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Work Product in Missouri

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WORK PRODUCT IN MISSOURI*

LARRY L. McMULLEN** AND ROBIN V. FOSTER***

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I. INTRODUCTION

One of the most important discovery limitations in Missouri practice, the “work product” doctrine,¹ also is one of the least understood. The doctrine

*The authors acknowledge the seminal Comment on this subject: *Discovery-Production of Attorney's Work Products*, by The Honorable Ike Skelton, Jr., United States Representative for the Fourth Congressional District of Missouri, 21 MO. L. REV. 279 (1956), and the suggestions on this work by Timothy W. Triplett, partner in the firm of Blackwell Sanders Matheny Weary & Lombardi, Kansas City, Missouri, author of Note, *Confidential Communications Privilege of Husband and Wife: Application under the Missouri Dissolution Statute*, 43 MO. L. REV. 235 (1978).

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1. The doctrine originally was based on *Hickman v. Taylor*, 329 U.S. 495 (1947). Early Missouri cases followed *Hickman*. See *infra* note 17 and accompanying

protects from discovery the trial preparations of parties and their representatives and other materials prepared in anticipation of litigation.² Frequently, however, objections based on work product are raised for the wrong type of materials or for incorrect reasons.³

A number of factors contribute to this continuing confusion. Some arise from the dynamic nature of the doctrine. The scope of work product protection has decreased, coinciding with the general trend in Missouri toward liberalization of discovery.⁴ The present protection of work product has evolved from a mixture of case law and supreme court rules.⁵

This article will examine the current status of work product under Missouri law from a practical standpoint. First, we will summarize the current rule and the development of the work product doctrine in Missouri. Major limitations and exceptions will then be discussed. Next, we will look at the basic prerequisites to attachment of work product protection, and will consider when work product is discoverable. In conclusion, we will discuss strategies by which lawyers can enhance the protection of their trial preparations.

II. THE DOCTRINE: AN OVERVIEW

A. Current Rule

Rule 56.01(b)(3)⁶ establishes two levels of immunity, one qualified, the

text. The doctrine's current scope basically is established by Mo. R. Civ. P. 56.01(b)(3). The doctrine, however, may not be limited to the provisions of that rule. See *infra* notes 131-42 and accompanying text.

2. See Mo. R. Civ. P. 56.01(b)(3).

3. Parties have often attempted to prevent discovery of relevant facts, witnesses' names, and other discoverable material on work product grounds. These categories of information clearly are not immune from discovery on that basis. See *infra* notes 85-117 and accompanying text.

4. See *infra* notes 36-40, 92 and accompanying text.

5. See *infra* notes 14-40 and accompanying text.

6. Mo. R. Civ. P. 56.01(b)(3) provides:

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this Rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. For purposes of this paragraph, a statement previously made is (a) a written statement

other absolute, that limit pretrial discovery. It does not limit materials that may be subpoenaed for or admitted at trial.⁷

The rule limits discovery of documents and tangible things prepared by parties and their representatives in anticipation of litigation.⁸ It is based upon the principle that parties and their attorneys should be free to prepare for trial without fear that their opponents will discover their preparations,⁹ thus encouraging diligent preparation by all parties. The ultimate objective of the rule is enhancement of the adversarial system on the theory that protecting work product will ensure that both parties will be in a position to effectively present the issues at trial.¹⁰

Two levels of work product are contemplated. Trial preparation materials,¹¹ such as witness statements, photographs, diagrams, and other investigative materials, are conditionally discoverable upon a showing of substantial need and inability without hardship to obtain the substantial equivalent through other means.¹² "Opinion" work product, which includes the mental impressions and legal theories of an attorney or other representative of a party (often referred to as "the thoughts and opinions of counsel"), is absolutely immune from discovery.¹³

B. *Development of Work Product Doctrine in Missouri*

1. Development Before Rule 56.01(b)(3)

Prior to 1947, Missouri courts had recognized, at least impliedly, that trial preparation materials should not be freely discoverable.¹⁴ Formal protec-

signed or otherwise adopted or approved by the person making it, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantial recital of an oral statement by the person making it and contemporaneously recorded.

7. *See id.*

8. *See id.*

9. *See Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). The rationale for the work product doctrine is discussed at length in Note, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, at 784-88 (1983).

10. *See Note, supra* note 9.

11. As used in this article, "trial preparation materials" include all work product other than opinion work product, which is described *infra* at note 13 and accompanying text.

12. *See Mo. R. Civ. P. 56.01(b)(3)*; *see also infra* notes 182-96 and accompanying text.

13. This absolute immunity may be subject to several narrowly drawn exceptions. *See infra* notes 173-81 and 197-209 and accompanying text.

14. *See, e.g., State ex rel. Iron Fireman Corp. v. Ward*, 351 Mo. 761, 767, 173 S.W.2d 920, 922 (1943) (en banc) (records of fire investigation subject to discovery because they were not prepared in anticipation of lawsuit); *cf. Curtis v. Indemnity Co.*, 327 Mo. 350, 370, 37 S.W.2d 616, 625 (1931) (adjuster's letters held subject to subpoena at trial because they were part of an investigation in the ordinary course of the party's business, "which investigation was not made in view of any existing or prospec-

tion came only after the 1947 United States Supreme Court case of *Hickman v. Taylor*.¹⁵ In *Hickman*, witness statements were protected from discovery as trial preparation materials.¹⁶ Missouri courts quickly recognized *Hickman* as persuasive authority.¹⁷

From the start, however, Missouri courts gave work product greater protection than envisioned in *Hickman*.¹⁸ The doctrine was applied to materials prepared by non-lawyers,¹⁹ and all work product was held absolutely immune from discovery,²⁰ even in cases of hardship.²¹ A party seeking to compel discovery of any material was required to establish three factors:²² (1) relevancy;²³ (2) absence of "privilege;" and (3) "good cause."²⁴ Under part two of this discoverability test, Missouri courts incorporated the work product privilege.²⁵

tive litigation").

15. 329 U.S. 495 (1947).

16. *Id.* at 509.

17. *See, e.g., State ex rel. Terminal R.R. Ass'n v. Flynn*, 363 Mo. 1065, 1072, 257 S.W.2d 69, 73 (Mo. 1950) (en banc) (now superceded in part by adoption of Mo. R. Civ. P. 56.01(b)(3)); *State ex rel. Miller's Mutual Fire Ins. Ass'n v. Caruthers*, 360 Mo. 8, 12, 226 S.W.2d 711, 713 (Mo. 1950) (en banc).

18. *See Parrett v. Ford Motor Co.*, 47 F.R.D. 22, 24 (W.D. Mo. 1968) (criticizing "unduly restrictive" Missouri work product doctrine and applying more liberal federal policy).

19. *See Flynn*, 363 Mo. 1065, 1072, 257 S.W.2d 69, 75 (1953) (en banc) (work product can be prepared by party's attorney or agent); *Caruthers*, 360 Mo. 8, 12, 226 S.W.2d 711, 713 (1950) (en banc) (applying work product protection to materials prepared "by parties and their adjusters or investigators").

20. *See Flynn*, 363 Mo. 1065, 1075, 257 S.W.2d 69, 75 (1953) (en banc) (photographs that probably were non-opinion trial preparation materials were absolutely immune from discovery).

21. *See, e.g., State ex rel. State Highway Comm'n v. Jensen*, 362 S.W.2d 568, 570 (Mo. 1962) (en banc) (rejecting requesting party's argument that discovery of work product should be permitted in cases of hardship); *Flynn*, 363 Mo. 1065, 257 S.W.2d 69 (1953) (en banc) (photographs taken immediately after the accident which very well could have uniquely preserved important evidence were absolutely privileged).

22. *See, e.g., Flynn*, 363 Mo. 1065, 1070, 257 S.W.2d 69, 71-72 (1953) (en banc); *State ex rel. St. Louis County Transit Co. v. Walsh*, 327 S.W.2d 713, 716 (Mo. App., St. L. 1959).

23. Discovery frequently was denied because the information sought would be inadmissible at trial. *See, e.g., Caruthers*, 360 Mo. at 12, 226 S.W.2d at 713 (interrogatories improper because they called for hearsay evidence); *State ex rel. Kroger Co. v. Craig*, 329 S.W.2d 804, 806 (Mo. App., Spr. 1959) (answers to interrogatories would be inadmissible as hearsay). This restriction no longer applies. *See* Mo. R. Civ. P. 56.01(b)(1), which provides, in part: "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

24. This test was established under the provisions of MO. REV. STAT. § 510.030 (1949) (repealed). *See, e.g., Flynn*, 363 Mo. 1065, 1070, 257 S.W.2d 69, 71-72 (Mo. 1953) (en banc).

25. *See, e.g., State ex rel. St. Louis County Transit Co. v. Walsh*, 327 S.W.2d 713, 717 (Mo. App., St. L. 1959) (discoverability of photographs under the three-part

Although the work product privilege is distinct from the attorney-client privilege,²⁶ Missouri courts occasionally have confused them.²⁷ For example, the work product doctrine was said by one court to have “arisen” from the attorney-client privilege.²⁸ This reasoning contradicted *Hickman v. Taylor*,²⁹ which established the doctrine because the attorney-client privilege did not adequately address the problem.³⁰ Even though later case law clarified the distinction,³¹ all work product remained absolutely immune.³²

This absolute immunity led to some anomalous results. For example, party statements were held not to be “work product,”³³ even though they often were. Courts tempered the absolute rule by holding that investigators and others engaged in trial preparation could be deposed for their factual knowledge.³⁴ Most decisions, however, perpetuated the application of the work product doctrine as an absolute privilege,³⁵ thereby foreclosing discovery of a wide range of relevant material.

2. Rule 56.01(b)(3)

In 1975, the Missouri Supreme Court codified a work product rule,³⁶ which is substantially the same as Rule 26(b)(3) of the Federal Rules of Civil

test hinged upon whether work product “privilege” attached).

26. For a comparison of the work product and attorney-client privilege discovery limitations, see *infra* notes 63-68 and accompanying text.

27. See, e.g., *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 24 (Mo. 1961) (en banc) (basis of work product doctrine in attorney-client privilege) (superceded in part by adoption of Mo. R. Civ. P. 56.01(b)(3)).

28. See *id.*

29. 329 U.S. 495 (1947).

30. See *id.* at 508.

31. See *State ex rel. Mueller v. Dixon*, 456 S.W.2d 594, 599 (Mo. App., K.C. 1970) (immunity from discovery of witnesses' statements rests upon work product rule). *But see Lindberg v. Safeway Stores*, 525 S.W.2d 571, 572 (Mo. App., K.C. 1975) (protecting accident report as a privileged communication rather than work product).

32. See, e.g., *State ex rel. Premier Panels v. Swink*, 400 S.W.2d 639, 644-45 (Mo. App., St. L. 1966) (inquiry regarding even the existence of photographs was improper).

33. See, e.g., *Combellick v. Rooks*, 401 S.W.2d 460, 464 (Mo. 1966) (en banc) (defendant entitled to discover a portion of his testimony in defense of a traffic charge because it was not “work product”); *State ex rel. Hudson v. Ginn*, 374 S.W.2d 34, 39 (Mo. 1964) (en banc) (a party may discover any statement he has previously given to an adverse party concerning the lawsuit or its subject matter because the statement is not “work product”).

34. See *State ex rel. Missouri Pub. Serv. Co. v. Elliott*, 434 S.W.2d 532, 537-38 (Mo. 1968) (en banc) (investigators of a gas explosion required to divulge their factual knowledge about the incident).

35. See, e.g., *State ex rel. Premier Panels v. Swink*, 400 S.W.2d 639, 644-45 (Mo. App., St. L. 1966).

36. Mo. R. Civ. P. 56.01(b)(3).

Procedure.³⁷ The rule fundamentally altered Missouri's approach to the work product doctrine. It eliminated the absolute immunity of trial preparation materials,³⁸ and provided for discovery upon a showing of substantial need and undue hardship.³⁹ The rule applies to all materials prepared in anticipation of litigation.⁴⁰

Since 1975, the courts have clarified the distinction between work product immunity and the attorney-client privilege in light of the new discoverability test.⁴¹ Other cases have discussed protection of work product in other litigation⁴² and the necessity of showing of need and hardship under the rule.⁴³ Many issues, however, remain either confused or unaddressed, including the extent to which intangibles are protected,⁴⁴ and the "anticipation of litigation" requirement.⁴⁵

III. LIMITATIONS ON THE WORK PRODUCT DOCTRINE

A. Overview

Other limitations may preclude discovery of work product materials notwithstanding a satisfactory showing of need and hardship.⁴⁶ Conversely, certain rules may limit the extent to which parties can resist discovery on work product grounds.⁴⁷ This section will discuss such limitations on, and extensions of, the scope of discovery.

37. FED. R. CIV. P. 26(b)(3). The federal rule provides: "Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order." *Id.* There is no counterpart to this provision in Mo. R. Civ. P. 56.01(b)(3). *See supra* note 6.

38. *Porter v. Gottschall*, 615 S.W.2d 63, 65 (Mo. 1981) (en banc).

39. *Id.*

40. *Id.*; *see also* Mo. R. Civ. P. 56.01(b)(3). The previous work product rule apparently did not apply to certain materials. *See State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 24-25 (Mo. 1961) (en banc) (photographs not "writings" within meaning of Mo. R. Civ. P. 57.01(b) (1959)).

41. *See State ex rel. Spear v. Davis*, 596 S.W.2d 499, 500-01 (Mo. App., E.D. 1980). *But see State ex rel. St. Louis Little Rock Hosp. v. Gaertner*, 682 S.W.2d 146, 149 (Mo. App., E.D. 1984) (stating that documents prepared at direction of employer for obtaining attorney's advice or for use in litigation fall within attorney-client privilege).

42. *See State ex rel. J.E. Dunn Constr. Co. v. Sprinkle*, 650 S.W.2d 707, 711 (Mo. App., W.D. 1983).

43. *See Porter v. Gottschall*, 615 S.W.2d 63, 65-66 (Mo. 1981) (en banc). The two-part showing for discovery of trial preparation materials under Rule 56.01(b)(3) is referred to herein as the "need and hardship" test or showing.

44. Rule 56.01(b)(3) specifically regulates discovery of certain "documents and tangible things . . ." and does not purport to cover intangibles. *See* Mo. R. Civ. P. 56.01(b)(3); *see also infra* notes 131-42 and accompanying text.

45. *See infra* notes 146-71 and accompanying text.

46. *See infra* notes 48-84 and accompanying text.

47. *See infra* notes 85-117 and accompanying text.

B. *Additional Limitations on the Scope of Discovery*

1. Overview

Before an item can be obtained under the need and hardship test of Rule 56.01(b)(3), it must be "otherwise discoverable."⁴⁸ The scope of discovery is governed by Rule 56.01(b)(1),⁴⁹ which excludes from permissible discovery items that are "privileged."⁵⁰ The effect of these provisions was demonstrated in *State ex rel. Cain v. Barker*,⁵¹ in which the Missouri Supreme Court concluded that because certain requested statements were "privileged," and therefore not within the scope of discovery under Rule 56.01, the court did not need to evaluate whether the requesting party had satisfied the conditions of Rule 56.01(b)(3).⁵² Thus, if a requested item is protected by another privilege, the Rule 56.01(b)(3) test is irrelevant. The privilege that most commonly might attach to such a requested item of work product is the attorney-client privilege; however, several other privileges should be considered in a discovery situation.⁵³

Other discovery limitations also might defeat discovery of work product notwithstanding a sufficient showing of need and hardship. Such limitations might include objections on the basis of burdensomeness and oppressiveness, harassment, and bad faith.⁵⁴

2. Important Discovery Privileges

a. Attorney-Client Privilege

(i) Basic Principles

By statute, an attorney is incompetent to testify "concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client. . . ."⁵⁵ This is declaratory of the common law.⁵⁶ In *State ex rel. Great American Insurance Company v. Smith*,⁵⁷ the Missouri Supreme Court held that the following test determines whether an attorney-client communication is privileged: (1) whether, at the time of the

48. Mo. R. Civ. P. 56.01(b)(3).

49. Mo. R. Civ. P. 56.01(b)(1).

50. *Id.*

51. 540 S.W.2d 50 (Mo. 1976) (en banc).

52. *Id.* at 57-58; see also *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 388 (Mo. 1978) (en banc) (Seiler, J., dissenting).

53. See *infra* notes 69-84 and accompanying text.

54. See, e.g., Mo. R. Civ. P. 56.01(c) (regarding protective orders).

55. Mo. REV. STAT. § 491.060(3) (Supp. 1984).

56. See *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 382 (Mo. 1978) (en banc). It should be noted, however, that in the recent case of *State v. Carter*, 641 S.W.2d 54 (Mo. 1982) (en banc), *cert. denied*, 461 U.S. 932 (1983), the Missouri Supreme Court indicated the privilege was purely statutory in nature. *Id.* at 57.

57. 574 S.W.2d 379 (Mo. 1978) (en banc).

communication, the relation of attorney and client existed; and (2) whether the communication pertained to a matter for which the attorney had been employed.⁵⁸ The court broadly defined the scope of the privilege, holding that when an attorney is retained with respect to a claim asserted by or against his client, all communications from the attorney to the client with respect to the matter are "essential elements of attorney-client consultation,"⁵⁹ whether such communications actually are "advice" to the client, or are factual reports or other types of communication.⁶⁰ Litigants should be mindful that attorney-client communications are absolutely privileged⁶¹ and are not subject to the substantial need and hardship test.⁶²

(ii) Comparison with Work Product

Work product immunity is broader than the attorney-client privilege. Work product does not have to be a communication in several important ways.⁶³ It may be prepared by a wide range of persons, including a party's employees and other non-attorney representatives.⁶⁴ Waiver of work product protection may not be as automatic as waiver of the attorney-client privilege.⁶⁵ In other ways, however, work product is more limited. Unlike work product, attorney-client communications do not have to be prepared in anticipation of litigation.⁶⁶ Additionally, the attorney-client privilege clearly remains effective through trial,⁶⁷ while work product immunity normally should not extend through trial at least when testimonial use is made of the materials.⁶⁸

58. *Id.* at 386.

59. *Id.* at 385.

60. *Id.* at 384-85.

61. In camera review of attorney-client communications generally should not be permitted in state court practice. *See id.* at 386-87. At least one federal court in Missouri, however, has ordered production of attorney-client communications for in camera review. *See In re Federal Skywalk Cases*, Case No. 81-0945-A-CV-W-5 slip op. at 1-2 (W.D. Mo., June 25, 1982).

62. Of course, many attorney-client communications include the attorney's mental impressions, conclusions, opinions, or legal theories concerning the lawsuit, all of which are absolutely protected as opinion work product. *See Mo. R. Civ. P. 56.01(b)(3)*. However, absent the attorney-client privilege, a court conceivably could classify as ordinary work product a letter in which an attorney simply quotes, verbatim or substantially verbatim, what a fact witness said during an interview.

63. *See Mo. R. Civ. P. 56.01(b)(3)*.

64. *See id.*

65. *See infra* notes 197-209 and accompanying text.

66. *See State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 386 (Mo. 1978) (en banc).

67. *See Mo. REV. STAT. § 491.060(3)* (Supp. 1984).

68. *See, e.g., United States v. Nobles*, 422 U.S. 225, 236-40 (1975); *Halford v. Yandell*, 558 S.W.2d 400, 408-09 (Mo. App., Spr. 1977). *See generally State ex rel. State Highway Comm'n v. Kalivas*, 484 S.W.2d 292, 294-95 (Mo. 1972). However, at least intangible opinion work product of attorneys should not be freely accessible during trial.

b. *Insurer-Insured Privilege*

Missouri has established a privilege for certain communications between insurers and insureds.⁶⁹ This privilege is grounded in the attorney-client privilege.⁷⁰ An attorney, however, need not have been specifically retained with respect to the subject matter of the communication.⁷¹

This privilege first was applied in *State ex rel. Cain v. Barker*,⁷² an automobile accident case. The plaintiff in *Cain* sought, under Rule 56.01(b)(3), to discover statements given by the defendant to his liability insurer after the accident.⁷³ The plaintiff argued that need and hardship existed under the work product rule because the defendant had refused to give statements to the insurer of the plaintiff's decedent and the defendant had forgotten important details by the time his deposition was taken.⁷⁴

The Missouri Supreme Court held the defendant's statements were *privileged* because an insurer-insured relationship existed between the defendant and his insurer when he made the statements.⁷⁵ The court indicated that such communications would be privileged under the following conditions: (1) the statement must be to a liability insurer for the purpose of defending any lawsuit against the insured arising out of a potentially liability-creating event; (2) the potential liability must be covered under the insurance policy; and (3) the insurer must be obligated under the policy to provide the insured with a defense.⁷⁶

As Chief Justice Seiler noted in his dissent, this privilege insulates a large category of material from discovery under Rule 56.01(b)(3).⁷⁷ It does not, however, completely nullify conditional work product discovery. Statements of witnesses to an insurer are not covered,⁷⁸ and the privilege is restricted to communications from a prospective defendant to his liability insurer with respect to a potentially liability-creating event.⁷⁹ Thus, the impact on discovery practice is confined to a narrow category.

c. Other Privileges

Other privileges that should be considered in appropriate situations in-

69. See *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 52 (Mo. 1976) (en banc).

70. *Id.* at 53-54.

71. *Id.*

72. 540 S.W.2d 50 (Mo. 1976) (en banc).

73. *Id.* at 51-52.

74. *Id.* at 52.

75. *Id.* at 53.

76. *Id.* at 53-57.

77. *Id.* at 58-62 (Seiler, C.J., dissenting).

78. The privilege only attaches to statements by the insured. *Id.* at 53-57.

79. See *id.* The privilege does not extend to other communications between insureds and insurers. See, e.g., *State ex rel. J.E. Dunn Constr. Co. v. Sprinkle*, 650 S.W.2d 707, 709-10 (Mo. App., W.D. 1983).

clude the husband-wife privilege,⁸⁰ the physician-patient privilege,⁸¹ the priest-penitent privilege,⁸² and the accountant-client privilege.⁸³ These privileges are less important in the context of this discussion, however, because the matters they protect are less likely to be prepared in anticipation of litigation than attorney-client and insurer-insured communications.⁸⁴

C. Work Product Exceptions that Expand Scope of Discovery

1. General

A number of items commonly sought in discovery are not protected as work product, including knowledge of relevant facts⁸⁵ and the identity of persons with knowledge relating to the matter in dispute.⁸⁶ These unprotected items cannot be converted into "work product" by being recited in protected memoranda of a party or its representatives.⁸⁷ Moreover, transmission of such discoverable items by privileged communication will not insulate them from discovery.⁸⁸ For example, otherwise discoverable material gathered by an attorney and transmitted to his client is not thereby converted into work product.⁸⁹ Even if only the attorney is aware of these discoverable matters, they must be revealed.⁹⁰

80. See MO. REV. STAT. §§ 491.020, 546.260 (1978); see also Note, *Confidential Communications Privilege of Husband and Wife: Application under the Missouri Dissolution Statute*, 43 MO. L. REV. 235 (1978).

81. See MO. REV. STAT. § 491.060(5) (Supp. 1984). The privilege is waived once a plaintiff files suit for personal injuries, thereby putting his condition in issue. See *State ex rel. McNutt v. Keet*, 432 S.W.2d 597, 601 (Mo. 1968) (en banc).

82. See MO. REV. STAT. § 491.060(4) (Supp. 1984).

83. See MO. REV. STAT. § 326.151 (1978); see also *Commerical Union Ins. Co. v. Talisman, Inc.*, 69 F.R.D. 490, 491 (E.D. Mo. 1975).

84. At least with respect to the spousal and the priest-penitent privileges, the matters covered thereby also are less likely to be in writing.

85. See, e.g., *State ex rel. Missouri Pub. Serv. Co. v. Elliott*, 434 S.W.2d 532, 537 (Mo. 1968) (en banc) (investigators subject to deposition on factual knowledge); *State ex rel. Mueller v. Dixon*, 456 S.W.2d 594, 599-600 (Mo. App., K.C. 1970) (factual information developed during party's investigation subject to discovery).

86. See, e.g., *State ex rel. Hudson v. Ginn*, 374 S.W.2d 34, 39 (Mo. 1964) (en banc); *State ex rel. Uregas Serv. Co. v. Adams*, 364 Mo. 389, —, 262 S.W.2d 9, 11 (1953) (en banc); *Garrison v. Garrison*, 640 S.W.2d 179, 180 (Mo. App., E.D. 1982).

87. See *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 61 (Mo. 1976) (en banc) (dicta); cf. *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 385 (Mo. 1978) (en banc) (attorney-client privilege does not extend to discoverable matters recited in communications between attorney and client).

88. Cf. *State ex rel. Great Am. Ins. Co. v. Smith* 574 S.W.2d 379, 385; *Curtis v. Indemnity Co.*, 327 Mo. 350, 369-70, 37 S.W.2d 616, 625-26 (1931) (transmission of non-privileged report to attorney would not cause privilege to attach).

89. Cf. *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379, 385 (Mo. 1978) (en banc).

90. See *State ex rel. Hof v. Cloyd*, 394 S.W.2d 408, 411 (Mo. 1965) (en banc); *State ex rel. Pete Rhodes Supply Co. v. Crain*, 373 S.W.2d 38, 42-44 (Mo. 1963) (en banc).

2. Specific Discoverable Matters

a. Knowledge of Facts

One of the basic underpinnings of the modern pretrial discovery process is the right to discover all relevant facts.⁹¹ The Missouri Supreme Court on several occasions has reiterated its predisposition toward open discovery.⁹² It is not surprising, therefore, that Missouri litigants have had little success in utilizing the work product doctrine as a means for insulating factual knowledge from discovery.

State ex rel. Hof v. Cloyd,⁹³ demonstrates the Missouri Supreme Court's unwillingness to limit discovery of facts through the work product doctrine. In *Cloyd*, the court stated that factual information is not protected simply because it is developed during the party's investigation, whether such knowledge is possessed by the party or only by his attorney.⁹⁴

This principle formed the basis of the court's decision in *State ex rel. Missouri Public Service Co. v. Elliott*.⁹⁵ The relator sought to depose insurance company investigators who examined the scene of an explosion. The insurance company's attorney objected to any substantive questioning, arguing that all of the investigators' knowledge and actions were work product.⁹⁶ Rejecting the insurance company's arguments, the Missouri Supreme Court held that the investigators could be deposed regarding what they saw, and whether they removed or disturbed anything.⁹⁷ The court also held that the investigators could be deposed regarding their actions at the scene of the explosion "to the extent that any ordinary individual would, so long as that testimony does not necessarily involve their conclusions."⁹⁸ Thus, the court, in allowing discovery, still protected from disclosure the "thoughts and opinions of counsel."

b. Identity of Persons with Knowledge

The Missouri Supreme Court early established that objections based on work product could not defeat discovery of the identity of persons with factual

91. See *State ex rel. Missouri Pub. Serv. Co. v. Elliott*, 434 S.W.2d 532, 537 (Mo. 1968) (en banc); *State ex rel. Hof v. Cloyd*, 394 S.W.2d 408, 411 (Mo. 1965) (en banc).

92. This predisposition was evident both before and after the work product doctrine was established. See, e.g., *State ex rel. Missouri Pub. Serv. Co. v. Elliott*, 434 S.W.2d 532, 538 (Mo. 1968) (en banc); *State ex rel. Iron Fireman Corp. v. Ward*, 351 Mo. 761, 763, 173 S.W.2d 920, 922 (Mo. 1943) (en banc).

93. 394 S.W.2d 408 (Mo. 1965) (en banc).

94. *Id.* at 411.

95. 434 S.W.2d 532 (Mo. 1968) (en banc).

96. *Id.* at 535.

97. *Id.* at 537.

98. *Id.*; see also *State ex rel. Spear v. Davis*, 596 S.W.2d 499, 500 (Mo. App., E.D. 1980) (post-Rule 56.01(b)(3) decision allowing depositions of parties' investigators).

knowledge relating to a lawsuit. In *State ex rel. Uregas Service Co. v. Adams*,⁹⁹ the court held that the relator could not withhold names of its agents who examined the scene of a gas explosion because the agents were witnesses to facts relating to the lawsuit.¹⁰⁰ The *Uregas* holding has been codified by court rule¹⁰¹ and reinforced by subsequent decisions, both before and after the effective date of Rule 56.01(b)(3).¹⁰²

c. Party Statements

Parties have been allowed to obtain their own statements since 1959.¹⁰³ The current party statements discovery provision is in Rule 56.01(b)(3).¹⁰⁴

Missouri courts have expansively interpreted the party statements discovery rule. In *Combellick v. Rooks*,¹⁰⁵ the plaintiff made a transcript of the defendant's testimony at a traffic court hearing concerning a traffic offense with which the defendant was charged. During discovery in the civil case, the plaintiff denied having possession of any statement by the defendant.¹⁰⁶ At trial, the plaintiff impeached the defendant's testimony with the traffic court transcript.¹⁰⁷ The Missouri Supreme Court reversed a judgment for the plaintiff on the ground that the defendant had been unfairly prejudiced by the plaintiff's use of the traffic court transcript.¹⁰⁸ Rejecting the plaintiff's argument that she was obligated only to produce copies of any statements by the defendant to the plaintiff, the court stated that the rule applied to all statements of the requesting party concerning the lawsuit or its subject matter.¹⁰⁹ Under this interpretation, the transcript of the defendant's police court testimony was held discoverable under the rule.¹¹⁰

The *Combellick* case did not address the discoverability of a party's unrecorded statement. Rule 56.01(b)(3) provides that a discoverable party "statement" is either a written statement adopted or approved by the party by signature or otherwise, or a contemporaneous recording of a party's statement,

99. 262 S.W.2d 9 (Mo. 1953) (en banc).

100. *Id.* at 11; see also *State ex rel. Miller's Mut. Fire Ins. Ass'n v. Caruthers*, 360 Mo. 8, 11, 226 S.W.2d 711, 712 (Mo. 1950) (en banc).

101. See Mo. R. Civ. P. 56.01(b)(1).

102. See, e.g., *State ex rel. Hudson v. Ginn*, 374 S.W.2d 34, 39 (Mo. 1964) (en banc); *State ex rel. Pete Rhodes Supply Co. v. Crain*, 373 S.W.2d 38, 44 (Mo. 1963) (en banc); *Garrison v. Garrison*, 640 S.W.2d 179, 180 (Mo. App., E.D. 1982); *Missouri State Park Bd. v. McDaniel*, 473 S.W.2d 774, 775 (Mo. App., Spr. 1971); and *State ex rel. Williams v. Vardeman*, 422 S.W.2d 400, 407 (Mo. App., K.C. 1967).

103. See Mo. R. Civ. P. 56.01 and 47.01(b) (1959); see also *State ex rel. Hudson v. Ginn*, 374 S.W.2d 34, 39 (Mo. 1964) (en banc).

104. See Mo. R. Civ. P. 56.01(b)(3).

105. 401 S.W.2d 460 (Mo. 1966) (en banc).

106. *Id.* at 463.

107. *Id.*

108. *Id.* at 464.

109. *Id.*

110. *Id.*

including transcriptions, which is a “substantially verbatim recital” of the requesting party’s oral statement.¹¹¹ This definition arguably excludes an unrecorded statement.

d. Basis for Claim

A party may not conceal the factual basis for its claims on work product grounds. Rule 55.27(d)¹¹² provides for a motion for a more definite statement of any matter that is not plead with sufficient definiteness or particularity to allow the opposing party properly to prepare responsive pleadings or to prepare for trial if no responsive pleading is required.¹¹³

Discovery requests requiring identification of the facts upon which a claim is based probably are not objectionable. However, such requests for a party’s contentions may require disclosure of an attorney’s legal theories if they are inartfully drafted, and thus be objectionable.¹¹⁴

e. Existence of Documents

Under pre-Rule 56.01(b)(3) case law, the existence of work product materials often was protected.¹¹⁵ This rule should no longer be followed. Rule 56.01 allows parties to discover the existence of documents related to the lawsuit.¹¹⁶ This is a common discovery tactic. The possible non-discoverability of a document on work product grounds should not be sufficient grounds for concealing the identity of such document.¹¹⁷

111. See Mo. R. Civ. P. 56.01(b)(3).

112. Mo. R. Civ. P. 55.27(d).

113. *Id.*

114. See generally J. MOORE, 4 MOORE’S FEDERAL PRACTICE § 26.56[3], at 26-139 (“to aid trial preparation, discovery is allowed as to the factual basis of the complaint, and as to the contentions of the defense”). Missouri lawyers must be careful, however, to avoid making such requests in too broad a matter, or in a manner that requires the interrogated party to draw legal conclusions. See, e.g. *State ex rel. Gamble Constr. Co. v. Carrol*, 408 S.W.2d 34, 36-38 (Mo. 1966) (en banc).

115. See, e.g., *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 24-25 (Mo. 1961) (en banc); *State ex rel. Uregas Serv. Co. v. Adams*, 364 Mo. 389, 393-94, 262 S.W.2d 9, 12 (Mo. 1953) (en banc); *State ex rel. Premier Panels v. Swink*, 400 S.W.2d 639, 644-45 (Mo. App., St. L. 1966).

116. See Mo. R. Civ. P. 56.01(b)(1).

117. In addition to Rule 56.01(b)(1), discovery of the existence of documents that might be work product is supported by the conditional discovery provisions of Rule 56.01(b)(3). Even if a document is work product, the opposing party might be able to compel its production; and therefore, such party should be able to discover the document’s existence. See generally J. MOORE, 4 MOORE’S FEDERAL PRACTICE § 26.64[2], at 26-353 to 26-354.

IV. DETERMINING WORK PRODUCT STATUS

A. Overview

After consideration of non-work product discovery limitations and exceptions,¹¹⁸ it remains to be determined whether the material sought actually is work product, the type of work product,¹¹⁹ and whether the requesting party can establish need or hardship,¹²⁰ or demonstrate a waiver of the protection.¹²¹ This section will focus on the basic elements that must be established to invoke work product protection: (a) what types of matter may be protected, and what may not; (b) persons who can create work product; and (c) the anticipation of litigation requirement.

B. Types of Work Product

1. Trial Preparation Materials

This category includes anything tangible prepared by a party or its representatives in anticipation of litigation.¹²² Such materials are work product if they are: (1) "otherwise discoverable" under Rule 56.01(b)(1); (2) "prepared in anticipation of litigation or for trial;" and (3) prepared by a party or its representative.¹²³ Tangible items that have been or should be accorded work product status include accident reports,¹²⁴ photographs,¹²⁵ surveillance films or photographs,¹²⁶ witness statements,¹²⁷ diagrams,¹²⁸ maps,¹²⁹ and drawings.¹³⁰

The rule does not specifically address intangibles.¹³¹ Clearly, a party must

118. See *supra* notes 46-117 and accompanying text.

119. See *infra* notes 122-42 and accompanying text.

120. See *infra* notes 182-96 and accompanying text.

121. See *infra* notes 197-209 and accompanying text.

122. See Mo. R. Civ. P. 56.01(b)(3).

123. See *id.*

124. Cf. *Lindberg v. Safeway Stores*, 525 S.W.2d 571, 572 (Mo. App., K.C. 1975) (accident report prepared in anticipation of litigation protected under the attorney-client privilege).

125. See *Porter v. Gottschall*, 615 S.W.2d 63, 65 (Mo. 1981) (en banc); *State ex rel. Terminal R.R. Ass'n v. Flynn*, 257 S.W.2d 69, 75 (Mo. 1953) (en banc). Under *Flynn*, photographs taken in anticipation of litigation were absolutely privileged from discovery. To that extent, *Porter* overruled *Flynn*, establishing instead that photographs are discoverable upon a sufficient showing of need and hardship.

126. See *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 25 (Mo. 1961) (en banc).

127. See *State ex rel. Mueller v. Dixon*, 456 S.W.2d 594, 599 (Mo. App., K.C. 1970).

128. See *Flynn*, 363 Mo. 1065, 1082, 257 S.W.2d 69, 75 (Mo. 1953) (en banc) (dicta).

129. See *id.* (dicta).

130. See *id.* (dicta).

131. The rule applies specifically to "documents and tangible things." Mo. R. Civ. P. 56.01(b)(3).

disclose recollections of discoverable facts and the identity of witnesses.¹³² However, what is the status of recollections of witness statements, instructions to investigators, and other undocumented preparations?

It could be argued that discovery of a party's recollections relating to its investigation would invade an area inextricably intertwined with the party's "mental impressions, conclusions, opinions or legal theories,"¹³³ and thus unavoidably would infringe upon opinion work product. Alternatively, a party might contend that discovery of such recollections is not specifically covered by Rule 56.01(b)(3), and, instead, is prohibited by the pre-Rule 56.01(b)(3) work product "privilege." In *Porter v. Gottschall*,¹³⁴ the court stated that Rule 56.01(b)(3) had "abrogated" the work product privilege *as to documents and tangible things*.¹³⁵ One could argue that, as to intangible work product, the privilege continues.¹³⁶

Intangible work product should be protected because the recollections of parties and their representatives of witnesses' statements and other factual aspects of parties' investigations inevitably are colored by their theories and impressions. Protecting this category will not infringe on discovery of facts; it simply will prevent discovery of parties' impressions of those facts.

2. Opinion Work Product (Tangible and Intangible)

If a court requires production of trial preparation materials, it must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."¹³⁷ Missouri courts have accorded such opinion work product, whether tangible or intangible, absolute immunity from discovery.¹³⁸

In *State ex rel. Missouri Public Service Co. v. Elliott*,¹³⁹ the Missouri Supreme Court allowed the relator to depose investigators who had inspected the scene of an explosion, but specifically noted that the deposing party could not require testimony that necessarily would involve the investigators' conclu-

132. See *supra* notes 91-102 and accompanying text.

133. Mo. R. Civ. P. 56.01(b)(3).

134. 615 S.W.2d 63 (Mo. 1981) (en banc).

135. *Id.* at 65.

136. Recollections of trial preparations, such as instructions given to investigators and other intangibles, more logically could be included within the "privileged" work product category. Cf. *State ex rel. Miller's Mut. Fire Ins. Ass'n v. Caruthers*, 360 Mo. 8, 12, 226 S.W.2d 711, 713 (1950) (en banc) (protecting instructions to agents and subjective purposes in trial preparations because discovery request sought "hearsay").

137. Mo. R. Civ. P. 56.01(b)(3).

138. See, e.g., *State ex rel. Spear v. Davis*, 596 S.W.2d 499, 500-01 (Mo. App., E.D. 1980); *Halford v. Yandell*, 558 S.W.2d 400, 409 (Mo. App., Spr. 1977); *Miller v. Iler*, 556 S.W.2d 492, 492-93 (Mo. App., Spr. 1977).

139. 434 S.W.2d 532 (Mo. 1968) (en banc).

sions.¹⁴⁰ Cases decided after the adoption of Rule 56.01(b)(3) continue the absolute protection of intangible opinion work product.¹⁴¹ For example, courts have held absolutely immune the identity of witnesses whom a party intends to call at trial.¹⁴² This clearly is an example of intangible opinion work product.

C. Making the Determination

1. Persons Who Can Create Work Product

An item is "work product" if it was created by or on behalf of a party in anticipation of litigation. The first part of this test is easy to satisfy because work product protection extends to material prepared in anticipation of litigation by a party and its representatives, including attorneys, consultants, sureties, indemnitors, insurers, and agents.¹⁴³ The inclusion of parties' agents makes this listing practically all-encompassing.

The representative must be working for the party at the time he creates work product materials. For example, in *State ex rel. Missouri Public Service Co. v. Elliott*,¹⁴⁴ the supreme court noted that an attorney cannot assert a work product claim unless he is acting on behalf of a client.¹⁴⁵ This principle should apply to any party representative. Work product protection should attach only to materials prepared for a party.

2. Anticipation of Litigation Requirement

The anticipation of litigation requirement has caused more difficulty. As a practical matter, if a colorable showing can be made that a requested item was prepared in anticipation of litigation, Missouri courts tend to find that the item is work product.¹⁴⁶ If there is a dispute regarding whether a requested item was prepared in anticipation of litigation, the trial court should resolve the issue as a question of fact.¹⁴⁷ While some pre-Rule 56.01(b)(3) cases pro-

140. *Id.* at 537.

141. *See supra* cases cited in note 138.

142. *See, e.g.,* *Garrison v. Garrison*, 640 S.W.2d 179, 180 (Mo. App., E.D. 1982); *State ex rel. State Highway Comm'n v. Pfitzinger*, 569 S.W.2d 335, 336 (Mo. App., St. L. 1978).

143. *See* Mo. R. Civ. P. 56.01(b)(3).

144. 434 S.W.2d 532 (Mo. 1968) (en banc).

145. *Id.* at 535.

146. *See, e.g., State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 24-25 (Mo. 1961) (en banc); *State ex rel. Uregas Serv. Co. v. Adams*, 364 Mo. 389, 394, 262 S.W.2d 9, 12 (1953) (en banc); *State ex rel. Premier Panels v. Swink*, 400 S.W.2d 639, 644-45 (Mo. App., St. L. 1966); *see also State ex rel. Spear v. Davis*, 596 S.W.2d 499, 500-01 (Mo. App., E.D. 1980) (court apparently assumed that any impressions formed by casualty insurer's agent were in anticipation of litigation).

147. Trial courts were given leeway in reviewing parties' assertions of work product protection prior to the adoption of Rule 56.01(b)(3). *See, e.g., State ex rel. St. Louis County Transit Co. v. Walsh*, 327 S.W.2d 713, 717-18 (Mo. App., St. L. 1959) (appellate court refused to disturb the trial court's ruling that photographs were not

tected the identity of work product materials, parties now are probably required to identify documents.¹⁴⁸

Several factors have influenced Missouri courts' application of the "anticipation of litigation" requirement.¹⁴⁹ Unfortunately, one factor has been unduly emphasized. Missouri courts often have accepted the fallacy that materials created in the ordinary course of business necessarily are not work product prepared "in anticipation of litigation."¹⁵⁰ Instead of being dispositive, this should be but one factor for consideration along with the other factors discussed below.

The point at which a requested item was created can be an important factor relating to the anticipation of litigation issue.¹⁵¹ However, timing is not dispositive in all cases. In *State ex rel. State Highway Commission v. Jensen*,¹⁵² the Missouri Supreme Court held that appraisal reports prepared for the State Highway Commission were protected work product. The court held

work product) (*Motion to transfer den. noted at 327 S.W.2d 713*). This discretion should still remain part of post-Rule 56.01(b)(3) work product analysis by appellate courts. *Walsh* made it clear that parties asserting work product protection for documents under some circumstances would have to establish a basis for their claims. *Id.* at 717. Parties did not, however, have to make a showing in all cases. *See, e.g., State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 25 (Mo. 1961) (en banc) (court presumed that any photographs requested could only have been taken in anticipation of litigation).

148. *See supra* notes 115-17 and accompanying text.

149. *See infra* notes 150-71 and accompanying text. For a general discussion of factors relating to the federal anticipation of litigation requirement, see Note, *Work Product Discovery: A Multifactor Approach to the Anticipation of Litigation Requirement in Federal Rule of Civil Procedure 26(b)(3)*, 66 IOWA L. REV. 1277 (1981).

150. *See, e.g., State ex rel. Cain v. Barker*, 540 S.W.2d 50, 58 n.1 (Mo. 1976) (en banc) ("Ordinarily, facts, information and records obtained or made in the ordinary and usual course of business are discoverable.") (Seiler, C.J., dissenting); *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 25 (Mo. 1961) (en banc) (photographs were work product because they were not created in the ordinary course of business and could not have been created for any reason other than litigation); *State ex rel. Terminal R.R. Ass'n v. Flynn*, 363 Mo. 1065, 1073-74, 257 S.W.2d 69, 74-75 (1953) (en banc) (work product issue hinged upon whether requested photographs were created in the ordinary course of business); *State ex rel. Iron Fireman Corp. v. Ward*, 351 Mo. 761, 766, 173 S.W.2d 920, 922 (1943) (en banc) (court implicitly accepted theory that fire investigation reports created in ordinary course of business could not be protected as trial preparation materials); *cf. Curtis v. Indemnity Co. of Am.*, 327 Mo. 350, 369-70, 37 S.W.2d 616, 625 (1931) (report subject to subpoena at trial because it was created in the ordinary course of business). Missouri courts have not been alone in misconstruing the importance of this factor. *See Diversified Indus. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (no work product immunity for materials "prepared in the regular course of business rather than for purposes of the litigation") (emphasis added) (quoting 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 2024, at 198-99 (1970)).

151. *See, e.g., Flynn*, 363 Mo. 1065, 1073-74, 257 S.W.2d 69, 74-75 (1953) (en banc) (photographs taken after accident were work product); *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 24-25 (Mo. 1961) (en banc) (same).

152. 362 S.W.2d 568 (Mo. 1962) (en banc).

that the Highway Commission was justified in anticipating litigation even though the reports were prepared before the parties' rights to seek relief in the circuit court had matured.¹⁵³

A closer question is presented in situations involving transactions that the parties realize may result in litigation. An insurance company's investigation regarding its liability under a policy should be protected even though such research is conducted prior to the company's denial of coverage.¹⁵⁴ However, research regarding the design of a new product probably cannot be characterized as being in anticipation of litigation notwithstanding manufacturers' awareness that design defects may lead to lawsuits.¹⁵⁵

The technical accrual of a cause of action is a guideline for courts and parties. It should not be applied blindly, however. Under some circumstances, courts should recognize that parties may reasonably anticipate specific lawsuits prior to accrual of the cause of action.

Another factor is the position and function of the individual creating or requesting the creation of a requested item.¹⁵⁶ The item may be work product even if it was not prepared by or at the request or direction of an attorney or other individual with discretionary decision-making power.¹⁵⁷ However, documents and other items created by or at the direction of individuals with wide discretionary authority or legal or quasi-legal duties are more likely to be classified as work product than documents created by individuals with little discretionary authority or whose job functions would not normally relate to legal matters.¹⁵⁸ Documents created by parties or their employees are less likely to be classified as work product than documents created by outside consultants, investigators, or attorneys.¹⁵⁹ Courts will focus on whether the person who created the item was in a position in which he logically would have duties relating to potential litigation. Persons whose duties relate to the party's ordinary business, primarily employees, obviously are less likely to be involved in preparations for trial.¹⁶⁰

153. *Id.* at 570.

154. In *Curtis*, 327 Mo. at 369-70, 37 S.W.2d at 625, an insurer's investigation of its potential liability for fire loss under policy was held not privileged. *Curtis*, a pre-*Hickman* case, involved admissibility at trial, not discoverability.

155. See generally, 23 AM. JUR. 2D *Depositions and Discovery* § 55 (1983). Cf. *Diversified Indus. v. Meredith*, 572 F.2d 596, 604 (8th Cir. 1977) (work product immunity does not attach merely because of a "remote prospect" of litigation).

156. See, e.g., *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 24-25 (Mo. 1961) (en banc) (comment distinguishing *State ex rel. St. Louis County Transit Co. v. Walsh*, 327 S.W.2d 713, 717 (Mo. App., St. L. 1959), on grounds that "the driver [in *Walsh*] was one who would ordinarily have nothing to do with investigations or the defense of claims").

157. See, e.g., *Flynn*, 363 Mo. 1065, 1073, 257 S.W.2d 69, 75 (1953) (en banc).

158. See, e.g., *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 24 (Mo. 1961) (en banc).

159. See, e.g., *id.*

160. See, e.g., *id.*

A third important factor is the time lapse between a liability-creating event and creation of a requested item.¹⁶¹ Again, this factor is not dispositive. Missouri courts have readily extended work product protection to documents created shortly after a liability-creating event.¹⁶² A long time lapse between creation of the requested item and filing of the lawsuit will favor the requesting party, while a short time lapse will favor the party opposing discovery.¹⁶³

The most important factor affecting the anticipation of litigation issue is whether the requested item was created in the ordinary course of business. Based upon prior Missouri case law, it appears that work product protection probably will be denied if the court concludes that the requested material was prepared in the party's ordinary course of business.¹⁶⁴ For instance, in *State ex rel. Cain v. Barker*,¹⁶⁵ Chief Justice Seiler observed that "ordinarily, facts, information and records obtained or made in the ordinary and usual course of business are discoverable."¹⁶⁶

Preparation of a document or gathering of information in the ordinary course of business should not automatically render the document or information discoverable, and, at least sometimes, it does not.¹⁶⁷ Confusion about this issue will continue until Missouri courts clearly rule that preparation in the ordinary course of business is not dispositive of the anticipation of litigation issue.¹⁶⁸

This issue is not purely academic. Insurance companies investigate

161. See, e.g., *State ex rel. Iron Fireman Corp. v. Ward*, 351 Mo. 761, 766, 173 S.W.2d 920, 922 (1943) (en banc) (document created shortly after event held discoverable); *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 25 (Mo. 1961) (en banc) (dicta indicating photographs taken immediately after accident are less likely to be work product); cf. *Curtis*, 327 Mo. 350, 369, 37 S.W.2d 616, 625 (1931) (reports made shortly after accident were not "privileged" and were subject to subpoena).

162. See, e.g., *Porter v. Gottschall*, 615 S.W.2d 63, 65 (Mo. 1981) (en banc) (photographs taken shortly after accident). In *Porter*, although photographs taken shortly after an accident were work product, they were held discoverable under the need and hardship test of Rule 56.01(b)(3). *Id.* at 65-66.

163. See, e.g., *Flynn*, 363 Mo. 1065, 1073, 257 S.W.2d 69, 74 (1953) (en banc) (photographs taken nine days before suit filed were work product); cf. *Curtis*, 327 Mo. 350, 369, 37 S.W.2d 616, 625-26 (1931) (reports written 22 months before lawsuit filed were subject to subpoena for trial).

164. See *supra* cases cited in note 150.

165. 540 S.W.2d 50 (Mo. 1976) (en banc).

166. *Id.* at 58 n.1.

167. For example, in a post-Rule 56.01(b)(3) case, a casualty insurer's agent was not required to testify about his mental impressions formed during an investigation of the insured's loss, even though such investigation clearly was in the casualty insurer's ordinary course of business of settling claims. *State ex rel. Spear v. Davis*, 596 S.W.2d 499, 500-01 (Mo. App., E.D. 1980).

168. Iowa recently clarified this point. See *Ashmead v. Harris*, 336 N.W.2d 197, 200-01 (Iowa 1983). *Ashmead* is analyzed in depth in Note, *A Routine Investigation of an Accident by a Liability Insurer is Conducted in Anticipation of Litigation within the Meaning of Iowa R. Civ. P. 122(c)*, 33 *DRAKE L. REV.* 727 (1984).

thousands of incidents every year. At least one Missouri case has indicated that such investigations, being in the ordinary course of insurance companies' business, are not shielded from discovery.¹⁶⁹ Concededly, investigations are a normal adjunct to the insurance business, but they almost always are in response to a specific event out of which litigation might arise. It is mistaken to say that because such investigations are part of insurance companies' everyday business, they are not conducted "in anticipation of litigation." When insurers become directly involved in litigation, they should be able to assert work product protection for investigative materials concerning an accident or other liability creating event.¹⁷⁰

Another area in which the ordinary course of business fallacy holds the potential for great mischief involves records prepared by parties pursuant to requirements of law. For example, many manufacturers are required by federal regulations to prepare and maintain investigative reports of complaints involving serious injuries and deaths related to their products.¹⁷¹ Such reports clearly are prepared with full awareness that litigation may arise out of the reported event. Holding such reports discoverable will impair the effectiveness of the investigation.

Creation of materials in the ordinary course of a party's business should not foreclose work product protection. Some parties' ordinary business includes investigation of liability-creating events and preparation for trial. Missouri courts should abandon their lockstep adherence to the idea that materials prepared in the ordinary course of business cannot be work product.

V. DISCOVERY OF WORK PRODUCT

A. *Opinion Work Product*

Opinion work product is protected absolutely from discovery under Missouri law,¹⁷² subject to several possible exceptions: where the protection is waived,¹⁷³ where the work product relates directly to an issue in the case,¹⁷⁴ or where fraud is involved.¹⁷⁵

169. See, e.g., *Flynn*, 363 Mo. 1065, 257 S.W.2d 69, 75 (1953) (en banc) (dicta).

170. Where an insurance investigation is made on behalf of an insured and the insurer is not directly involved, the ordinary course of business factor should not be relevant. The focus should be whether the requested material was created in the ordinary course of a party's business. *But see State ex rel. Cain v. Barker*, 540 S.W.2d 50, 58 (Mo. 1976) (en banc).

171. See, e.g., 21 C.F.R. § 803 (1985) (requiring reports from medical device manufacturers).

172. *State ex rel. Spear v. Davis*, 596 S.W.2d 499, 500-01 (Mo. App., E.D. 1980).

173. See *infra* notes 197-209 and accompanying text.

174. See *infra* notes 176-80 and accompanying text.

175. See *infra* note 181 and accompanying text.

In *Curtis v. Indemnity Co.*,¹⁷⁶ a pre-*Hickman* case, the Missouri Supreme Court held that letters from an adjuster to the insurance company evaluating a fire loss, which today might have been considered opinion work product,¹⁷⁷ were subject to subpoena for use at trial because they related to the insurance company's basis for denying coverage.¹⁷⁸ Whether *Curtis* would control in such a case today is debatable, however, at least where the attorney-client privilege is available.¹⁷⁹ Another "at issue" exception might arise from cases of malicious prosecution.¹⁸⁰

Missouri courts may choose to follow a federal court doctrine which recognizes a "fraud/conspiracy" exception to the opinion work product rule. The doctrine also applies to attorney-client communications.¹⁸¹ Where an attorney conspires or participates with his client in the perpetration of a fraud or crime, courts are not likely to allow such activities to be sheltered under the work product doctrine.

B. Trial Preparation Materials

Rule 56.01(b)(3) requires the party seeking discovery to establish: (1) substantial need for the materials in preparing its case; and (2) inability to obtain the substantial equivalent thereof by other means without undue hardship.¹⁸² Missouri case law offers little guidance with respect to practical application of this requirement. Substantial need may be found when the requested material constitutes evidence that materially could influence the litigation. In *Porter v. Gottschall*,¹⁸³ the Missouri Supreme Court found substantial need where accident scene photographs that were requested in discovery were the only reliable evidence "which could have shown the position of the vehicles

176. 327 Mo. 350, 37 S.W.2d 616 (1931).

177. The letters consisted of reports by the insurance investigator concerning his evaluation of the loss and whether it was covered by the policy. *Id.* at 625-26. However, among other factors cited by the court in holding the letters were not privileged was an almost two-year time lapse between the letters and the lawsuit. Thus, the letters might not have been considered work product. See *supra* notes 161-63 and accompanying text.

178. *Curtis*, 327 Mo. at —, 37 S.W.2d at 626.

179. This is illustrated by the holding in *State ex rel. Great Am. Ins. Co. v. Smith*, 574 S.W.2d 379 (Mo. 1978) (en banc). *Smith* arose out of the relator's denial of coverage for the insured's fire loss. Even though the insured claimed vexatious refusal to settle, the court held that letters from an attorney to the relator relating to the coverage issue were absolutely protected by the attorney-client privilege. *Id.* at 384-85.

180. See generally Note, *supra* note 9, at 831-33.

181. See, e.g., *In re Sealed Case*, 676 F.2d 793, 811-16 (D.C. Cir. 1982). See generally J. MOORE, 4 MOORE'S FEDERAL PRACTICE § 26.64[4], at 26-439 to 26-446; Note, *supra* note 9, at 833-37.

182. MO. R. CIV. P. 56.01(b)(3). Parties cannot circumvent this requirement by using discovery devices other than interrogatories or document production requests. See, e.g., *State ex rel. State Farm Mut. Auto. Ins. Co. v. Keet*, 601 S.W.2d 669, 672 (Mo. App., S.D. 1980).

183. 615 S.W.2d 63 (Mo. 1981) (en banc).

after the accident, the debris on the road, and possibly skid marks."¹⁸⁴ Substantial need also has been found where the requesting party has established a substantial likelihood that the materials will impeach a witness's testimony.¹⁸⁵

Courts determine inability to obtain a substantial equivalent without undue hardship based upon what alternative evidence is realistically available to the requesting party.¹⁸⁶ In *Porter v. Gottschall*,¹⁸⁷ the requesting party successfully sought photographs of an accident scene. No witness could recall the accident itself, the passage of six years had faded the memory of the only witness who could recall the scene of the accident, and the only other evidence, a rough diagram drawn by an investigating officer, did not adequately substitute as evidence. Basically, in *Porter*, it was simply impossible to obtain the substantial equivalent of the requested photographs, regardless of the hardships the requesting party might have been willing to sustain. Clearly, a requesting party will have to demonstrate a good faith effort to obtain the substantial equivalent.¹⁸⁸ Dilatory preparation efforts should be fatal to a work product request.¹⁸⁹

Perhaps the most useful way to examine the need and hardship test is to focus on key factors that should influence the courts. These include the following:

(1) Date of requested item. An item created at or shortly after the time of the liability-creating event more likely will be held discoverable because it is more likely to be unique and to constitute material evidence.¹⁹⁰

(2) Availability of alternate sources. The extent to which the requesting

184. *Id.* at 66.

185. See generally J. MOORE, 4 MOORE'S FEDERAL PRACTICE § 26.64 [3-1], at 26-375 to 26-377. In *Hickman v. Taylor*, 329 U.S. 495 (1947), the court noted work product might be discoverable if it "might be useful for purposes of impeachment or corroboration." *Id.* at 511. But see *Helverson v. J.J. Newberry Co.*, 16 F.R.D. 330 (W.D. Mo. 1954) (denying discovery sought on impeachment grounds); *cf.* *State v. Smith*, 431 S.W.2d 74, 82 (Mo. 1968) (prosecuting witness' statement not required to be produced at trial of criminal case where defendant alleged only a possibility of impeachment). Pre-Rule 56.01(b)(3) case law indicated that work product was immune even where sought for impeachment purposes. See *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 25 (Mo. 1961) (en banc).

186. See J. MOORE, 4 MOORE'S FEDERAL PRACTICE § 26.64[3.-1] at 26-362 to 26-381, and cases cited therein; *cf.* *State ex rel. Albert v. Adams*, 540 S.W.2d 26, 30 (Mo. 1976) (en banc) ("It is a plain rule of discovery that a party will not be required to make available any compilation of data or research efforts that is equally available to the interrogating party."); *Combellick v. Rooks*, 401 S.W.2d 460, 464 (Mo. 1966) (en banc) (noting that opposing party might not be required to produce the statement where requesting party had equal access to the statement).

187. 615 S.W.2d 63 (Mo. 1981) (en banc).

188. *State ex rel. Albert v. Adams*, 540 S.W.2d 26, 30 (Mo. 1976) (en banc).

189. *Cf. id.*

190. See, e.g., *Porter v. Gottschall*, 615 S.W.2d 63, 66 (Mo. 1981) (en banc) (photographs taken shortly after accident); *State ex rel. Cain v. Barker*, 540 S.W.2d 50, 60-61 (Mo. 1976) (en banc) (Seiler, C.J., dissenting) (contemporaneous witness statements should be more freely discoverable than non-contemporaneous statements).

party has reasonable access to witnesses, non-protected documents, or other sources that could satisfactorily substitute for the requested item clearly will influence the courts.¹⁹¹

(3) Requesting party's preparation efforts. Dilatory preparation efforts will substantially lessen a requesting party's chances of obtaining work product. If the requesting party had substantially the same opportunity to secure evidence as the other party, a court very likely will deny discovery.¹⁹²

(4) Uniqueness. Certain items uniquely preserve evidence. Photographs, tape recordings, and documentation of testing that destroys unique objects, such as cutting up sections from failed structural supports, are logical examples of this category. Courts are more likely to order discovery of these items, than of items for which satisfactory substitutes are available.¹⁹³

(5) Passage of time. Passage of time will impair certain types of evidence, such as witnesses' memories.¹⁹⁴ If the requesting party did not have reasonable access to witnesses at the time of their statements to the opposing party, the statements more likely will be discoverable.¹⁹⁵

There is little Missouri case law regarding the required showing under Rule 56.01(b)(3). Therefore, federal precedents may be useful.¹⁹⁶

C. Waiver

In *State ex rel. Mueller v. Dixon*,¹⁹⁷ a pre-Rule 56.01(b)(3) case, the court held that "[w]ork product immunity, as any other, may be relinquished by voluntary disclosure of the protected information."¹⁹⁸ In *Dixon*, the oppos-

191. In *Porter v. Gottschall*, 615 S.W.2d 63 (Mo. 1981) (en banc), the party seeking photographs did not have such access. See also *Fontaine v. Sunflower Beef Carrier*, 87 F.R.D. 89, 93 (E.D. Mo. 1980) (police report satisfactory substitute for work product witness statement); cf. *State ex rel. Albert v. Adams*, 540 S.W.2d 26, 30 (Mo. 1976) (en banc).

192. See, e.g., *Almaguer v. Chicago, R.I. & Pac. R.R.*, 55 F.R.D. 147, 150 (D.C. Neb. 1972) (discovery of document denied because of failure to timely seek deposition).

193. See, e.g., *Porter v. Gottschall*, 615 S.W.2d 63, 66 (Mo. 1981) (en banc) (witness' memory was not satisfactory substitute for requested photographs); cf. *State ex rel. Premier Panels v. Swink*, 400 S.W.2d 639, 644 (Mo. App., St. L. 1966) (tests of allegedly defective product were not work product because they were not prepared at request of counsel).

194. See, e.g., *Porter v. Gottschall*, 615 S.W.2d 63, 66 (Mo. 1981) (en banc).

195. See, J. MOORE, 4 MOORE'S FEDERAL PRACTICE § 26.64[3.-1], at 26-369 n.8 and cases cited therein.

196. Missouri courts are not bound by federal work product case law. See *State ex rel. St. Louis Pub. Serv. Co. v. McMillian*, 351 S.W.2d 22, 26 (Mo. 1961) (en banc). However, Missouri courts have followed federal case law in some cases. See, e.g., *State ex rel. Pete Rhodes Supply Co. v. Crain*, 373 S.W.2d 38, 41 (Mo. 1963) (en banc).

197. 456 S.W.2d 594 (Mo. App., K.C. 1970).

198. *Id.* at 597. See generally Note, *Waiver of the Work Product Immunity*, 4 U. ILL. L.F. 953, 964 (1981).

ing party already had revealed the basic contents of the requested work product. This disclosure, directly to the requesting party, clearly satisfied the principle that waiver occurs upon a disclosure that is inconsistent with denying access to the requesting party.¹⁹⁹

Waiver should not be found where work product is disclosed to persons with allied interests.²⁰⁰ For example, disclosure to expert consultants should not automatically constitute waiver.²⁰¹ However, if such experts are later identified as experts to be used at trial, and they rely upon work product for testimonial purposes, the other party probably will be able to obtain the material.²⁰²

The waiver of work product protection with respect to a particular item probably does not waive other privileges that may shield such item from discovery.²⁰³ And waiver of other privileges with respect to a particular item should not necessitate a finding that work product protection has been waived.²⁰⁴ In *Halford v. Yandell*,²⁰⁵ the plaintiff waived the attorney-client privilege with respect to a requested written statement. This waiver, however, did not automatically waive work product protection.²⁰⁶ In this regard, the court stated that "[a]n objection based upon the ground of violation of work product is not equivalent to an objection based on the ground of violation of the attorney-client privilege."²⁰⁷ The *Yandell* court proceeded to consider on its merits a claim that the statement was work product.

It has been stated that either the attorney or the client may assert the work product protection.²⁰⁸ The ultimate decision with respect to waiver, however, should be that of the client. It also should be clear that an attorney cannot assert work product protection against his client's wishes with respect to materials prepared for the client's case.²⁰⁹

199. See Note, *supra* note 9, at 881-84.

200. See 23 AM. JUR. 2d *Depositions and Discovery* § 67 (1983).

201. Arguably, work product disclosed to an expert should not thereby become discoverable. See *Baise v. Alewel's, Inc.*, 99 F.R.D. 95, 97 (W.D. Mo. 1983). Mo. R. Civ. P. 56.01(b)(4) provides the exclusive means for discovery of facts known and opinions held by experts which were acquired or developed in anticipation of litigation. Subdivision (b)(4)(a) provides for identification by interrogatory of any expert whom the other party expects to call as an expert witness at trial and for a statement of the general nature of the subject matter on which the expert is expected to testify. Rule 56.01(b)(4) purports to provide the exclusive method for discovery of experts' opinions and knowledge of facts. However, documents upon which experts base trial testimony may be discoverable at that time. Cf. *Halford v. Yandell*, 558 S.W.2d 400, 406-10 (Mo. App., Spr. 1977).

202. See 23 AM. JUR. 2d *Depositions and Discovery* § 67 (1983).

203. See *Halford v. Yandell*, 558 S.W.2d 400, 404 (Mo. App., Spr. 1977).

204. See *id.*

205. 558 S.W.2d 400 (Mo. App., Spr. 1977).

206. *Id.* at 404.

207. *Id.*

208. See Note, *supra* note 9, at 869-80.

209. See Note, *supra* note 9, at 874.

D. *Discovery in Other Litigation*

The extent to which work product in one lawsuit is protected in subsequent or concurrent litigation has been discussed in a number of jurisdictions, including Missouri.²¹⁰ Complex multi-suit relationships can be imagined, but the problem most likely would arise when one party's work product is requested in another concurrent lawsuit (in which the first person is not a party) by a person who is a party in both lawsuits. If the first party's work product is not protected in the second lawsuit, the requesting party will be able to obtain freely his opponent's trial preparations. Undoubtedly there are other scenarios; however, the foregoing example demonstrates the problems that can result from discovery of work product in other litigation.

The most desirable result would be to protect work product from discovery or subpoena in any other lawsuit once the protection has successfully been asserted (absent waiver or other factor rendering the work product discoverable). Lawyers and parties thereby would be assured of the "zone of privacy" that the United States Supreme Court created in *Hickman v. Taylor*.²¹¹ Rule 56.01(b)(3), however, purports only to cover work product of a party or a party's representative.²¹² The Missouri Supreme Court discussed the possibility of protecting the work product of nonparties in *State ex rel. Missouri Public Service Company v. Elliott*.²¹³ Missouri should extend by rule or case law work product protection to include nonparties' work product. Federal cases have extended different levels of protection to work product created in other litigation. This protection ranges from shielding documents in related litigation to providing the same level of immunity for all work product regardless of the lawsuit for which it is prepared.²¹⁴ Unfortunately, the only Missouri case directly addressing the other litigation issue failed to extend any protection to work product outside of the litigation for which it is created. In *State ex rel. J.E. Dunn Construction Company v. Sprinkle*,²¹⁵ the city of Kansas City sued J.E. Dunn Construction Company for damages arising out of the Kemper Arena roof collapse. Prior to that lawsuit, the city's casualty insurer, Great American Insurance Company, had investigated the city's claim for casualty coverage. The investigation generated documents relating to the city's coverage claim and the cause of the collapse.²¹⁶ The city and Great American Insurance Company ultimately settled under an agreement resulting in the lawsuit against Dunn. Dunn requested production of the documents from the earlier investigation in the city's control. The city objected, partly on work

210. See *State ex rel. J.E. Dunn Constr. Co. v. Sprinkle*, 650 S.W.2d 707, 711 (Mo. App., W.D. 1983).

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

212. See Mo. R. Civ. P. 56.01(b)(3) (emphasis added).

213. 434 S.W.2d 532, 536 (Mo. 1968) (en banc).

214. See Note, *The Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412 (1983); Note, *supra* note 9, at 855-64.

215. 650 S.W.2d 707 (Mo. App., W.D. 1983).

216. *Id.* at 709.

product grounds.²¹⁷

There was no question that the requested material would be work product in litigation between the city and the insurance company.²¹⁸ However, the court of appeals rejected the argument that such immunity would apply in the current litigation, holding, "[t]he qualified 'work product' immunity applies only to information and materials gathered by one's adversary in the litigation, or in preparation for the litigation, in which the discovery is being sought."²¹⁹

The holding in *J.E. Dunn Construction Company* should be re-examined. By restricting protection of work product to the litigation for which it is prepared, the decision creates a number of problems. First, parties and courts will have to determine for which litigation an item of work product is prepared. Second, allowing such discovery will dilute the privacy accorded trial preparations and, under the reasoning of *Hickman v. Taylor*,²²⁰ will aggravate problems that the work product doctrine was designed to solve. Attorneys will be less inclined to fully document trial preparation out of fear that such documentation will not be protected. Third, parties might be compelled to reveal work product during the pendency of the litigation for which it is prepared. If the work product is requested in concurrent litigation, under *J.E. Dunn Construction Company*, parties may have to produce the material, with the attendant risk that their opponents will obtain the material. Thus, opinion work product would be accorded no greater protection than regular work product.²²¹

VI. STRATEGIES FOR PREVENTING DISCOVERY OF TRIAL PREPARATIONS

From a practical standpoint, faced with the possibility that work product materials may be discovered, attorneys and parties can take various actions to minimize the risk of such discovery.

Document creation should be strictly controlled. When the possibility of litigation arises, documents created with respect to that possibility should be maintained separately from documents created in the party's day-to-day non-litigation activities.²²² Such documents should be identified as work product. Naturally, this labeling will not ensure protection; however, it will support the party's argument that the document was created in anticipation of litigation.²²³ Documents created in anticipation of litigation should, if possible, include theories and opinions of representatives responsible for the litigation.

217. *Id.*

218. *Id.* at 711.

219. *Id.*

220. 329 U.S. 495 (1947).

221. This is another reason for utilizing attorney-client communications in trial preparations. *See supra* notes 55-68 and accompanying text.

222. This will weaken any argument that the documents were created in the ordinary course of business.

223. Labeling has been a factor in defeating a claim of work product. *See State ex rel. St. Louis Little Rock Hosp. v. Gaertner*, 682 S.W.2d 146 (Mo. App., E.D. 1984).

This will increase the likelihood that a particular document will be absolutely protected as opinion work product.

Attorneys and parties also should maximize the use of attorney-client communications in the preparation of lawsuits. The documents thereby created will be absolutely privileged and immune from discovery,²²⁴ although relevant facts recited in such documents will remain freely discoverable.²²⁵ Nevertheless, from the standpoint of the party to whom discovery has been propounded, it is much more desirable to respond to interrogatories by framing answers specifically for that purpose, rather than having to provide one's opponent with documents that were created for internal use.

VII. CONCLUSION

Work product has evolved and changed dramatically in Missouri since *Hickman v Taylor*.²²⁶ There have been two opposing strains of thought and policy running through this development. First, there has been a general tendency toward liberalization of discovery, which has included a trend towards allowing discovery of certain work product materials.²²⁷ Always present, however, has been an undercurrent of limiting intrusion into lawyers' and parties' preparations for trial.²²⁸ This, of course, is the classic conflict that first led to creation of the work product doctrine and then to the limited discoverability test of Rule 56.01(b)(3). These two counter-trends will continue to shape the work product doctrine in Missouri.

224. See *supra* notes 55-68 and accompanying text.

225. See *supra* notes 84-90 and accompanying text. Of course, the privilege would not attach to documents attached to such communications. See *supra* notes 84-90 and accompanying text.

226. 329 U.S. 495 (1947).

227. See *supra* notes 36-40, 92 and accompanying text.

228. The most apparent example being the new insurer-insured privilege. See *supra* notes 69-85 and accompanying text.

