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THE WORK PRODUCT DOCTRINE IN THE STATE COURTS

When the modern Federal Rules of Civil Procedure were adopted in 1938, considerable doubt and controversy arose concerning the broad provisions for deposition and discovery.[1] That controversy can be fairly described as a conflict both of emotion and of basic philosophy. Many lawyers engaged in the daily maneuvering of the adversary process naturally tended to defend a system which put a high premium on their individual abilities.[2] Others were able to stand back and look at the trial practice of the day with some concern for basic incongruities. Too often, they felt, the obtaining of truth in fair trials was frustrated by surprise and incomplete presentation of facts. Furthermore, many cases were tried which would have been settled had the parties had more complete knowledge of the facts before they began. Broad discovery procedures aimed at full disclosure of facts before trial were thought necessary to encourage settlements and to promote fairer, more efficient trials.[3] Very little broadside criticism of extensive pretrial discovery now appears,[4] and one might fairly assume that the benefits it was predicted would accompany broad discovery have been realized at least in substantial part. This assumption as to general success is further buttressed by the fact that, since 1938, discovery procedures identical with or similar to those of the Federal Rules have been adopted in at least thirty states.[5] It is clear that this number is

1 FED. R. CIV. P. 26-37.

2 See Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498 (1958).

3 *Ibid.*

4 Clark, *The Practical Operation of Discovery*, 12 F.R.D. 131 (1952); Speck, *The Use of Discovery in United States District Courts*, 60 YALE L.J. 1132 (1951); Wright, Wegner & Richardson, *Practicing Attorney's View of the Utility of Discovery*, 12 F.R.D. 97 (1952).

5 This classification has been made with a view to whether the state has retained admissibility at trial as a limitation on its discovery procedures. That such a classification is somewhat arbitrary is illustrated by recent experience in Michigan. MICH. GEN. CT. R. 302.2(1) limits the scope of discovery by a requirement of admissibility at trial, as did the preceding rules. MICH. CT. R. 35, § 6. By reading the admissibility requirement broadly to include matters which are admissible for any purpose (*e.g.*, impeachment), the Michigan court has broadened the scope of discovery to a point where a significant number of work product questions may arise. Wilson v. Saginaw Circuit Judge, 370 Mich. 404, 122 N.W.2d 57 (1963); Kalamazoo Yellow Cab v. Kalamazoo Circuit Judge, 363 Mich. 384, 109 N.W.2d 821 (1961); Banaszkiewicz v. Baun, 359 Mich. 109, 101 N.W.2d 306 (1960). See also King, *Limitations on Discovery*, Mich. S.B.J. Dec. 1963, p. 13; Meisenholder, *The New Michigan Pre-Trial Procedural Rules—Models for Other States?* 61 MICH. L. REV. 1389, 1428 (1963).

growing and that pressure will mount in the remaining states for increased discovery opportunities.[6] The arguments for and against the basic decision to broaden discovery have been ably presented elsewhere.[7] This comment will deal solely with problems in the important area which has come to be known as "work product" doctrine. The experience of the federal courts indicates that any state which seeks to broaden its discovery rules must eventually face up to the recurring problems in this area.

In general terms, the work product doctrine is concerned with protecting a party's trial preparations from disclosure under the modern discovery procedures. The protection of work product must be distinguished from the attorney-client privilege. The two concepts often appear side-by-side in the cases since both may involve protection of trial preparations.[8] The attorney-client privilege is, however, generally viewed as an evidentiary privilege belonging to the client and designed to encourage full disclosure by him to his attorney.[9] This is the approach espoused by Professor Wigmore[10] and expressly adopted by the Supreme Court of the United States for purposes of the Federal Rules of Civil Procedure.[11] In some states the privilege has been viewed as protecting some trial preparatory materials which are not in the form of disclosures by the client to the attorney.[12] Also, opinions have differed as to precisely what matters fall within the category of a client's "disclosures."[13] Material which falls within the attorney-client privilege is protected from discovery not because it is inadmissible at trial, but because the discovery rules specifically provide that the production of privileged matter shall not be ordered.[14] Thus, in this one instance the scope of the rule of admissibility at trial is coterminous with the scope of discovery. Discovery of trial preparations which fall outside evidentiary privileges can be avoided, however, only on the basis of protection furnished by the discovery rules themselves and not on the basis of inadmissibility at trial. An important interrelationship of the attorney-client privilege with the work product doctrine is apparent. To the extent that a given matter falls within the privilege, there is no need for work product protection. Likewise, if the attorney-client privilege is construed narrowly, the need for work product protection may be substantially increased.

Just as there appears to be general agreement as to the desirability of broad discovery procedures, there appears also to be general agreement that there is some need for the protection of a party's trial preparations.

6 See generally Wright, *Procedural Reform in the States*, 24 F.R.D. 85 (1959).

7 *Developments in the Law—Discovery*, 74 HARV. L. REV. 940 (1961).

8 Such was the case in Hickman v. Taylor, 329 U.S. 495 (1947), itself. See notes 17-19 *infra* and accompanying text.

9 8 WIGMORE, EVIDENCE §§ 2290-92 (McNaughton ed. 1961).

10 *Ibid.*

11 Hickman v. Taylor, 329 U.S. 495, 509 (1947).

12 See notes 43, 82 *infra* and accompanying text.

13 8 WIGMORE, *op. cit. supra* note 8, §§ 2294-320.

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

It is thought that laziness and sloppy trial preparation would be encouraged if the lawyer who has not made a thorough investigation and study were allowed to appropriate the fruits of such labors as have been expended on the other side.[15] The Federal Rules are singularly uninformative on the question of protecting trial preparations which fall outside traditional categories of privilege.[16] The Rules do require that the party seeking discovery show "good cause" for the disclosure, at least where writings or other physical items are sought.[17] The "good cause" requirement has properly been given a liberal reading, no extensive showing of justification being thought necessary.[18] It is generally considered sufficient that the factual disclosure would aid in the preparation of the party's case or be reasonably calculated to lead to admissible evidence.[19] The party must also show that the information sought could not otherwise be obtained without substantial inconvenience.[20] This is not to say, however, that the concept of "good cause" has not been helpful in obtaining protection for trial preparations.[21]

The fact remains that much trial preparation material is replete with information which might very well lead to admissible evidence and which is not immediately accessible to the adverse party. The Federal Rules make no explicit provision for the protection of such materials. Nevertheless, in the case of *Hickman v. Taylor*[22] the Supreme Court read into the Federal Rules a limited protection of trial preparations beyond that available through privilege and the good cause requirement. In *Hickman*, discovery was sought of certain statements of witnesses which had been personally procured by an attorney in the process of preparing for litigation. The attorney-client privilege was held inapplicable,[23] but the Court thought that, without a strong showing of need, a party ought not to be allowed access to these statements by discovery.[24] The protection provided to work product was to be greater than that which was provided by the "good cause" requirement.[25] However, unlike the protection afforded by a privilege, the immunity established by the work product principle was

15 "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 . . . ." Hickman v. Taylor, 329 U.S. 495, 511 (1946).

16 This problem was quickly recognized, and a number of solutions were suggested. Tolman, *supra* note 2.

17 FED. R. CIV. P. 34.

18 2A BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 796, at 417 (Rules ed. 1961).

19 *Id.* at 420.

20 *Id.* at 417-18.

21 *E.g.*, Diniero v. United States Lines Co., 21 F.R.D. 316 (S.D.N.Y. 1957).

22 329 U.S. 495 (1947).

23 *Id.* at 508.

24 *Id.* at 511-12.

25 2A BARRON & HOLTZOFF, *op. cit. supra* note 18, at 419. But compare the confusing use of terminology in Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949).

intended to be qualified.[26] The language of the Court in the *Hickman* case is capable of being read broadly, so as to give extensive protection to a party's trial preparations,[27] but, on its facts, the case can be narrowly construed. Therefore it is not surprising that in the absence of further holdings by the Supreme Court, the lower federal courts have gone in every conceivable direction in applying the *Hickman* "work product" doctrine.[28] While the doctrine has on occasion been limited to the protection of information and materials which result from the trial attorney's personal effort,[29] it has in other instances been extended to protect the efforts of a nonlawyer agent of a litigant.[30] While sufficient need for disclosure has sometimes been held to exist where substantial inconvenience would otherwise result to the proponent of discovery,[31] other cases have demanded nearly absolute necessity.[32]

Adding to the confusion is the fact that, prior to the Supreme Court's decision of *Hickman v. Taylor*, the Advisory Committee on the Federal Rules of Civil Procedure submitted a proposed amendment to Rule 30(b), adding the following language:

> "The court shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert."[33]

The Court refused to adopt this language,[34] and the significance of its refusal has been argued both ways.[35] Those who prefer a reading of *Hickman* which limits it as closely as possible to its facts argue that the amendment was refused because it was unduly restrictive of the scope of discovery.[36] Others have felt that *Hickman* itself was broad enough to

26 Hickman v. Taylor, 329 U.S. 495, 511 (1947).

27 See Hauger v. Chicago, R.I. & P.R.R., 216 F.2d 501 (7th Cir. 1954); Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949).

28 4 MOORE, FEDERAL PRACTICE ¶ 26.23[8] (2d ed. 1963).

29 De Bruce v. Pennsylvania R.R., 6 F.R.D. 403 (E.D. Pa. 1947). See also 4 MOORE, *op. cit. supra* note 28, ¶ 26.23[8.-1], at 1382.

30 Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949).

31 Newell v. Capital Transit Co., 7 F.R.D. 732 (D.D.C. 1948).

32 Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949).

33 ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 39-40 (1946).

34 FED. R. CIV. P. 30(b) has been left unchanged.

35 The Court did not explain its refusal to adopt the amendment.

36 2A BARRON & HOLTZOFF, *op. cit. supra* note 14, § 652.2, at 130.

obviate any need for additional language in the Rules.[37] Whatever the Court's intent may have been, what is important to states as they determine the proper scope of their discovery procedures in the work product area is that the Federal Rules, and the federal cases do not present a helpful model which can be easily followed. The unsettled state of the federal authorities is indicative of the lack of consensus among judges and lawyers as to the proper balance to be struck in protecting trial preparations. If it is proper to recognize some area of protection for trial preparation, then it would hardly seem to follow that an extension beyond a narrow reading of *Hickman v. Taylor* should be condemned as *ipso facto* contrary to the policy of broad discovery. On the other hand, each instance in which information is protected from discovery must be recognized as a potential inroad on the policy favoring full factual discovery as an encouragement of settlements and fairness at trial. No particular approach to the balancing of these considerations appears destined for universal acceptance. Nevertheless, whatever the approach adopted by a state, it should represent a conscious attempt to balance the conflicting policies.

FEDERAL RULES ADOPTED WITHOUT MODIFICATION

In light of the continuing importance of the work product problem and the need for certainty of planning and efficient judicial administration, it is not easy to understand why a state would adopt the Federal Rules without modification or explanation in the work product area. Ten states, however, have done just that.[38] Such a strict copying of the Federal Rules stands as an invitation to apply the federal precedents. In fact, where the question has been considered, it has been explicitly indicated that such an application is the proper method of construction.[39] However, to refer a state's courts and lawyers to an ever-increasing list of federal decisions, which support conflicting results on many specific points,[40] invites confusion. Not only is there a possibility of misinterpretation of the federal cases individually, but there is the further danger of failing to appreciate the variations of doctrine from circuit to circuit. There is also a real hazard that, as in two recent Arizona decisions,[41] interpretation of large numbers of federal precedents will be substituted for a coherent consideration of the policies involved. In *Dean v. Superior Court* the Arizona court engaged

[37] See Clark, *Experience Under the Amendments to the Federal Rules of Civil Procedure*, 8 F.R.D. 497, 502 (1949).

[38] ALA. CODE tit. 7, § 474(9) (1960); ARIZ. R. CIV. P. 26-34; ARK. STAT. ANN. §§ 28-348 to -356 (1962); COLO. R. CIV. P. 26-34; DEL. R. CIV. P. 26-34 (modification of Federal Rules on immaterial points); FLA. STAT. ANN. §§ 1.21-.31 (1952); GA. CODE §§ 38-2101 to -2109 (1959); N.M.R. CIV. P. 21-1-1(26)-(34) (additions to Federal Rules on immaterial points); N.D.R. CIV. P. 26-34; WYO. R. CIV. P. 26-34.

[39] *E.g.*, *Ex parte* Denton, 266 Ala. 279, 96 So. 2d 296 (1957); Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. 1963).

[40] See notes 28-32 *supra* and accompanying text.

[41] State v. Whitman, 91 Ariz. 120, 370 P.2d 273 (1962); Dean v. Superior Court, 84 Ariz. 104, 324 P.2d 764 (1958). See also Comment, 1 ARIZ. L. REV. 112 (1959).

in a baffling discussion of federal cases.[42] At the outset the court was misled by language in *Alltmont v. United States*[43] and concluded that *statements* of witnesses, even when taken by an attorney, are to be disclosed upon a showing of "good cause."[44] At the same time the court appears to have accorded absolute protection to memoranda purporting to set forth the substance of witnesses' statements.[45] The court asserted that this distinction represents the view of the Supreme Court in *Hickman v. Taylor,* but the language cited was from the concurring opinion of Mr. Justice Jackson.[46] It is clear on the facts of the *Hickman* case itself that the work product doctrine therein expressed is to apply to actual statements of witnesses.[47] This is not to say that the statement-versus-memorandum distinction drawn by the Arizona court is not defensible in substance. The method of reaching the conclusion, however, is totally undesirable, for the initial confusion within the federal cases is now compounded by the misinterpretation of those cases. Similar confusion appeared in *State v. Whitman,*[48] where discovery of an expert witness' findings was sought. Here a substantial split among the federal cases put the court in the desirable position of being able to pick and choose, although this course left the bar guessing as to which cases the court might find convincing.

Incongruity was compounded in a recent Delaware case[49] where the court held that its decisions prior to the adoption of the state's version of the Federal Rules,[50] which decisions had extended the scope of the attorney-client privilege to witness statements gathered by an attorney, were applicable to the new rules of discovery. Despite this marked difference from the federal view on the closely related question of privilege, the Delaware court expressly sanctioned the citation of federal decisions on the scope of work product protection. This attempt to apply federal work product doctrine while retaining state notions of a broad attorney-client privilege illustrates an additional hazard of the adoption by a state of the Federal Rules without modifications in the work product area. Reference has already been made to the close interrelationship of the work product doctrine with the attorney-client privilege.[51] The breadth and importance of the work product doctrine is a result, in part, of a narrow view of the privilege. It is not at all clear that a satisfactory approach to work product problems can be achieved by reference to federal doctrine without concurrent adoption of the federal view of the scope of the attorney-client privilege.[52]

42 84 Ariz. 104, 324 P.2d 764 (1958).
43 117 F.2d 971 (3d Cir. 1949).
44 Dean v. Superior Court, 84 Ariz. 104, 110, 324 P.2d 764, 768 (1958).
45 *Id.* at 112-13, 324 P.2d at 769.
46 329 U.S. 495, 516-17.
47 Hickman v. Taylor, 329 U.S. 495, 498 (1947).
48 91 Ariz. 120, 370 P.2d 273 (1962).
49 Graham v. Allis-Chalmers Mfg. Co., 188 A.2d 125 (Del. 1963).
50 DEL. R. CIV. P.
51 See notes 8-14 *supra* and accompanying text.
52 See notes 9-11 *supra* and accompanying text.

Discovery in general, and in the area of trial preparations in particular, is almost universally narrower under state rules than it is under the Federal Rules.[53] It is not surprising, therefore, that the general tendency of the courts in applying state versions of the Federal Rules has been to favor broad protection of work product. For example, the leading Florida case of *Atlantic Coast Line R.R. v. Allen*[54] held that the doctrine of the *Hickman* case applies to all "work product of the adverse party, and it matter[s] not whether the product is the creature of the party, his agent or his attorney."[55] Broad protection of trial preparations is not necessarily to be criticized, but to reach this result by picking and choosing among conflicting federal cases is to avoid the careful balancing of policy which should underlie the work product doctrine.

EXPRESS WORK PRODUCT PROVISIONS

The states that have adopted broad pre-trial discovery have commonly done so by extensive duplication of the federal provisions.[56] However, most of these states have gone beyond the general wording of the Federal Rules and bare reliance upon federal decisions in dealing with the area of work product. The most popular approach in these states is to insert a provision identical with or similar to that which was suggested by the Federal Advisory Committee,[57] but rejected by the United States Supreme Court.[58] Why these states adopted the Committee's suggested provision and what they felt they were accomplishing by doing so are not at all clear. It has been suggested that the most important reason for the adoption is to avoid the entire "work product" problem.[59] In some states, however, the adoption seems to have been merely an attempt to insure that the doctrine of the *Hickman* case would be applied.[60] If the intent was to adopt in specific terms the work product doctrine of the federal courts, then that intent was doomed to frustration. The rule suggested by the

53 See discussion *infra* notes 89-103. Only in California and possibly Wisconsin has there been any attempt to make discovery broader than that provided in the Federal Rules.

54 40 So. 2d 115 (Fla. 1949).

55 *Id.* at 116. See also Arizona cases cited note 41 *supra*.

56 Only in New York, California, Pennsylvania, and Wisconsin has broad discovery been provided by rules of substantially original form. N.Y. CIV. PRAC. LAW §§ 3101-3134; CAL. CIV. PROC. CODE §§ 2016-35 (Supp. 1963); PA. R. CIV. P. 4001-25; WIS STAT. ANN. §§ 326.01-.29 (Cum. Supp. 1963).

57 See note 34 *supra* and accompanying text. Such provisions include: IDAHO R. CIV. P. 26(b); IOWA R. CIV. P. 141(a); KY. CT. R. 37.02; LA. CODE CIV. PROC. ANN. art. 1452 (1960); ME. R. CIV. P. 26(b); MD. R. CIV. P. 410d; NEV. R. CIV. P. 30(b); N.J.R. CIV. PRAC. 4:16-2; UTAH R. CIV. P. 30(b); WASH. R. CIV. P. 26(b); W. VA. CIV. PRAC. R. 34(b).

58 See note 34 *supra* and accompanying text.

59 Clay, *May the Federal Rules Be Successfully Adopted To Improve State Procedure? The Kentucky Experience*, 24 F.R.D. 437, 442 (1960).

60 See note to UTAH R. CIV. P. 30(b), 9 UTAH CODE ANN. 560 (1963): "Although the Supreme Court of the United States failed to adopt the foregoing amendment, it has made an interpretation of the Rule [referring to *Hickman v. Taylor*] which reaches the same result, in effect, as the amendment does."

Federal Advisory Committee and rules of like wording call for a broader limitation on the scope of discovery than the rule which might be gleaned from the vast majority of the federal decisions.[61] First, the Committee's rule expressly applies the substantial justification requirement of *Hickman* to writings obtained or prepared by the *adverse party, his surety, indemnitor, or agent,* as well as those of the attorney.[62] It is thus a *litigant's* trial preparation and not merely his attorney's which constitutes the work product. This is the result under some federal cases,[63] but contrary holdings can be found.[64] Second, the Committee's proposed rule articulates the substantial justification requirement in terms of unfair prejudice and undue hardship or injustice.[65] As discussed above, the federal cases have varied significantly in their formulations of the substantial justification required under the *Hickman* case.[66] Third, in the second sentence of the rule, the Committee's amendment provides a substantial area of *absolute* protection for the attorney's trial preparation materials.[67] *Hickman* explicitly rejected any rule of absolute protection beyond the attorney-client privilege.[68] The potential breadth of this second sentence has not been widely recognized. For example, significant portions of a witness' statement, when given in response to an attorney's interrogation, might be said to reflect the attorney's "mental impressions" or "legal theories" through the questions he asks.

In most of the states where the proposed amendment to the Federal Rules has been adopted, the amendment has gone substantially or completely without interpretation. However, a number of significant decisions indicating attitudes toward the provision have appeared. The decisions have tended toward broad protection of work product—broad at least in comparison to that afforded by the federal rule as it appears to be developing and thus broad in the minds of those who thought of the amendment as substantially a codification of the *Hickman* rule. The most striking example of this trend is a New Jersey case[69] in which the disclosure of names and addresses of a party's expert witnesses was held to have been properly refused. Perhaps the example is too striking, for the procedure adopted by the New Jersey court was not merely a strict application of the work product rule, but was in fact a clear misapplication of the rule in

61 See notes 32-36 *supra* and accompanying text. See also cases cited note 73 *infra.*

62 *Cf.* sources cited note 29 *supra.*

63 *E.g.,* Hauger v. Chicago, R.I. & P.R.R., 216 F.2d 501 (7th Cir. 1954).

64 *E.g.,* De Bruce v. Pennsylvania R.R., 6 F.R.D. 403 (E.D. Pa. 1947).

65 *Cf.* cases cited notes 31-32 *supra.*

66 *Ibid.*

67 "The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert." ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 39 (1946).

68 329 U.S. at 511.

69 Gibilterra v. Rosemawr Homes, 19 N.J. 166, 115 A.2d 553 (1955).

the light of underlying policy considerations. The availability of such names and addresses will not encourage the adversary to be sloppy in his trial preparations. On the contrary, he will be encouraged to make a thorough investigation of the expert's qualifications so as to protect his client from any disadvantage at trial. Likewise, the name and address of the witness will rarely be revealing of the opponents' legal theories and tactics. This is not to say that justice is better served by giving access to this information, but, if names and addresses of witnesses are to be protected from disclosure, work product is not the proper theory to be used.[70]

Although one might well argue with the results which have flowed from the form and interpretation of the Advisory Committee's amendment, the adoption of that amendment has had one commendable result. It has enabled the states to attack work product with a clean slate and to consider their limitations on the scope of discovery in the light of what they believe to be the proper balancing of competing policies. Expressly and by implication, the courts have rejected recourse to the mass of conflicting federal cases as a method of interpreting their rules.[71] No case has been found in which a court has said that the Committee's rule as adopted in the state was intended to be a codification of *Hickman v. Taylor*, thus making federal cases applicable, although such an intention does seem to have underlain adoption in some states.[72] Having thus rejected federal precedent on work product, the state court has at least an opportunity to undertake a meaningful analysis of the problem which faces it,[73] even though the form of the rule restricts the permissible scope of the inquiry.

WORK PRODUCT "PRIVILEGE" PROVISIONS

A third approach to the protection of trial preparations has been to extend an absolute privilege not to disclose in the course of pre-trial discovery procedures. Five states—Illinois, Minnesota, Missouri, Pennsylvania, and Texas—have adopted this approach.[74] Their rules in effect establish a work product *privilege* by extending absolute protection to the matters which would be afforded only qualified protection by the provision suggested by the Federal Advisory Committee. The Minnesota and Missouri rules were obviously adapted from the Committee's language.[75]

70 It is notable that immediately after this case the New Jersey rule was amended to call for disclosure of the identity and location of expert witnesses for the purpose of allowing the adverse party to investigate the expert's qualifications. N.J. REV. RULE 4:16-2.

71 State v. Bair, 83 Idaho 475, 365 P.2d 216 (1961); Bender v. Eaton, 343 S.W.2d 799 (Ky. 1961); Dawson v. Lindsey, 143 So. 2d 150 (La. App. 1962).

72 See text accompanying notes 38-39 *supra*.

73 State v. Bair, 83 Idaho 475, 365 P.2d 216 (1961); Stephan v. LaCorte, 77 N.J. Super. 443, 186 A.2d 713 (L. 1962).

74 ILL. SUP. CT. R. 19-5(1); MINN. R. CIV. P. 26.02; MO. R. CIV. P. 57.01(b); PA. R. CIV. P. 4011; TEX. R. CIV. P. 167, 186a.

75 *E.g.*, MINN. R. CIV. P. 26.02 includes this language: "The production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial, or of any writing that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, or, except as provided in Rule 35, the conclusions of an expert, shall not be required."

The other states have produced their own wordings, but the provisions amount to the same thing on their face.[76] The wisdom of this broad privilege approach can best be judged by considering an area in which work product questions frequently arise—the statements of witnesses. For example, a truck driver collides with plaintiff's car at an intersection, and an agent of the truck driver's employer obtains the names of the witnesses and goes to get their statements. Such statements may well contain important factual information, knowledge of which will facilitate the uncovering of truth and may encourage settlement of the claim. In this case an order of disclosure would surely militate in favor of the goals of modern discovery rules.[77] However, the results of allowing plaintiff to compel this disclosure are not entirely desirable. In the first place, it would not be quite fair to allow plaintiff to sit back while the defendant diligently procures information on the transaction and then to appropriate the fruits of the latter's labor. Such a practice would encourage sloppy trial preparation rather than the thorough preparation the discovery rules were designed to make possible. Second, in at least some instances, as discussed above,[78] the witnesses' statements may reflect the interrogating party's legal theories. Therefore, in many cases, the work product objection would seem properly to be interposed. It would seem no undue hardship on the plaintiff to require that he himself go and talk to the witness. In this way the party gets the information which the law would want him to have, without unfair advantage.

Suppose, however, that a given witness has died or moved half-way around the world. Here the balance of competing policies is significantly changed. The policy of broad discovery rules continues to favor disclosure, but there is no longer an available alternative for the effectuation of that policy. Likewise, allowing disclosure will no longer encourage sloppy trial preparation, for in such cases the party could not, except perhaps at prohibitive expense, have obtained the information independently. The policy behind the extension of privilege to this information seems then to rest upon the danger of unfair access to the opponents' thoughts and theories or some even more vague concept of unfairness. If this problem were one of admissibility at trial, an objection based upon unfairness would hardly seem to justify an absolute privilege, for the judge could, in his discretion, determine in each situation whether there would be such an unfair disclosure. The absence of an impartial arbiter in many parts of the discovery process may be important in distinguishing the proper scope of discovery

76 *E.g.*, PA. R. CIV. P. 4011 provides: "No discovery or inspection shall be permitted which . . . (d) would disclose the existence or location of reports, memoranda, statements, information or other things made or secured by any person or party in anticipation of litigation or in preparation for trial or would obtain any such thing from a party or his insurer, or the attorney or agent of either of them, other than information as to the identity or whereabouts of witnesses . . . ."

77 See note 3 *supra* and accompanying text.

78 See notes 67-68 *supra* and accompanying text.

from that of rules of evidence. If it is a proper objection to many rules of evidence that they draw distinctions which are too fine, too subtle, and too technical, such an objection would be applicable with even greater force in discovery proceedings. The infusion of questions of degree into discovery proceedings may well promote haggling and delay in a process which is designed to bring increased efficiency to the court system. The problem thus becomes one of weighing the benefits to be derived from disclosure in proper cases against the detriments of lost efficiency in the process of determining whether disclosure is proper. A judgment must be made as to the real dangers of unfair advantage and delay on the one side and, on the other, the danger of substantial withholding of information which ought otherwise to be disclosed. Therefore, the broad privilege approach to work product need not be justified solely on the ground that the opposing party, as a matter of fairness, ought never to have the protected information. The rule can be said, rather, to represent a judgment that, on balance, discovery will run more smoothly and justly if the information is protected absolutely.

Since the dangers of haggling and delay result from the retention of degree questions as to the scope of discovery, these dangers may be alleviated by the elimination of any degree of protection for work product as well as by the extension of broad privilege. Brief reference should be made here to the solution to the work product dilemma formerly embraced by California, discussed more fully below.[79] California determined that the combined policies of certainty and broad disclosure outweighed the danger of unfair advantage. Therefore, the broad privilege approach can not be justified alone by its encouraging of efficiency and dispatch in discovery proceedings. Rather, it must be justified by a combination of policy judgments: first, that efficiency requires the elimination of close questions and, second, that the injustice resulting from exclusion in all cases is not as great as the injustice in a system which generally allows discovery.

Although the policy balancing represented by a broad work product privilege might be articulated as indicated above, it has not been so stated. It is difficult to escape the suspicion that these privilege rules represent, in fact, a compromise with the lingering fear of the "fishing expedition," rather than a reasoned limitation on an otherwise accepted method of procedure. This lack of articulation of policy has been apparent as well in the judicial interpretations of the broad privilege rule. A number of decisions have extended the rule beyond the point where it can possibly be harmonized with the basic goals of pre-trial discovery. Perhaps the most striking example is found in the Texas cases in which the cloak of the work product privilege has been thrown around the names and addresses of witnesses.[80] The precise facts of the cases involved serve to

79 See notes 89-100 *infra* and accompanying text.

80 *E.g.*, *Ex parte* Ladon, 160 Tex. 7, 325 S.W.2d 121 (1959); Dallas Ry. & Terminal Co. v. Oehler, 156 Tex. 488, 296 S.W.2d 757 (1956).

illustrate how indefensible such a rule is in light of the competing policies. In *Ex parte Ladon*,[81] a bus driver compiled a list of the names and addresses of witnesses following an accident in which he was involved. Plaintiff had been injured when thrown to the floor of the bus as a result of a sudden stop. The attorney for the bus company was cited for contempt when he refused to produce the driver's list for discovery. On appeal, the refusal was held proper under the court's rules provision for a broad work product privilege.[82] Some history of the rules' adoption was cited to support the court's interpretation. The Texas court explained that the extension of the privilege to the identity and location of witnesses was a product of compromise.[83] But the compromise would appear to have been with the sporting theory of litigation and flatly irreconcilable with the adoption of broad discovery. The *Ladon* case presents a stark picture of the plaintiff lying injured on the floor of the bus while the bus driver busily compiles his protected list of witnesses.

It seems clear that the policy which underlies a decision such as *Ladon* is basically inconsistent with the policy which supports broad discovery rules in the first instance.[84] In order to facilitate the maximum availability of facts to the parties, the discovery rules are designed to give a party access to those facts which are within the peculiar control of the adverse party. In perhaps the vast majority of cases, the protection of witnesses' statements as work product does no substantial violence to the foregoing policy. The adverse party can go to the witness on his own to learn the facts. But, when the *names* of the witnesses are within the peculiar control of the other party, no such easy access to the facts is available. Thus, to protect the names of witnesses is to preclude the party from obtaining the facts to which the discovery rules were meant to give him access. Surely a list of names of witnesses cannot reflect the thought processes or legal theories of the party who has the list, and in many cases it would seem that possession of the names would be more the result of the fortunes of time and place than the result of diligent and skillful search.

The Illinois court has reached the opposite result as to names and addresses of witnesses in a setting substantially similar to that in the

81 160 Tex. 7, 325 S.W.2d 121 (1959).

82 *Id.* at 9, 325 S.W.2d at 123. The proviso reads: "provided that the rights herein granted shall not extend to the written communications passing between agents or representatives or the employees of either party to the suit, or communications between any party and his agents, representatives, or their employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation or defense of such claim or the circumstances out of which same has arisen. TEX. R. CIV. P. 167."

83 *Ex parte* Ladon, 160 Tex. 7, 11, 325 S.W.2d 121, 124 (1959).

84 "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession." Hickman v. Taylor, 329 U.S. 495, 507 (1947).

Ladon case.[85] This result is clearly to be preferred. In other cases as well, the Illinois court has been careful in interpreting its broad privilege rule to avoid unjustifiable results which might easily flow from a literal reading of the rule.[86] In the recent case of *Stimpert v. Abdnour*,[87] the Illinois court refused protection for the transcript of an interview with the defendant taken by plaintiff's attorney on the ground that it would be admissible at trial as an admission of a party. The court went far in reconciling its privilege rule with the policy of broad discovery:

> "The discovery provisions of the Civil Practice Act and our Supreme Court Rules were enacted to broaden the scope of available discovery to enhance the true function of a trial as a means of ascertaining the truth, and to provide methods from [*sic*] the prompt and just disposition of litigation . . . . Our promulgation of Rule 19-5(1) was not inconsistent with this philosophy, but was an effort to protect litigants from unnecessary harassment, and violations of their well recognized rights . . . . The . . . exemption, sometimes loosely referred to as the 'work product' privilege, was believed necessary to prevent complete invasion of the files of counsel. It is clear that this exemption would protect notes and memoranda prepared by counsel for use in trial . . . . As properly understood, however, this rule does not protect material and relevant evidentiary facts from the truth-seeking processes of discovery."[88]

By so restricting the scope of its privilege provision in relation to its broad discovery rules, the Illinois court has shown that these privilege provisions can be made to represent a defensible balancing of legitimate policies. It may be, in fact, that Illinois courts will eventually allow discovery of trial preparations in more cases than will the federal courts.

REJECTION OF THE WORK PRODUCT DOCTRINE

Until recently, in at least one state—California—there was a conscious effort to make pre-trial discovery broader than that afforded under the Federal Rules in the area of trial preparation materials. This effort began with a code provision clearly designed to avoid the confusion of the federal precedents:

> "All matters which are privileged against disclosure upon the trial under the law of this State are privileged against disclosure through discovery procedure. This article shall not be construed to change the law of this

85 Krupp v. Chicago Transit Authority, 8 Ill. 2d 37, 132 N.E.2d 532 (1956).

86 ILL. SUP. CT. R. 19-5(1) provides: "All matters which are privileged against disclosure upon trial are privileged against disclosure through any discovery procedure. Disclosure of memoranda, reports or documents made by or for a party in preparation for trial or any privileged communications between any party or his agent and the attorney for the party shall not be required through any discovery procedure."

87 24 Ill. 2d 26, 179 N.E.2d 602 (1962).

88 *Id.* at 31, 179 N.E.2d at 605.

> State with respect to the existence of any privilege, whether provided for by statute or judicial decision, nor shall it be construed to incorporate by reference any judicial decisions on privilege of any other jurisdiction."[89]

This provision accompanied a general adoption by California of the Federal Rules. In *Greyhound Corp. v. Superior Court*[90] the California court held that the alteration was made "for the express purpose of creating in California a system of discovery procedures less restrictive than those then employed in the federal courts."[91] Thus, the provision was held to have rejected the federal doctrine as well as the individual federal precedents. The net result of the *Greyhound* holding that the California rule rejected the federal work product concept was not itself especially far-reaching in light of the scope of the California attorney-client privilege, which extended to reports compiled by a party's agents in anticipation of litigation.[92] But, in the *Greyhound* case and cases following it,[93] the California court expressly rejected its prior view of the scope of the privilege, limiting it to the scope indicated by Wigmore and adopted by the Supreme Court in the *Hickman* case.[94]

The result of these two developments in California, the rejection of the work product doctrine and the restriction of the attorney-client privilege, was to broaden significantly the scope of discovery in the area of trial preparations. Subsequently, discovery was allowed of reports of a condemner's expert appraiser,[95] a report of an engineering firm made expressly for a party's attorney,[96] and pictures taken by a party himself.[97] Thus California placed primary emphasis on the full disclosure of facts through the discovery process. Implicit in this development was the belief that, in the bulk of the cases involving the discovery of trial preparations, the fear of encouraging the sloppy lawyer ought not to be a controlling factor. In short, California proceeded from the proposition that this material may be discovered.

The California development ought not to be seen as having given a blanket license to the adverse party to search at will through his opponent's trial preparations. The right to discovery was conditioned here, as it is under the Federal Rules, on a showing of "good cause" in every case. It is

89 Calif. Stat. ch. 1904 (1957).
90 56 Cal. 2d 355, 15 Cal. Rptr. 90, 364 P.2d 266 (1961).
91 *Id.* at 375, 15 Cal. Rptr. at 98, 364 P.2d at 274.
92 Holm v. Superior Court, 42 Cal. 2d 500, 267 P.2d 1025 (1954).
93 *E.g.*, Suezaki v. Superior Court, 58 Cal. 2d 166, 23 Cal. Rptr. 368, 373 P.2d 432 (1962).
94 See notes 9-11 *supra*.
95 Oceanside Union School Dist. v. Superior Court, 58 Cal. 2d 180, 23 Cal. Rptr. 375, 373 P.2d 439 (1962).
96 San Diego Professional Ass'n v. Superior Court, 58 Cal. 2d 194, 23 Cal. Rptr. 384, 373 P.2d 448 (1962).
97 Suezaki v. Superior Court, 58 Cal. 2d 166, 23 Cal. Rptr. 368, 373 P.2d 432 (1962).

true, as noted above,[98] that the "good cause" inquiry would not normally be a rigorous one, and a showing of possible usefulness in obtaining all relevant information would suffice in most cases. But the California court clearly stated that "this is not to say that discovery may not be denied, in proper cases, when disclosure of the attorney's efforts, opinions, conclusions or theories would be *against public policy* . . . or would be eminently unfair or unjust, or would impose an undue burden."[99] It remained for the California courts to give substance to these limitations, and the California rules might have attained a shape similar to that suggested for the Federal Rules by those who would read *Hickman v. Taylor* narrowly.[100] Clearly, however, the path would have been different, for the California court started with the proposition that benefits of factual disclosures would normally outweigh any unfairness; only where the preponderant unfairness was actually shown would protection have been given. With no work product objection as such available to them, California litigants would have been encouraged to limit their objections to cases of true prejudice. Likewise, the court would have determined the proper degree of protection from discovery faced not with the question of what is "work product," but rather what is fair, thus avoiding a tyranny of labels. Some commentators questioned whether the benefits of additional disclosure of facts would even have begun to balance the mischief which the new California doctrine invited.[101] But it would seem to have been worthy of a period of fair trial.

It is unfortunate that this fresh attempt to re-examine the proper scope of discovery has been somewhat frustrated by restrictive legislation. Recent amendments to the California Code of Civil Procedure provide:

> "The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances. . . . It is the policy of this State (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts."[102]

98 See notes 17-20 *supra* and accompanying text.

99 Greyhound Corp. v. Superior Court, 56 Cal. 2d 355, 401, 15 Cal. Rptr. 90, 115, 364 P.2d 266, 291 (1961). (Emphasis added.)

100 In Suezaki v. Superior Court, 58 Cal. 2d 166, 23 Cal. Rptr. 368, 373 P.2d 432 (1962), the California court indicated that the two approaches might well reach similar results. Clearly a California court will be hesitant to give access to an attorney's mental processes or legal theories.

101 Committee on the Administration of Justice, *Report*, 37 CAL. S.B.J. 585, 586-87 (1962); Masterson, *Discovery of Attorney's Work Product Under Section 2031 of the California Code of Civil Procedure*, 10 U.C.L.A.L. REV. 575 (1963); Comment, 10 U.C.L.A.L. REV. 593 (1963).

102 CAL. CIV. PROC. CODE §§ 2016(b), (g) (Supp. 1963).

Also added was a provision for a stricter "good cause" inquiry:

> "A party required to show 'good cause' to obtain discovery . . . shall show specific facts justifying discovery and mere proof of the relevance of the information sought to the subject matter of the action shall not be sufficient."[103]

On their face, these provisions would hardly seem to be a statutory confirmation of judicially established rules.[104] The policy statement in the amendment is not in conflict with that declared previously by the courts, and this might be viewed as an invitation to continue as before. The other quoted provisions, however, belie any such legislative intent. Speculation as to the consequences of the new provisions in particular cases would not be fruitful here. Whatever may now be protected from discovery in California, the advantages of the approach under the *Greyhound* decision have been lost. Whereas the fact that a given matter was part of a lawyer's trial preparations was formerly but one factor in determining the justice of allowing discovery, it now provides prima facie protection. The central inquiry has shifted from what is fair to what is "work product." It should be noted that the work product provisions relate only to the *lawyer's* trial preparations. But the general restriction of the "good cause" requirement will serve to narrow the scope of discovery as to all types of matter.

Desirable freedom in determining the proper scope of broadened discovery rules may, however, lie ahead for Wisconsin. This state has stood as a leader in broadening pre-trial discovery by independent formulation of rules. The results of such independence give the impression that a great deal more thought and deliberation went into the formulation of these rules than is apparent where the Federal Rules have been simply adopted, virtually *in toto*. In 1961, Wisconsin broadened the scope of its discovery by adopting the following provision eliminating an admissibility requirement:

> "A deponent shall be examined regarding any matter, not privileged, which is relevant to the controversy, but it shall not be grounds for objection that testimony will be inadmissible at trial if testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."[105]

In the first case interpreting this provision, the Wisconsin court indicated its determination to avoid federal precedent and at least some of the limitations of the federal work product doctrine. In *State ex rel. Reynolds v. Circuit Court*,[106] an action challenging a condemnation award, discovery

103 CAL. CIV. PROC. CODE § 2036(a) (Supp. 1963).
104 *But see* Brown v. Superior Court, 32 Cal. Rptr. 527, 534 (Ct. App. 1963).
105 WIS. STAT. § 326.12(2) (1962).
106 15 Wis. 2d 311, 112 N.W.2d 686 (1961), *rehearing denied*, 113 N.W.2d 537 (1962).

was held to be properly granted of opinions of the state's expert appraisal witnesses. In dismissing the argument for work product protection the court declared:

> "To whatever extent the principle of the Hickman case is to be followed in limiting discovery procedure in this state, we conclude that it provides no basis for refusing plaintiffs the opportunity of examining these expert witnesses concerning the relevant opinions they have formed, and the observations, knowledge, information, and theories on which the opinions are based."[107]

The court expressly recognized that there was contrary authority under the Federal Rules.[108] Thus Wisconsin seems to have combined an independence of federal precedent with a tendency to grant a broader scope of discovery which could lead to results similar to those in California prior to the recent statutory restrictions. At least, in the absence of a "work product" provision in the statutes, there is room for a case-by-case development with an emphasis on the fairness in each case.

CONCLUSION

Broad rules of pre-trial discovery are based on a determination that, in general, the benefits of full disclosure outweigh its unavoidable dangers. Encouraging settlements and promoting fair trials are the goals; use for harassment and the promotion of sloppy trial preparations are prominent dangers. Nearly all limitations which are placed upon the scope of discovery will, to some degree, hamper the realization of the goals of the broad rules. The limitation may be justified where the dangers avoided can fairly be said to outweigh the benefits which are lost. Thus, in the work product area, the protection from disclosure of a given matter may encourage diligent trial preparation without substantially hindering full factual disclosure. Such a limitation is clearly justifiable. It is just such a balancing of benefits and dangers which should underlie the implementation of the work product concept.

In choosing the best method of administering a work product limitation, considerations of efficiency in application are proper. Here, too, if the benefits in efficiency of administration of a rule can be demonstrated, they may outweigh the detriments involved in preventing full disclosure. On such a basis a work product "privilege" rule may be found superior to the more flexible and qualified protection vouchsafed under the Federal Rules. The danger to be avoided is that of the adoption of limitations upon discovery which are not responsive to real dangers. Such limitations are a source of backdoor attack on the policy of full disclosure which underlies modern discovery.

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107 *Id.* at 321, 112 N.W.2d at 691.
108 *Ibid.*