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An Attorney's Thoughts Remain Inviolable: The Missouri Supreme Court Protects Intangible Work Product

*State ex rel. Atchison, Topeka & Santa Fe R.R. Co. v. O'Malley*¹

I. INTRODUCTION

The work product rule provides that the tangible and intangible results of an attorney's trial preparation are protected from discovery.² This protection extends to the thoughts, mental impressions and opinions of an attorney, as well as to trial preparation materials.³ However, Missouri Rule of Civil Procedure 56.01(b)(4), which sets out the work product rule, refers only to "documents and tangible things" prepared in anticipation of litigation.⁴

In 1993, two Missouri appellate courts considered whether intangible work product is protected in Missouri and reached opposite conclusions.⁵ In *State ex rel. Krigbaum v. Lemon*, the Eastern District Court of Appeals held that the work product doctrine only protects those documents or tangible things protected by the rule.⁶ The Western District Court of Appeals, in *State ex rel. State Board of Pharmacy v. Otto*, held that intangible work product is protected from discovery by the United States Supreme Court's decision in *Hickman v. Taylor*.⁷

In *State ex rel. Atchison, Topeka, Santa Fe R.R. Co. v. O'Malley*,⁸ the Missouri Supreme Court clarified the Missouri work product rule, overruling *Krigbaum* and embracing the *Otto* protection of intangible work product.⁹

II. FACTS AND HOLDING

Charles Herriman sued Atchison, Topeka & Santa Fe Railway Company ("Santa Fe") under the Federal Employers' Liability Act,¹⁰ seeking damages for

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1. 898 S.W.2d 550 (Mo. 1995).
 2. *Hickman v. Taylor*, 329 U.S. 495 (1947).
 3. *Id.* at 511.
 4. MO. S. CT. R. 56.01(b)(4).
 5. *State ex rel. Krigbaum v. Lemon*, 854 S.W.2d 72 (Mo. Ct. App. 1993); *State ex rel. State Bd. of Pharmacy v. Otto*, 866 S.W.2d 480 (Mo. Ct. App. 1993).
 6. *Krigbaum*, 854 S.W.2d. at 73.
 7. *Otto*, 866 S.W.2d at 483 (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)).
 8. 898 S.W.2d 550 (Mo. 1995).
 9. *Id.* at 553.
 10. 45 U.S.C. §§ 51-60 (1994).

personal injuries suffered while working for Santa Fe.¹¹ In his first set of interrogatories, Herriman asked whether Santa Fe had obtained any statements or reports from any person regarding the accident or Herriman's claimed injuries.¹² Herriman also asked for the names of persons from whom the statements or reports were obtained, whether the statements were oral or written and the date and present location of the statements or reports.¹³

In partial compliance with the request, Santa Fe produced copies of medical records, documents and statements obtained from Herriman and his physician and identified all known individuals with knowledge of relevant facts.¹⁴ Santa Fe objected to the remainder of the request, claiming that it sought privileged intangible work product.¹⁵

Herriman sought an order compelling Santa Fe to answer the interrogatories¹⁶ from Circuit Judge John R. O'Malley.¹⁷ Judge O'Malley ordered Santa Fe to comply with the discovery requests, and Santa Fe sought writs of prohibition and *mandamus* from the Missouri Supreme Court.¹⁸

11. *O'Malley*, 898 S.W.2d at 551.

12. *Id.* at 553.

13. *Id.* The interrogatories in question read as follows:

3. Have any statements or reports been obtained from any persons, including physicians or hospitals, regarding the occurrence or injuries described in Plaintiff's Petition?

4. If so, name the persons from whom the statements or reports have been obtained, the date of said statements or reports, the number of said statements or reports, whether oral or written, to who[m] said statements or reports were made and the location of said statements or reports at the present time.

...

6. State whether any statements were taken pertaining to the occurrence mentioned in Plaintiff's Petition, either signed or unsigned, recorded by court reporter or stenographer. If so, state:

(a) when said statements were taken;

(b) who took said statement;

(c) where said statements were taken;

(d) who was present at the time said statements were taken;

(e) who gave said statements; and

(f) who currently has possession of said statements.

Id.

14. *O'Malley*, 898 S.W.2d at 553.

15. *Id.*

16. *Id.* at 551.

17. *Id.* The Honorable John R. O'Malley serves on the Circuit Court of Jackson County and was the respondent in Santa Fe's petition for writs of prohibition and *mandamus*.

18. *O'Malley*, 898 S.W.2d at 551.

In a unanimous decision, written by Judge Elwood Thomas,¹⁹ the court clarified Missouri work product doctrine, holding that the interrogatories sought work product and that Missouri Rule of Civil Procedure 56.01 “does not alter or abrogate the protections of intangible work product, which exist independently of Rule 56.01(b)(3).”²⁰

III. LEGAL BACKGROUND

In their original form, the 1938 Federal Rules of Civil Procedure did not specifically limit a party’s access to an opposing attorney’s mental impressions or documents developed in the course of his opponent’s trial preparation.²¹ Courts disagreed about the extent to which such inquiry could be made.²² The United States Supreme Court, in *Hickman v. Taylor*,²³ created a qualified immunity from discovery for attorney work product prepared in anticipation of litigation.²⁴

A. Work Product Doctrine Created: *Hickman v. Taylor* and Federal Rule of Civil Procedure 26(b)(3)

The *Hickman* case arose after a tugboat accident in which five of nine crew members, including Norman Hickman, drowned.²⁵ Shortly after the accident, an attorney for the tugboat company interviewed and took statements from the survivors and other potential witnesses.²⁶

19. Before his appointment to the Missouri Supreme Court in 1991, Judge Thomas taught evidence at the University of Missouri-Columbia Law School from 1965 to 1978. Judge Thomas died in 1996 after a lengthy battle with Parkinson’s disease. *O’Malley* was Judge Thomas’ last evidence case.

For more information about Judge Thomas, see Timothy J. Heinz, *A Tribute to Judge Thomas*, 61 MO. L. REV. 1 (1996).

20. *O’Malley*, 898 S.W.2d at 553.

21. See Elizabeth G. Thornburg, *Rethinking Work Product*, 77 VA. L. REV. 1515, 1518 (1991); CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CIVIL PROCEDURE § 2021 (2d ed. 1994).

22. See WRIGHT ET AL., *supra* note 21, § 2021 nn.2-9.

23. 329 U.S. 495 (1947).

24. *Id.* at 511-12. For a general discussion of work product doctrine, see John A. Anderson et al., Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760 (1983). For a discussion of the work product doctrine in Missouri, see Larry L. McMullen & Robin V. Foster, *Work Product in Missouri*, 50 MO. L. REV. 563 (1985).

25. *Hickman*, 329 U.S. at 498.

26. *Id.*

Four of the five potential claims were settled; the administrator of Hickman's estate brought suit in a federal court under the Jones Act.²⁷ The plaintiff filed several interrogatories directed to the tug owners, one of which asked the owners to identify and produce all statements from crew members of any vessel taken in connection with the accident, including summaries of oral statements.²⁸ The tug owners objected to the interrogatory on the grounds that it called for "privileged matter obtained in preparation for litigation" and that answering "would involve practically turning over not only the complete files, but also the telephone records and, almost, the thoughts of counsel."²⁹

The District Court for the Eastern District of Pennsylvania held that the requested matters were not privileged and ordered the tug owners and their attorney to answer the interrogatories, produce all written statements of witnesses, produce all memoranda containing statements of fact by witnesses and state any fact concerning the case which the defendants learned through oral statements by witnesses.³⁰ Upon their refusal, the court judged the defendants and their attorney in contempt and ordered them imprisoned until they complied.³¹ The Third Circuit Court of Appeals reversed, holding that the information sought was part of the "work product of the lawyer" and privileged from discovery.³²

The United States Supreme Court affirmed, but used a slightly different analysis.³³ The Court noted that federal rules of discovery are premised on the idea that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation," and "either party may compel the other to disclose whatever facts he has in his possession."³⁴ The Court said that the information sought did not fall within the scope of attorney-client privilege, but went beyond the intended scope of discovery.³⁵ The plaintiff "made more than

27. *Id.*

28. *Id.* at 498-99. The interrogatory read:

State whether any statements of the members of the crews of the Tugs "J.M. Taylor" and "Philadelphia" or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug "John M. Taylor." Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports.

Id.

29. *Id.* at 499.

30. *Id.* at 499-500 (citing *Hickman v. Taylor*, 4 F.R.D. 479 (E.D. Penn. 1945)).

31. *Id.* at 500.

32. *Hickman v. Taylor*, 153 F.2d 212, 223 (3d Cir. 1946).

33. *Hickman*, 329 U.S. 495 (1947).

34. *Id.* at 507.

35. *Id.* at 508.

an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel.”³⁶

The request reached into a lawyer’s work as “an officer of the court . . . bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients,” and the Court said that it was essential that this work be done “with a certain degree of privacy.”³⁷

This work is reflected, of course, in the interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney’s thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.³⁸

The *Hickman* court took the middle ground between the district court, which proposed free discovery of work product, and the court of appeals, which called the material privileged.³⁹ The Court created a qualified immunity from discovery for written materials obtained or prepared in anticipation of litigation, explaining that the materials may be discoverable if the party seeking discovery can “establish adequate reasons to justify production.”⁴⁰ Disclosure might be required, for example, where relevant facts are hidden in an attorney’s file or where witnesses are no longer available or are difficult to reach.⁴¹ Noting that the plaintiff could obtain all material, non-privileged facts through normal discovery methods, the Court denied production.⁴²

The Court applied a different rule to the oral statements made by witnesses to the defendants’ lawyer, because disclosure of these statements would require the attorney to produce his recollection and impressions of the witnesses’ statements. This intangible type of work product would only be discoverable in “rare situations.”⁴³ The Court said, “[W]e do not believe that any showing of necessity can be made under the circumstances of this case to justify production

36. *Id.*

37. *Id.* at 510.

38. *Id.* at 511.

39. *See* WRIGHT ET AL., *supra* note 21, § 2022.

40. *Hickman*, 329 U.S. at 511-12.

41. *Id.*

42. *Id.* at 513.

43. *Id.*

. . . If there should be a rare situation justifying production of these matters, petitioner's case is not of that type."⁴⁴

In 1970, the Supreme Court amended the Federal Rules of Civil Procedure to include a specific discovery exemption for trial preparation materials.⁴⁵ Federal Rule of Civil Procedure 26(b)(3) codifies the *Hickman* "substantial need" rule⁴⁶ and protects from discovery "documents and tangible things . . . prepared in anticipation of litigation or for trial or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)."⁴⁷ These "documents and tangible things" are available only upon a showing of "substantial need."⁴⁸

The federal rule, which has been followed by Missouri⁴⁹ and most other states,⁵⁰ specifically protects only tangible trial preparation materials. The rule indicates that intangible work product should not be disclosed freely,⁵¹ but the

44. *Id.*

45. FED. R. CIV. P. 26(b)(3).

46. *Hickman*, 329 U.S. at 511-12.

47. FED. R. CIV. P. 26(b)(3).

48. *Id.*

49. MO. S. CT. R. 56.01(b)(4).

50. Thirty-four states have adopted verbatim copies of Rule 26(b)(3), and 10 others have rules very similar to the federal rule. Verbatim copies include: ALA. R. CIV. P. 26(b)(3); ALASKA R. CIV. P. 26(b)(3); ARIZ. R. CIV. P. 26(b)(3); ARK. R. CIV. P. 26(b)(3); COLO. R. CIV. P. 26(b)(3); DEL. CT. C.P.R. 26(b)(3); FLA. R. CIV. P. 1.280(b)(3); GA. CODE ANN. § 9-11-26(b)(3); HAW. R. CIV. P. 26(b)(3); IND. R. TRIAL PRAC. 26(b)(3); IOWA R. CIV. P. 122(c); KAN. STAT. ANN. § 60-226(b)(3); KY. R. CIV. P. 26.03(3); ME. R. CIV. P. 26(b)(3); MASS. R. CIV. P. 26(b)(3); MISS. R. CIV. P. 26(b)(3); MONT. R. CIV. P. 26(b)(3); NEB. R. CIV. P. 26(b)(3); NEV. R. CIV. P. 26(b)(3); N.H. SUPER. CT. R. 35(b)(2); N.J. CIV. PRAC. R. 4:10-2(c); N.M. R. CIV. P. 1-026(b)(4); N.D. R. CIV. P. 26(b)(3); OR. R. CIV. P. 35(B)(3); S.C. R. CIV. P. 26(b)(3); S.D. COD. LAWS ANN. § 15-6-26(b)(3); TENN. R. CIV. P. 26(b)(3); UTAH R. CIV. P. 26(b)(3); VT. R. CIV. P. 26(b)(3); VA. S. CT. R. 4:1(b)(3); WASH. SUPER. CT. CIV. R. 26(b)(3); W. VA. R. CIV. P. 26(b)(3); WIS. R. CIV. P. 804.01(2)(c); WYO. R. CIV. P. 26(b)(3).

Similar state rules include: CONN. SUPER. CT. R. 219; IDAHO R. CIV. P. 26(b)(3); LA. CODE CIV. PROC. ANN. art. 1424; MD. CIR. CT. R. CIV. P. 2-402(c) & (d); MICH. R. CIV. P. 26.02(c); MINN. R. CIV. P. 26.02(c); MO. S. CT. R. 56.01(b)(3); N.C. GEN. STAT. § 1A-1, R. 26(b)(3); OKLA. STAT. ANN. tit. 12 § 3226(B)(2); R.I. SUPER. CT. R. CIV. P. 26(b)(2). See generally WRIGHT ET AL., *supra* note 21, § 2023 nn.27-28.

For a description of the provisions of the courts in the remaining six states, see Thornburg, *supra* note 21, at 1583 n.31.

51. FED. R. CIV. P. 26(b)(3) reads:

In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinion or legal theories of an attorney or other representative of a party concerning the litigation.

extent of the protection of intangible work product under the rule is not clear. Courts have varied in their interpretation of the rule's protection of intangible work product.⁵²

B. Protection of Intangible Work Product in the Federal Courts

Prior to the enactment of Rule 26(b)(3), the courts focused on whether the proposed discovery fit within the facts of *Hickman v. Taylor*.⁵³ The post-rule decisions contain conflicting interpretations of the rule as it applies to intangible work product. Several post-rule cases have held that work product protection extended only to "documents and tangible things" specified in Rule 26(b)(3).⁵⁴ In *Lincoln Gateway Realty Company v. Carri-Craft, Inc.*,⁵⁵ the court considered an interrogatory which, with respect to certain statements taken by the plaintiff and identified in a previous interrogatory, asked for the date the statement was taken, the identity of the person who obtained the statement from the witness, and the identity of his or her employer at the time the statement was taken.⁵⁶ The plaintiff contended that the interrogatory sought trial preparation materials within the meaning of Federal Rule of Civil Procedure 26(b). The court said that the information was clearly within the scope of discovery because trial preparation materials are limited to "documents and tangible things" in Rule 26(b)(3).⁵⁷

52. See *infra* notes 53-114.

53. Holding that proposed discovery was proper: *Klop v. United Fruit Co.*, 18 F.R.D. 310, 312 (S.D.N.Y. 1955) (holding that interrogatory seeking names of people from whom plaintiff had obtained statement was proper because *Hickman* concerned statements prepared by the attorney, not the names of the persons from whom statements had been taken); *Seven-Up Co. v. Get Up Corp.*, 30 F.R.D. 550, 553 (N.D. Ohio 1962) (holding that interrogatories requesting names of interviewees, dates of interviews and questions asked by interviewer did not come within *Hickman* rule, because they were not "written statements, private memoranda and personal recollections" prepared by the opposing attorney).

Holding that proposed discovery was improper: *Besley-Welles Corp. v. Ballax, Inc.*, 43 F.R.D. 368 (E.D. Wis. 1968) (Interrogatory seeking names and addresses of all persons contacted as possible witnesses went beyond proper inquiry about names of people with knowledge of relevant facts and invaded protected work product.); *Cunningham v. Mutual Life Ins. Co. of New York*, 11 F.R.D. 331 (E.D.N.Y.) (same); *Uinta Oil Refining Co. v. Continental Oil Co.*, 226 F. Supp. 495 (D. Utah 1964); *St. Paul Fire & Marine Ins. Co. v. King*, 45 F.R.D. 521 (W.D. Okla. 1968).

54. See *Lincoln Gateway Realty Co. v. Carri-Craft, Inc.*, 53 F.R.D. 303, 307 (W.D. Mo. 1971); *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 200 (D. Kan. 1996).

55. 53 F.R.D. 303, 307 (W.D. Mo. 1971).

56. *Id.*

57. *Id.* See also *Mackey v. IBP, Inc.*, 167 F.R.D. 186 (D. Kan. 1996) (held that interrogatory did not seek work product, because did not seek documents or tangible

Some courts have upheld similar interrogatories on the grounds that a party must reveal the identities of individuals with knowledge of relevant facts.⁵⁸ These courts said that interrogatories seeking the names of individuals from whom a party had taken statements were no more than attempts to identify individuals with knowledge of the relevant facts.⁵⁹ The courts said that a party was entitled under Federal Rule of Civil Procedure 26(b)(3) to obtain information as to “the existence, [and] description . . . of any . . . documents.”⁶⁰

On the other hand, most courts and commentators have interpreted Rule 26(b)(3) as a limitation to protection of trial preparation materials, not an abrogation of the protection provided by *Hickman* for intangible work product.⁶¹ The courts have also distinguished between interrogatories seeking the identity of individuals with knowledge of facts and interrogatories seeking the names of individuals who have been interviewed or who will be called as witnesses.⁶²

In *Massachusetts v. First National Supermarkets, Inc.*,⁶³ the court held that an interrogatory requesting the names and addresses of interviewees improperly sought protected work product.⁶⁴ The court said that Rule 26(b)(3) only protects “documents and tangible things,” but the Supreme Court’s holding in *Hickman v. Taylor* protected intangible work product from discovery.⁶⁵

In *Board of Education of Evanston v. Admiral Heating and Ventilating, Inc.*,⁶⁶ the court considered an interrogatory asking defendants to identify anyone they had interviewed concerning construction bids and to describe the circumstances of the interview.⁶⁷ The court said that a party may properly “inquire into the identity and location of persons having knowledge of relevant facts,” but “may not do so in a fashion that effectively infringes upon the opposing attorney’s preparation of his case for trial.”⁶⁸ According to the court,

things as specified in Rule 26(b)(3)).

58. *Ballard v. Allegheny Airlines, Inc.*, 43 F.R.D. 368 (E.D. Wis. 1968); *Chatman v. American Export Lines, Inc.*, 20 F.R.D. 176 (S.D.N.Y. 1956).

59. *Ballard*, 45 F.R.D. at 369; *Chatman*, 20 F.R.D. at 178.

60. *Ballard*, 45 F.R.D. at 369; *Chatman*, 20 F.R.D. at 178 (citing *Jones v. Pennsylvania R. Co.*, 7 F.R.D. 662, 663 (N.D. Ill. 1947)).

61. See *infra* notes 63-65. See also Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 841 (1983); Edward H. Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269, 1300-01 (1969).

62. See *infra* notes 66-69.

63. 112 F.R.D. 149 (D. Mass. 1986).

64. *Id.* at 152.

65. *Id.*

66. 104 F.R.D. 23 (N.D. Ill. 1984).

67. *Id.* at 32.

68. *Id.* See also *Laxalt v. McClatchy*, 116 F.R.D. 438 (D. Nev. 1987); *Hoffman v. United Telecomm., Inc.*, 117 F.R.D. 436 (D. Kan. 1987); *United States v. Maryland Shipbuilding & Drydock Co.*, 51 F.R.D. 159 (D. Md. 1970).

the interrogatory in question was such an infringement. It was legitimate to ask for identification of persons who had knowledge of the relevant facts. However,

[t]o go beyond that—to tell plaintiffs whom defendants have interviewed, where and when such interviews took place and whether or not a record was made—is to give plaintiffs no more knowledge of substantive relevant facts, but rather to afford them the potential for significant insights into the defense lawyers' preparation of their case (and thus their mental processes).⁶⁹

The two conflicting lines of federal cases have created confusion not only in the federal courts, but at the state level as well.⁷⁰

C. Protection of Intangible Work Product in Missouri

Like the federal rule, Missouri Rule of Civil Procedure 56.01 explicitly protects only tangible work product.⁷¹ Missouri courts, like their federal counterparts, have interpreted the rule in a variety of ways.⁷²

69. *Admiral*, 104 F.R.D. at 32.

70. *See infra* notes 73-115 and accompanying text.

71. MO. S. CT. R. 56.01(b)(3). Part (b) of the rule provides in pertinent part: (b) Scope of discovery. Unless otherwise limited by order of the Court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter

(3) Trial Preparation: Materials . . . [A] party may obtain discovery of documents and tangible things otherwise discoverable under 56.01(b)(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, including an 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 the case and that the adverse party 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.

72. *See infra* notes 73-115 and accompanying text.

Even after *Hickman*, Missouri courts often relied on protections other than the work product doctrine to protect intangible work product. Three years after the United States Supreme Court decided *Hickman*, the Missouri Supreme Court decided *State ex rel. Miller's Mutual Fire Insurance Association v. Caruthers*.⁷³ In *Caruthers*, the court considered the propriety of interrogatories asking whether the party had investigated the plaintiff, the purpose of any investigation, the instructions to investigators and the names and addresses of all persons interviewed. In holding that the interrogatories were improper, the court relied on a line of cases which did not allow interrogatories to inquire about information that the party could know only through hearsay.⁷⁴ The court did not mention work product in relation to the list of interviewees, but it did note that the interrogatory requesting the purpose of any investigation and the instructions to investigators sought information protected by the *Hickman* work product doctrine.⁷⁵

In *State ex rel. St. Louis Public Service Company v. McMillian*,⁷⁶ the Missouri Supreme Court again prevented the discovery of an opposing party's investigative process, this time using a pragmatic rationale. The Court considered whether a plaintiff's interrogatory could ask whether the defendant had taken photographs of the plaintiff since her injury.⁷⁷ The court did not allow the interrogatory, because any photographs would be privileged work product, and the plaintiff would not be able to obtain them.⁷⁸ The court held that "[w]here the sole purpose of an inquiry is to procure the production of material which, if it is in existence at all, is privileged, we see no legitimate purpose in permitting the inquiry and prolonging the controversy."⁷⁹

73. 226 S.W.2d 711 (Mo. 1950) (en banc).

74. *Id.* at 713 (citing *State ex rel. Williams v. Buzard*, 190 S.W.2d 907 (Mo. 1945) (en banc); *State ex rel. Thompson v. Harris*, 195 S.W.2d 645 (Mo. 1946) (en banc); *State ex rel. Kansas City Pub. Serv. Co. v. Dowan*, 203 S.W.2d 407 (Mo. 1947) (en banc)). See also *State ex rel. Premier Panels, Inc. v. Swink*, 400 S.W.2d 639 (Mo. Ct. App. 1966).

Prior to *Hickman*, some federal courts used a similar rationale. See generally WRIGHT ET AL., *supra* note 21, § 2008.

75. *State ex rel. Miller's Mut. Fire Ins. Ass'n v. Caruthers*, 226 S.W.2d 711, 713 (Mo. 1950) (en banc).

76. 351 S.W.2d 22 (Mo. 1961).

77. *Id.* at 25.

78. *Id.*

79. *Id.* See also *State ex rel. Missouri Pac. R.R. Co. v. Koehr*, 853 S.W.2d 925, 927 (Mo. 1993) (Interrogatory inquiring about existence of surveillance reports held improper because there was no "legitimate purpose in the inquiry, aside from the production of privileged material.").

The Missouri Supreme Court explicitly recognized protection for intangible work product in *State ex rel. Gray v. Jensen*.⁸⁰ The court held that an interrogatory asking for the names and addresses of all doctors that the plaintiff planned to call to testify was improper because it sought information that was protected work product.⁸¹ The court said that the interrogatory went

beyond a request for those who have knowledge. It invades the area of judgment and trial strategy as to which persons actually will be used as witnesses. This usually will be governed by the opinion and advice of trial counsel. To require an answer to this inquiry would be to invade the work product of counsel and the privileged relationship between attorney and client.⁸²

D. Conflicting Decisions: State ex rel. Krigbaum v. Lemon and State ex rel. State Board of Pharmacy v. Otto

In 1993, protection of intangible work product was considered by both the Missouri Eastern District Court of Appeals and Western District Court of Appeals. The two courts virtually ignored the sparse and conflicting Missouri cases, looking instead to federal precedent and coming to directly contradictory decisions. In *State ex rel. Krigbaum v. Lemon*,⁸³ the Eastern District Court of Appeals compelled a party to answer an interrogatory that requested the names of all persons from whom the plaintiff and her attorney had received statements. The court said that the information sought was not protected work product.⁸⁴ A few months later, the Western District Court of Appeals held in *State ex rel. State Board of Pharmacy v. Otto*⁸⁵ that a similar interrogatory improperly sought information protected by the work product doctrine.⁸⁶

In *Krigbaum*, the defendants in a personal injury action served an interrogatory on the plaintiff requesting the names and addresses of all persons from whom the plaintiff or her attorney had received statements.⁸⁷ Over the objection of the plaintiff, the trial judge⁸⁸ entered an order compelling the

80. 395 S.W.2d 143 (Mo. 1965) (en banc).

81. *Id.* at 145-46.

82. *Id.* at 146.

83. 854 S.W.2d 72 (Mo. Ct. App. 1993).

84. *Id.* at 73.

85. *State ex rel. State Bd. of Pharmacy v. Otto*, 866 S.W.2d 480 (Mo. Ct. App. 1993).

86. *Id.* at 482-85.

87. *Krigbaum*, 854 S.W.2d at 73. The interrogatory in question also requested the date of the statement, the person who took the statement, the form and location of the statement, and the person presently having custody or control of the statement. *Id.*

88. The ruling complained of was made by Judge Carroll Blackwell. The case was

plaintiff to answer the interrogatory, and the plaintiff sought a writ of prohibition from the court of appeals.⁸⁹

The court of appeals denied the writ, holding that the request was authorized by Rule 56.01.⁹⁰ Looking to the language of Rule 56.01(b)(3), the court stated that “[t]o be protected as work product, or ‘Trial Preparation: Materials,’ the materials must be ‘documents’ or ‘tangible things.’”⁹¹ The court found that the request was clearly authorized by Rule 56.01, because the defendants did not ask for documents or tangible things or the contents of the statements, but only asked about the existence of the documents or tangible things.⁹²

The court said that the language of 56.01(b)(1) directly refuted the plaintiff’s claim of work product protection.⁹³ Rule 56.01(b)(1) permits the discovery of “the existence, description, nature, custody, and location of documents or other tangible things” and the “identity and location of persons having knowledge of any discoverable matter.”⁹⁴ According to the court, the information sought fell within the scope of 56.01(b)(1).

The court stated that its position requiring disclosure was supported by federal precedent, citing the statement in *Lincoln Gateway Realty* that work product protection is limited to “documents and tangible things.”⁹⁵ The court also relied on *Chatman v. American Export Lines, Inc.*, which held that interrogatories seeking the names of individuals from whom a party had taken statements were no more than a proper attempt to identify individuals with knowledge of the relevant facts.⁹⁶

The Western District Court of Appeals faced the same issue a few months later in *State ex rel. State Board of Pharmacy v. Otto*, and held that a similar interrogatory sought information that was protected work product.⁹⁷ The *Otto* case involved a complaint filed before the Administrative Hearing Commission by the State Board of Pharmacy in an action to discipline a Missouri

subsequently assigned to Judge James Lemon. *Id.* at 73 n.1.

89. *Krigbaum*, 854 S.W.2d at 73.

90. *Id.* at 73-74.

91. *Id.* at 73 (citing Board of Registration for the Healing Arts v. Spinden, 798 S.W.2d 472, 477 (Mo. Ct. App. 1990) and Enke v. Anderson, 733 S.W.2d 462, 466 (Mo. Ct. App. 1987)).

92. *Id.*

93. *Id.*

94. *Id.* at 73-74.

95. *Id.* at 74 (citing Lincoln Gateway Realty Co. v. Carri-Craft, Inc., 53 F.R.D. 303, 307 (W.D. Mo. 1971)).

96. *Chatman v. American Export Lines, Inc.*, 20 F.R.D. 176, 178 (S.D.N.Y. 1956).

97. *State ex rel. State Bd. of Pharmacy v. Otto*, 866 S.W.2d 480 (Mo. Ct. App. 1993).

pharmacist.⁹⁸ In preparation for trial, the board's attorney conducted interviews, reviewed documents and prepared notes and memoranda.⁹⁹

The defendant pharmacist served an interrogatory on the board requesting details of the board's investigation of the pharmacist, including the names of the persons contacted and detailed descriptions of statements and documents obtained.¹⁰⁰ The board objected to the interrogatory on the ground that it sought information which constituted opinion work product.¹⁰¹ After the trial court overruled the objection and ordered the board to comply, the board sought a writ of prohibition in the Circuit Court of Cole County.¹⁰² The circuit court upheld the trial court's order, and the board appealed to the Western District Court of Appeals.¹⁰³

The *Otto* court, unlike the *Krigbaum* court, recognized work product protection for both tangible trial preparation materials and intangible work product.¹⁰⁴ Protection for trial preparation materials, the court explained, comes

98. *Id.* at 481.

99. *Id.*

100. The interrogatory in question stated:

9. Whether or not you have conducted or have cause [sic] to be conducted any investigation or further investigation of Respondent, James E. Drake, after the inspection of April 4, 1988 of Drake's Medical Center Pharmacy, and if so state:

- A. Identify each person conducting each such investigation or further investigation on your behalf;
- B. Describe in detail each such investigation or further investigation;
- C. Identify each person contacted during each such investigation or further investigation the date of each such contract [sic] and identify each person acting on your behalf who contacted each such person on each such date;
- D. Describe in detail what each person said on each date when he/she was contacted and/or interviewed;
- E. Describe in detail what was said to each person when he/she was contacted and/or interviewed on each such date;
- F. Identify and describe in detail each document you obtained during each such investigation or further investigation;
- G. Identify the person who provided you with each document identified in answer to Interrogatory No. 9G [sic] above; and
- H. Identify and describe each document prepared during such investigation or further investigation.

Id. at 482.

101. *Otto*, 866 S.W.2d at 482.

102. *Id.*

103. *Id.*

104. *Id.* (citing *Board of Healing Arts v. Spinden*, 798 S.W.2d 472, 476-78 (Mo.

from Rule 56.01(b)(3).¹⁰⁵ The court noted that Rule 56.01(b)(3) “grants no protection for opinion work product which is not in the form of ‘documents or tangible things.’”¹⁰⁶ The protection for intangible opinion work product, the court said, flows out of the United States Supreme Court’s decision in *Hickman v. Taylor*.¹⁰⁷

Like the court in *Krigbaum*, the *Otto* court looked to federal case law interpreting Federal Rule of Civil Procedure 26(b)(4). The court quoted *In re Grand Jury Subpoena Dated Nov. 8, 1979*,¹⁰⁸ which included an attorney’s pattern of investigation in its definition of work product as “the tangible and intangible material which reflects an attorney’s efforts at investigating and preparing a case, including one’s pattern of investigation, assembling of information, determination of relevant facts, preparation of legal theories, planning of strategy, and recording of mental impressions.”¹⁰⁹

The *Otto* court also adopted the *First National Supermarkets* view that:

the basis for not permitting interrogatories to be propounded which seek the names of persons interviewed by an adverse party is not found in Rule 26(b)(3), F.R. Civ. P., for that rule protects only ‘documents and things.’ Rather the basis . . . is the Supreme Court’s holding in *Hickman v. Taylor* that an attorney’s ‘work-product’ is protected against discovery from an adverse party.¹¹⁰

Finally, the *Otto* court also cited *Laxalt v. McClatchy*,¹¹¹ which distinguished between interrogatories requesting the names of witnesses with knowledge of relevant facts and interrogatories requesting names of people interviewed by opposing counsel.¹¹² The court said that the latter inquiry was prevented by the work product rule, explaining that disclosure of such information would allow opposing counsel “to formulate a list of which witnesses counsel considered important and which were not.”¹¹³ Allowing such an interrogatory would allow discovery of the very “type of mental impression and trial strategy which the work product rule was meant to protect.”¹¹⁴

Ct. App. 1990)).

105. *Id.* at 483.

106. *Id.*

107. 329 U.S. 495 (1947).

108. 622 F.2d 933 (6th Cir. 1980).

109. *Otto*, 866 S.W.2d at 483 (quoting *In re Grand Jury*, 622 F.2d. at 935).

110. *Id.* (quoting *Massachusetts v. First Nat’l Supermarkets, Inc.*, 112 F.R.D. 149, 152 (D. Mass. 1986)).

111. 116 F.R.D. 438 (D. Nev. 1987).

112. *Id.* at 443.

113. *Id.*

114. *Id.* (citing *Board of Ed. of Evanston v. Admiral Heating and Ventilating, Inc.*,

The *Otto* court distinguished *Krigbaum*, saying that the *Krigbaum* interrogatory, which asked for names and addresses of persons from whom statements had been taken, was much narrower than the interrogatory in *Otto*.¹¹⁵ By distinguishing *Krigbaum* on its facts, the *Otto* court avoided direct conflict with the Eastern District Court of Appeals. However, the divergent analysis of the two appellate courts was clear, and the stage was set for the Missouri Supreme Court to resolve the question.

IV. INSTANT DECISION

In *State ex. rel. Atchison, Topeka and Santa Fe R.R. Co. v. O'Malley*,¹¹⁶ the Missouri Supreme Court explicitly protected intangible work product privilege. The court first cited *Hickman v. Taylor*¹¹⁷ as “[t]he most important case in the evolution of the work product doctrine.”¹¹⁸ The court then set out the two prongs of work product doctrine, explaining that work product “consists of both tangible work product (consisting of trial preparation documents such as written statements, briefs, and attorney memoranda) and intangible work product (consisting of an attorney’s mental impressions, conclusions, opinions, and legal theories—sometimes called opinion work product.)”¹¹⁹

According to the court, tangible work product is protected by Rule 56.01(b)(3), “which codifies the substantial need rule from *Hickman v. Taylor*.”¹²⁰ The *Krigbaum*¹²¹ decision was incorrect, the court said, because it looked to the rule as the sole protection of work product and ignored intangible work product.¹²² The court explained that the rule “represents only half of the work product doctrine. The rule does not alter or abrogate the protections of intangible work product, which exist independently of Rule 56.01(b)(3).”¹²³ The court, thus, adopted the *Otto* view of intangible work product as a separate privilege rooted in *Hickman*, not in the rule.

The *O'Malley* court also corrected the *Krigbaum* court’s narrow interpretation of Rule 56.01(b)(1). The *Krigbaum* court erred in holding that rule mandated the disclosure of the existence, nature and custody of the

104 F.R.D. 23, 32 (N.D. Ill. 1984)).

115. *Id.* at 483.

116. 898 S.W.2d 550 (Mo. 1995).

117. 329 U.S. 495 (1947).

118. *O'Malley*, 898 S.W.2d at 552.

119. *Id.*

120. *Id.* (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)).

121. *State ex rel. Krigbaum v. Lemon*, 854 S.W.2d 72 (Mo. Ct. App. 1993).

122. *O'Malley*, 898 S.W.2d at 553 (citing *Krigbaum*, 854 S.W.2d at 73).

123. *Id.* at 553 (citing *State ex rel. State Bd. of Pharmacy v. Otto*, 866 S.W.2d 480, 483 (Mo. Ct. App. 1993)).

witnesses' statements was also error.¹²⁴ Work product is considered privileged, the court explained.¹²⁵ The court said that the rule, which states that a party "may obtain discovery regarding any matter, not privileged, which is relevant . . .,"¹²⁶ clearly places privileged work product outside the scope of permissible discovery.¹²⁷

Applying the law to the facts at hand, the court held that the work product doctrine protected the requested information.¹²⁸ The court said the interrogatories sought "a schematic of the attorney's investigative process" which "aides [sic] the other attorney not because it reveals facts relevant to the case, but because it reveals the investigative process and relative weight attributed to certain witnesses' statements by the opposing side."¹²⁹

Finally, the court noted in *dicta* that the interrogatories "do, however, ask for certain information that, as a practical matter, Santa Fe may be required to disclose."¹³⁰ If Santa Fe were to claim a work product privilege regarding tangible witnesses' statements, it would have to divulge sufficient information regarding the witness statements to allow Herriman to assess the applicability of the privilege.¹³¹ The court said that Herriman would have to know which documents were claimed to be privileged and have sufficient information to evaluate the claim of privilege.¹³²

The court suggested that Missouri follow the procedure laid out in the recently enacted Federal Rule of Civil Procedure 26(b)(5).¹³³ The new federal rule requires parties to make the claim of privilege expressly and describe the material in sufficient detail to enable the other party to assess the applicability of the privilege.¹³⁴ The court said that the rule "promotes the ever-present aim

124. *Id.* (citing *Krigbaum*, 854 S.W.2d at 73).

125. *Id.* (citing *State ex rel. Missouri Pub. Serv. Co. v. Elliott*, 434 S.W.2d 532 (Mo. 1968)).

126. MO. S. CT. R. 56.01(b)(1).

127. *O'Malley*, 898 S.W.2d at 553.

128. *Id.*

129. *Id.*

130. *Id.* at 554.

131. *Id.*

132. *Id.*

133. FED. R. CIV. P. 26(b)(5).

134. *Id.* The rule provides:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

of efficiency in the discovery process” by reducing the need for *in camera* inspection of the documents.¹³⁵

V. COMMENT

In *O'Malley*, the Missouri Supreme Court favored a well-reasoned approach that is faithful to the *Hickman* concept of work product protection. The alternative approach followed in *Krigbaum* is an overly narrow interpretation of the Missouri rule that fails to protect the mental impressions and legal theories of an attorney preparing for trial.

Shortly after the federal rules created modern discovery, which some commentators call “a decidedly nonadversarial process,”¹³⁶ the United States Supreme Court sought to preserve the adversarial process by protecting an attorney’s thoughts and strategies from opposing counsel. *Hickman v. Taylor* is based on belief in the adversarial nature of the American legal system, belief in the ideal of a lawyer “bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients.”¹³⁷ As Justice Jackson wrote in his concurrence in *Hickman*, “a common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.”¹³⁸

The *Hickman* court qualified the protection for trial preparation materials, stating that such materials might be discoverable upon a sufficient showing of need.¹³⁹ The Court, however, was rather incredulous that intangible work product such as oral statements taken by an attorney in preparation for trial would ever be discoverable.¹⁴⁰ Any interpretation of subsequent Rule 26(b)(3) to the effect that intangible work product is not protected surely strays from the spirit of *Hickman*.

The approach offered by *Krigbaum* is an overly narrow interpretation of the Missouri rule that would fail to protect an attorney’s mental impressions. The courts that have limited work product protection to “documents and tangible things” have overlooked the *Hickman* holding that intangible work product is only discoverable in “rare situations.”¹⁴¹ In addition, these courts have overlooked language in both the federal and Missouri rule which requires a court

FED. R. CIV. P. 26(b)(5).

135. *O'Malley*, 898 S.W.2d at 554.

136. Thornburg, *supra* note 21, at 1518.

137. *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

138. *Id.* at 516 (Jackson, J., concurring).

139. *Id.* at 511-12.

140. *Id.* at 513.

141. *Id.*

ordering discovery of tangible work product to “protect against disclosure of mental impressions, conclusions, opinion, or legal theories of an attorney or other representative of a party concerning the litigation.”¹⁴² The rules themselves clearly provides for protection of intangible work product.

The *O'Malley* approach is consistent with *Hickman v. Taylor*, as well as with Missouri's prior recognition and protection of intangible work product in *Jensen*.¹⁴³ In *Jensen*, an interrogatory seeking the names of doctors to be called at trial was improper because “[i]t invades the area of judgment and trial strategy.”¹⁴⁴ The interrogatory in *O'Malley* invaded the area of judgment and trial strategy by requiring the opposing party to categorize individuals with knowledge. By requesting the names of the people with knowledge, as well as the names of people from whom Santa Fe had obtained written or oral statements, the interrogatory sought to reveal the “investigative process and relative weight attributed to certain witnesses' statements by the opposing side.”¹⁴⁵

Some commentators advocate eliminating work product protection, arguing that the protection results in the suppression of relevant evidence and costly discovery disputes.¹⁴⁶ But even the harshest critics of work product doctrine have reservations about eliminating the protection of intangible work product. Professor Thornburg, who attacked the work product doctrine in her article, *Rethinking Work Product*, admits concerns about allocating the costs of trial preparation between parties and preventing attorney harassment should opinion work product be made discoverable.¹⁴⁷

Arguments for the elimination of work product protection are part of a larger proposal for reform of the American legal system.¹⁴⁸ Professor Thornburg

142. FED. R. CIV. P. 26(b)(3).

143. *State ex rel. Gray v. Jensen*, 395 S.W.2d 143 (Mo. 1965).

144. *Id.* at 146.

145. *O'Malley*, 898 S.W.2d at 553.

146. Thornburg, *supra* note 21, at 1572.

147. Thornburg, *supra* note 21, at 1572-75. Professor Thornburg advocates eliminating intangible as well as tangible work product, because preserving the privilege would undermine any gains (in terms of reducing discovery disputes) that would be achieved by eliminating tangible work product. Thornburg, *supra* note 21, at 1572-75.

148. See, e.g., Thornburg, *supra* note 21, at 1571; Edmund Byrne, *The Adversary System: Who Needs It?*, in *ETHICS AND THE LEGAL PROFESSION* 204 (Michael Davis & Frederick A. Elliston eds., 1986); Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix*, 69 MINN. L. REV. 1 (1984); Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. U. L. REV. 729, 738-40 (1906); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

and fellow critics of the work product doctrine argue convincingly for a more open and cooperative system.¹⁴⁹ As long as we remain committed to an adversarial system, however, protection of intangible work product is necessary to preserve that system.

After *O'Malley*, intangible work product is clearly protected from discovery in Missouri courts. Courts confronted with similar discovery requests will recognize that information about the investigative process reveals an attorney's trial strategy and opinions about the relative value of witnesses.

Although *O'Malley* resolves any confusion about Missouri's protection of intangible work product, the court's suggestion that Missouri adopt the privilege claim procedures of Federal Rule of Civil Procedure 26(b)(5) may be the seed of future disputes. The rule requires a party claiming tangible work product protection to make the claim expressly and describe the material "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."¹⁵⁰

The rule does not contain a standard for the amount, or level of detail, of information which must be given. The drafters purposely left the standard open, preferring it be decided on a case-by-case basis.¹⁵¹ In the federal courts, privilege logs are often skeletal and incomplete and disputes arise about the proper level of detail in the log.¹⁵² Privilege logs, which were intended to eliminate the need for *in camera* inspection of documents, often result in lengthy disputes and court inspection of the documents.¹⁵³ Without a precise standard, Missouri courts can probably expect similar disputes.

In addition, the case-by-case standard suggested by the Missouri Supreme Court may result in disclosure of intangible work product, the very information the Court protected in *O'Malley*. A party cannot ask about the existence of documents, but can frame a motion for production of documents in such a way that the required privilege log will reveal the same information. A court applying the new rule might require a party to reveal information about his or her trial preparation and strategy unnecessarily. The Missouri rule should specify the information that must be included in a privilege log, as well as information that it is not required—the names of individuals from whom statements have been taken, for example.

149. See *supra* notes 146-48 and accompanying text.

150. FED. R. CIV. P. 26(b)(5).

151. See Rebecca A. Cochran, *Evaluating Federal Rule of Civil Procedure 26(b)(5) as a Response to Silent and Functionally Silent Privilege Claims*, 13 REV. LITIG. 219, 249 (1994).

152. *Id.* at 231.

153. *Id.*

Finally, the *O'Malley* decision may affect Rule 57.01(c).¹⁵⁴ This rule allows "contention interrogatories," which enable a party to discover the facts and conclusions of counsel that form the basis of the claim.¹⁵⁵ In *Krigbaum*, the court said that purely legal conclusions were not discoverable, but that facts and opinions related to facts may be discovered.¹⁵⁶ However, after *O'Malley*, it seems clear that such interrogatories seek the thoughts and mental impressions of the opposing attorney, which are protected opinion work product.

Stating that contention interrogatories aid the discovery process,¹⁵⁷ the *Krigbaum* court overruled *State ex rel. Papin Builders, Inc. v. Litz*,¹⁵⁸ which had treated contention interrogatories with marked disfavor.¹⁵⁹ In *Litz*, the Missouri Eastern District Court of Appeals limited the use of contention interrogatories by setting up a six-factor balancing test to determine whether a contention interrogatory should be allowed on a case by case basis.¹⁶⁰

154. Rule 57.01(c) provides in relevant part:

An interrogatory is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

MO. SUP. CT. R. 57.01(c).

155. *State ex rel. Krigbaum v. Lemon*, 854 S.W.2d 72, 73 (Mo. Ct. App. 1993), overruled on other grounds, *State ex rel. Atchison, Topeka and Santa Fe R.R. Co. v. O'Malley*, 898 S.W.2d 550 (Mo. 1995).

The interrogatories at issue in *O'Malley* were not contention interrogatories, so the portion of *Krigbaum* dealing with contention interrogatories was not directly overturned. The *O'Malley* decision only addressed *Krigbaum* to the extent that it misinterpreted intangible work product doctrine. *O'Malley*, 898 S.W.2d at 553.

156. *Krigbaum*, 854 S.W.2d at 74.

157. *Id.*

158. 734 S.W.2d 853 (Mo. Ct. App. 1987).

159. *Id.* at 860-61.

160. *Id.* In order to be proper under Rule 57.01, each of the following questions regarding an interrogatory must be answered in the affirmative:

(1) Would the answer immediately serve a substantial purpose in framing the issues;

(2) Would the interrogatory unduly burden the party answering the interrogatory;

(3) Is the interrogatory a practical and reasonable one;

(4) Does the interrogatory call for the parties' theory of law;

(5) Does the interrogatory involve an ultimate issue or issues in the case;

(6) May the answer to an interrogatory be obtained by a motion to make more definite.

Id. at 861.

The *Litz* court noted that the rationale for allowing contention interrogatories is rooted in the federal notice pleading system.¹⁶¹ Under notice pleading, the pleadings serve only to give notice of the claim; the discovery process must be quite liberal so that the parties can discover the underlying facts.¹⁶² The court said that the rationale made little sense in Missouri, which follows a fact pleading system that requires that the pleadings set out the factual basis for a claim or defense.¹⁶³

The reasoning of *Litz*, supported by the *O'Malley* decision, makes the future of contention interrogatories questionable. Proponents of contention interrogatories may argue that they are directed at a party and not at an attorney and, therefore, do not invade an attorney's thoughts and mental impressions.¹⁶⁴ This distinction seems weak. Legal opinions come from the party's attorney, and the party cannot refuse to answer an interrogatory on the grounds that the information is peculiarly within the knowledge of his or her attorney.¹⁶⁵

VI. CONCLUSION

The United States Supreme Court, in *Hickman v. Taylor*, extended protection from discovery to both tangible and intangible work product. In *State ex rel. Atchison, Topeka & Santa Fe R.R. Co. v. O'Malley*, the Missouri Supreme Court clarified the Missouri work product rule to ensure that intangible work product is protected from discovery.

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161. *Id.* at 860-61.

162. *Id.*

163. *Id.* at 858. The court said the proper device to define factual issues is a Rule 55.27(d) motion to make a more definite and certain statement. *Id.* at 861.

164. *Litz*, 734 S.W.2d at 861.

165. *Hickman v. Taylor*, 329 U.S. 495, 504 (1947).

