WIGMORE, EVIDENCE §§ 2290-92 (McNaughton rev. 1961).
67. See Hickman v. Taylor, 329 U.S. 495, 511 (1947).

federal courts.[68] Though discovery may not be as essential as the right to a jury in any traditional constitutional sense, it has become an indispensable aid in the furtherance of justice administered after full disclosure of facts.[69] The Supreme Court considered the Federal Rules as an invaluable aid in "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[70]

CONCLUSION

The *Hickman* doctrine is an integral adjunct of discovery and advances the liberal philosophy of the Federal Rules.[71] It is suggested that it expresses an affirmative federal policy on the discoverability of work product essential to the procedure in federal courts that it be applied in diversity cases, state immunity laws notwithstanding.

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68. The section of the Federal Rules entitled "Depositions and Discovery" creates integrated procedural devices for advancing the stage of litigation at which disclosure of facts can be compelled. The discovery instruments provide a means for narrowing and clarifying the basic issues, and for ascertaining facts relevant to these issues or information regarding the existence or whereabouts of such facts. Hickman v. Taylor, 329 U.S. 495, 506 (1947). Other benefits of the discovery procedure include the encouragement of pre-trial settlement; the opportunity for detecting and exposing fraudulent and groundless claims and defenses; and the promotion of efficiency in trial time and expense. 4 MOORE ¶ 26.02(2).

Limitations on the broad scope of discovery require that the material sought be relevant to the subject matter of the action. FED. R. CIV. P. 26(b). See generally 2A BARRON & HOLTZOFF § 647. The material must be of a nonprivileged character. FED. R. CIV. P. 26(b). Good cause must be shown for several types of discovery. FED. R. CIV. P. 34, discovery and production of documents and things for inspection, copying, or photographing; FED. R. CIV. P. 35, physical and mental examination of persons; Hickman v. Taylor, *supra,* attorney's work product. See generally 2A BARRON & HOLTZOFF § 652.4; *Developments in the Law—Discovery,* 74 HARV. L. REV. 940, 1033-39 (1961).

Discovery is not limited to material which will be admissible at trial, but has a standard of relevancy which is much broader. See generally 4 MOORE ¶ 26.16. Thus the right to take statements must be distinguished from the right to use them in court. WRIGHT, FEDERAL COURTS 308 (1963). In accomplishing the aims of the Federal Rules, the discovery provisions must be applied to the fullest extent and the privilege limitation restricted to its narrowest extent. Hickman v. Taylor, *supra; accord,* Radient Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 323 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963).

69. See note 68 *supra.*

70. See Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

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