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INTRODUCTION

Some of the most significant innovations embodied in the Federal Rules of Civil Procedure are those dealing with pre-trial procedure. The provisions in this area have, to a large extent, removed fact-revelation and issue formulation from the trial itself to the pre-trial stage. To the extent this has been accomplished, the common law *sporting* concept of trial by personal combat has been abandoned.

Pre-trial discovery devices, of course, can be used to turn a lawsuit into a personal contest of strength between the parties. Even without such intention, extensive use of discovery may tend to wear down and discourage the weaker party.[1] Therefore, inequality of resources is still an important factor in the outcome of any litigation. In spite of this fact, the discovery provisions of the Federal Rules of Civil Procedure are an attempt to put unequal opponents on a more equal footing. In trying to equalize the resources of the contesting parties, so that truth may be better ascertained, the Federal Rules have raised issues not present under common law procedure. These issues involve the questions of when, and to what extent, a party may gain the benefit of his adversary's trial preparations. Mr. Justice Murphy said in *Hickman v. Taylor*,[2] "[i]t is a problem that rests on what has been one of the most hazy frontiers of the discovery process."[3]

It is at least certain that some trial preparations, some of the time, are subject to discovery. This Article will discuss which trial preparations are subject to discovery and when they may be discovered.

It seems that the court decisions on these questions are far from satisfying; largely due to the confusion created by the Supreme Court's decision in *Hickman*. The Court in *Hickman* distinguished the "work-product" of an attorney from other subjects of discovery. Before discovery of work-product could be granted, the moving party had to show more than the ordinary "good

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1. Clark, *A Symposium on the Use of Depositions and Discovery Under the Federal Rules*, 12 F.R.D. 131 (1952).

2. 329 U.S. 495 (1946).

3. *Id.* at 514.

cause" required when non-work-product material was the subject of the discovery.

The term "work-product" is unfortunately vague. It is usually thought to include that data created specifically for impending litigation, and reflecting in some way an attorney's thoughts about the case. Thus, many different types of material may be considered work-product material. For example, a memorandum on a question of intestate succession, an expert opinion on a boiler explosion, and a description of an accident by an eyewitness may all fall into the work-product classification.

This Article will show that the distinction created in *Hickman* between work-product material and non-work-product material is unwarranted; that the *Hickman* decision prevents proper trial preparation, when such preparation should rather be encouraged; and finally, that the evils the Court sought to avoid in *Hickman* were not only insubstantial, but would also not be promoted by allowing discovery of work-product material to the same extent as ordinary non-work-product material.

It would seem that *Hickman* is a step backward from the goals of the Federal Rules of Civil Procedure. Certainly the liberal spirit of the Rules is violated by an unwarranted infringement upon the right of discovery. Even Mr. Justice Jackson recognized that the Rules themselves placed no explicit obstacles in the way of discovering work-product material.[4]

Unrestricted discovery of trial preparations is not being urged here. The Federal Rules place certain limitations on discovery, whether by interrogatory, deposition, or production. These limitations require that the moving party show good cause, and that the data sought be relevant. These seem to be reasonable demands. What is being suggested in this Article is that these limitations be the only requirements that must be met in order to gain discovery of work-product material. A distinction treating work-product material as a special class of data seems unwarranted.

It must be remembered that the purpose of federal discovery is not just to uncover facts. The function of discovery is also to narrow the issues and make plain the legal theories in each case. These functions must necessarily be performed through discovery because of the loose "notice" pleadings of the Rules.

Mr. Justice Murphy in *Hickman* treated these functions of discovery as being equal in importance:

> The various instruments of discovery now serve (1) as a device along with the pre-trial hearing under Rule 16 to narrow and clarify the basic issues between the parties and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of

4. *Id.* at 518.

> facts, relative to those issues. Thus, civil trials in the federal courts no longer need be carried on in the dark.[5]

In suggesting that *Hickman* is a step backward from the goals of the Federal Rules, it is perhaps necessary to determine what preceded that decision. Similarly, in discussing the innovations made by the Federal Rules, it again is necessary to know what went before. Thus, the Article begins with an examination of the common law treatment of discovery.

Discovery Prior to the Federal Rules

At common law a trial consisted of a personal struggle between the two or more contesting parties. Thus, early disputes were resolved by personal combat. Because of the slow evolution of English judicial institutions, this reliance on strength persisted even into the period when trials became a consideration of the truth of conflicting claims.[6]

As trials became a consideration of the issues, the struggle became one not only of strength but also of strategy. The chief weapons were secrecy and surprise.[7] Initially, the common law made no provision for any of the discovery techniques now found in the Federal Rules.

As cases and the law became more complex, need was felt for a method which would narrow the issues, limit the factual questions involved, and give notice of the legal theories upon which each party relied.[8] This need was first met by the pleadings.[9] The pleadings, however, became susceptible to intricate refinements and ultimately were less a means of giving notice of facts and issues than an avenue for defeating the less skilled attorney.[10]

To escape the hazards of common law issue-pleading, attorneys relied upon the general pleas, avoiding commitment to one particular theory.[11] For the plaintiff such a plea might have been the common counts in assumpsit[12] or, for the defendant the general issue.[13]

> It is doubtful whether common law pleading ever afforded an adequate basis for preparation for trial. In any event, there were two factors at work which ultimately destroyed to a large extent whatever degree of efficiency the system formerly had. Clear statements of the facts of the case in the plaintiff's pleadings gave way to fictitious and vague allegations which were couched in antiquated terminology.

5. *Id.* at 498.
6. See generally Millar, Civil Procedure in the Trial Court in Historical Perspective Ch. II (1952).
7. *Id.* ch. III.
8. See generally Millar, *op. cit. supra* note 6, ch. II.
9. See generally Stephen, Principles of Pleading in Civil Actions *100-210.
10. Millar, *op. cit. supra* note 6, ch. II, refers to the "tyranny of the pleadings."
11. Ragland, Discovery Before Trial, 1-10 (1932).
12. Stephen, *op. cit. supra* note 9, at *100-210.
13. 1 Chitty, Pleadings *490.

> The plaintiff was more concerned with invoking the judicial process by incantation of the precise ritual than he was in reciting the facts of the case. The defendant, too, was allowed to conceal his true position under the guise of an easy formula, the general issue. The general issue was used not only for the purpose of denying everything in the opposite pleading, whether really controverted or not, but also for the purpose of enabling the party pleading it to prove matters not suggested on the face of the pleading.[14]

This situation was somewhat ameliorated by the development of several common law discovery devices of limited utility. Certain documents could be obtained by the use of profert and oyer.[15] In addition, the facts upon which a party relied could be obtained, to a limited extent, by requesting a bill of particulars.[16]

These devices were of limited value. They were prevented from becoming more useful by the adoption of the Hillary Rules in 1834. These Rules made precise pleading of utmost importance, causing—it is estimated—every fourth case to be decided on a question of pleading.[17] The Hillary Rules so increased the necessity for discovery that attorneys came to rely on the equity bill of discovery to gain the ends which the common law pleading had sought to achieve.

Chancery practice was markedly different from that at common law.[18] Since little emphasis was given to the pleadings, issues were defined by the pleading of evidence. Both parties were thereby well-informed prior to the actual hearing.[19] "Pleadings and discovery were commingled in the equity

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14. RAGLAND, *op. cit. supra* note 11, at 2.

15. 3 BLACKSTONE, COMMENTARIES 299 (1833); 6 WIGMORE, Evidence § 1858 (3d ed. 1940).

> Before the passing of the recent Act for the amendment of Evidence, there existed but two modes by which a party, plaintiff or defendant, to an action at law, could obtain an inspection of documents relating to the cause in the hands of an adversary. One, which was available only in the case of a deed, was by demand of oyer; a proceeding in which whenever one party to a cause made profert—that is, alleged in his pleading that he showed the deed in court—his opponent was entitled to demand oyer; that is, in theory to hear the deed read, practically to have a copy of it.

POLLOCK, POWER OF THE COURT TO COMPEL PRODUCTION, 77 Law Library (1853).

16. Comment, 74 HARV. L. REV. 940, 947 (1960).

> The real purpose of ordering the bill of particulars was to more fully disclose the facts of the case. Their object was to give the parties every reasonable facility for coming to the trial fully prepared for what might be produced by the other side. At common law, granting or denying a demand for particulars was a matter within the sound discretion of the court under the facts of the particular case.

RAGLAND, *op. cit. supra* note 11, at 11-12.

17. *Id.* at 5.

18. MILLAR, *op. cit. supra* note 6, ch. II, § 3. Equitable relief, by the 19th century, was quite well developed. Following the Statute of Westminster in 1285, the flexibility of the common law had slowly vanished, since the King's Courts were forbidden to issue new writs. Therefore remedies in these courts were not available to meet new needs. At the time that common law practice was thus ossifying, the chancery courts began developing a flexible procedure of their own.

19. RAGLAND, *op. cit. supra* note 11, at 13-17.

pleadings. The result was that pleading in equity assumed the form of a detailed statement of the party's evidence."[20]

From the early equity pleadings interrogatories and production eventually evolved as distinct entities.[21] However, equity was only of limited assistance. The moving party had first to show that without the desired information, he had no remedy at law.[22] He then had to designate with particularity the documents or data sought, demonstrate their relevance to his own case, as distinguished from that of his adversary, and finally prove that his opponent possessed the desired material.[23] Thus, a party at law was confronted by considerable obstacles before he could obtain discovery in equity.

This general English practice prevailed also in the United States, both in the federal and the state courts.[24] In addition, by statutes, Congress provided for several limited supplementary devices. Among these were the deposition de bene esse[25] and the dedimus potestatem.[26] Congress also provided for a deposition in perpetuam rei semoriam.[27] Though this device might have been of considerable value, no procedure for its use was ever established.[28] In addition to the foregoing, Equity Rule 58 in 1912 also provided for discovery similar to that already described in England's chancery courts.

The provision for discovery under Equity Rule 58 was made virtually unavailable to parties on the law side because the Supreme Court held there was a remedy at law.[29] This remedy consisted of a statute empowering a court to order discovery of documents in trials at law as at equity.[30] This might have provided an alternative to the equity remedy, except for the later holding by the Supreme Court that this statute, unlike the equity bill, did not permit discovery before trial.[31]

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20. *Id.* at 15.

21. See Langdell, *Discovery Under the Judicature Acts, 1873, 1875* 11 HARV. L. REV. 137 (1897).

22. STORY, EQUITY JURISPRUDENCE § 1483 (3d Eng. ed. 1920).

23. Comment, 74 HARV. L. REV. 940, 947 (1960); POLLOCK, *op. cit. supra* note 15, at 12-15; See also HARE, ON DISCOVERY (1849).

24. Pike and Willis, *The New Federal Deposition-Discovery Procedure: I*, 38 COLUM. L. REV. 1179, 1182 (1938); Tolman, *Discovery Under the Federal Rules*, 58 COLUM. L. REV. 498 (1958).

25. REV. STAT. § 863 (1875).

26. REV. STAT. § 866 (1875).

These two federal statutes were very limited in scope. Both permitted disclosures before trial, but only to obtain proof, and a showing of the probability of this was essential as a condition to their use. Lack of information or need for exploration of the facts, the usual reasons for discovery, had nothing to do with the right to take depositions under these statutes.

Tolman, *op. cit. supra* note 24, at 500.

27. REV. STAT. § 866 (1875).

28. Comment, 74 HARV. L. REV. 940, 949 (1960).

29. United States v. Bitter Root Co., 200 U. S. 451 (1905).

30. REV. STAT. § 724 (1875).

31. Carpenter v. Winn, 211 U.S. 533 (1911), contains a history of this section.

Another statute which might have made pre-trial discovery possible provided that depositions could be taken in the manner prescribed by state law.[32] However, the Supreme Court held that this did not enlarge the grounds for taking depositions in the federal courts, but merely referred to the procedure for taking such depositions, since the federal statutes prescribed the limits for depositions.[33] The "limit" was found in the requirement that testimony under federal procedure must be in "open court." Why this conflicted with the provisions of state procedure is not clear. This interpretation was particularly crippling, since some states at the time had relatively liberal discovery provisions.[34]

Thus, there was a vacuum in the federal courts. On the law side, pre-trial discovery was virtually unavailable. In equity the old chancery practice remained, but the restrictions on its use still prevailed, and the burden on the moving party was considerable. This condition of the law prior to the Federal Rules was criticized frequently.[35] But the "sporting" concept of litigation remained dominant, and this left little room for pre-trial discovery.

Under the common law the non-availability of discovery procedures precluded raising the issue of whether an attorney's trial preparations were subject to discovery. It seems, however, that the fundamental assumptions of the common law were clearly antagonistic to invasions of an attorney's privacy. When the possibility of such invasions was first raised under the Federal Rules, the old common law assumptions arose again with all their vigor.

Discovery of Trial Preparations Under the Federal Rules Prior to *Hickman v. Taylor*

The Federal Rules of Civil Procedure, with their innovations in pre-trial procedure, were adopted in 1938. No longer were the functions of "notice-

32. Conformity Act of 1872, Rev. Stat. § 914 (1872).

33. Hanks v. Tooth, 194 U.S. 303 (1904); Ex Parte Fiske, 113 U.S. 713 (1875).

34. See, *e.g.*, New York Code of Civil Procedure § 870, 871, 872; see also Ragland, *op. cit. supra* note 11, at 272-391 for a general description of state discovery procedure prior to 1934.

35. *E.g.*, In Zolla v. Grand Rapids Store, 46 F.2d 319 (1931) Judge Woolsey wrote:

> That at this date the practice on the law side of the federal courts should be so lacking in plasticity with regard to interlocutory remedies seems extraordinary, when it is remembered that under the procedure in almost all the states, through examination before trial or otherwise, the plaintiff can secure evidence and documents in advance which he can use at trial, and also that, throughout the British Empire, every paper or letter even remotely connected with a case, must, unless privileged, be discovered to the opposing party . . . . It is unfortunate that the practice of automatic compulsory discovery is not in force here.
>
> The rationale of this attitude is, of course, not only that the court wants to know the truth, but also that it is good for both parties to learn the truth far enough ahead of the trial not only to enable them to prepare for trial, but also to decide whether or not it may be futile to proceed to trial.

Id. at 320.

giving, issue-formulation and fact-revelation" to be "primarily and inadequately performed by the pleadings."[36] The pleadings were reduced by Rule 8 to short and plain statements of jurisdiction, the claim upon which relief was sought, and a demand for relief.

The pleadings were supplemented by the provisions for depositions,[37] interrogatories,[38] and production.[39] Any of these provisions might be involved in discovery of trial preparations. However, the discoverability of such materials is questioned most often on motions for production of documents under Rule 34.[40] In part this is true because the provisions for production under the Federal Rules are much more liberal than under prior law.[41]

Rule 34 abandons the cumbersome procedure of having to go into equity.[42] In addition, while a moving party must still designate the documents sought, interrogatories may be used to obtain the necessary information from an adversary. Also, the requirement of designation in minimal, reference by factual category, such as employment records or witness statements being sufficient.[43] Similarly, interrogatories or depositions may be used to establish the necessary possession, custody, or control in the adverse party.[44]

One other aspect of Rule 34 represents a considerable improvement of prior law. This is the reference to Rule 26(b) as determinant of the type of material which is discoverable. Rule 26 provides:

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36. Hickman v. Taylor, 329 U.S. at 500.

37. FED. R. CIV. P. 26, 27. These may be coupled with a subpoena duces tecum under Rule 45, for production purposes.

38. FED. R. CIV. P. 31, 33.

39. FED. R. CIV. P. 34.

40. FED. R. CIV. P. 34 provides:

> Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit inspection and copying or photographing of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody or control . . . .

41. See the comparison of Equity Rule 58 and Rule 34 in 4 MOORE, FEDERAL PRACTICE § 34.03 (2d ed. 1962). However, the Federal Rules still draw heavily on the Equity Rules of 1912. See Chandler, FEDERAL JUDICIAL SYSTEM 31 F.R.D. 307, 499 (1963).

42. "The Federal Rules . . . govern the procedure in The United States district courts in all suits of a civil nature, whether cognizable as cases at law or in equity . . . ." FED. R. CIV. P. 1. "There shall be one form of action to be known as a civil action . . . ." FED. R. CIV. P. 2.

43. See, *e.g.*, Connecticut Mut. Life Ins. Co. v. Shields, 17 F.R.D. 273 (S.D.N.Y. 1955).

44. Although a party in the absence of good cause may not compel production, he may still question as to existence, location, and possession. This may be of considerable value. Smith v. Ins. Co., 30 F.R.D. 534 (N.D. Tenn. 1962); Harvey v. Eimco, 28 F.R.D. 380 (E.D. Pa. 1961); Baker v. Yellow Cab, 12 F.R.D. 84 (W.D. Mo. 1951). However, good cause must be shown to get the *substance* of documents by interrogatories or depositions. Connecticut Mut. Life Ins. Co. v. Shields, 17 F.R.D. 273 (S.D.N.Y. 1955).

> [T]he deponent may be examined 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 the examining party or to the claim or defense of any other party. . . .

Rule 26(b) also provides that inadmissibility at trial is not a bar to discovery of materials, if such materials "appear reasonably calculated to lead to the discovery of admissible evidence." These liberal provisions apply not only to production, but also are expressly incorporated into the provisions dealing with interrogatories and depositions.[45]

With the adoption of the Federal Rules it could no longer be said that:

> The conception of justice has always been subordinate to the conception of the law as a game between opposing counsel . . . both sides conduct their operations with as much secrecy as possible . . . The bar has viewed with suspicion any attempts to destroy this secrecy. An open consideration of the facts has not seemed a primary aim of the game. . . .[46]

Rather:

> The parties were no longer to be kept in the dark as to the evidence in the possession of their opponents. Fact ascertainment was to have precedence over the disadvantages which extensive discovery might have on the diligent lawyer whose trial preparations it would expose to the scrutiny of his adversary.[47]

The discovery provisions were pressed into operation immediately upon adoption. One study estimated that they were used in over 25% of the cases coming to trial, and emphasized that they were significant factors in 80% of the cases which were never tried.[48] This widespread usage unavoidably raised the question of how far one could go in discovering trial preparations.

The bounds of discovery were unmarked. One of the limits might have been in the requirement that good cause be shown to justify production under Rule 34. The language of Rules 34 and 26 suggests that good cause must mean something more than mere relevancy, since otherwise the explicit requirement of relevancy in Rule 26 becomes superfluous.[49] Early cases, therefor, whether dealing with trial preparations or not, required more than relevancy before finding that good cause had been shown.[50] Later cases, how-

45. See FED. R. CIV. P. 26, 27, 31, 33.

46. Pike and Willis, *op. cit. supra* note 24, at 1180.

47. Taine, *Discovery of Trial Preparations in the Federal Courts* 50 COLUM. L. REV. 1026 (1950). See also Seligson v. Camp Westover, 1 F.R.D. 733 (S.D.N.Y. 1941).

48. Clark, *op. sit. supra* note 1.

49. *See* Williams v. Northern Pac. Ry., 30 F.R.D. 26 (D. Mont. 1962); Crowe v. Chesapeake Ry., 29 F.R.D. 148 (E.D. Mich. 1961).

50. See, *e.g.*, Reeves v. Pennsylvania Ry., 8 F.R.D. 616 (D. Del. 1949).
The rule contemplates the showing of good cause for the production of documents and not merely the relevancy of particular papers. Relevancy has to do with the

ever, have stated that the modern trend is to equate good cause and relevancy.[51] That this is the trend may well be doubted in the light of recent district court decisions.[52]

Either of these interpretations of good cause has inherent difficulties:

> The difficulty with the good cause-is-relevancy approach is that it interprets a portion of Rule 34 as redundant and thereby violates elementary canons of construction. The main objection to the good cause-requires-special-circumstances treatment is that it reintroduces the sporting aspect which the Federal Rules were thought to have excised from judicial proceedings.[53]

The good cause requirement specifically applies only to production under Rule 34. There is no such express requirement with respect to depositions and interrogatories. However, a court under Rule 30(b) has broad power to deny interrogatories and depositions. In *Hickman*, the Supreme Court stated that the good cause requirement should be read into 30(b), at least when discovery is sought of trial preparations.[54]

In the early cases dealing with discovery of trial preparations, the courts usually found a failure to show good cause (something in addition to mere relevancy). Where the material sought consisted of statements from witnesses taken by an attorney with a clear eye towards litigation, many courts indicated that *no* showing of good cause could warrant discovery.[55] Where the material was not prepared by attorneys for litigation, or was prepared in "the ordinary course of business" (not specifically for trial), discovery was sometimes allowed. But such cases were rare, because of the narrow meaning given "ordinary course of business", limiting it to the scope of the business records exception to the hearsay exclusion rule.[56]

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content of the desired documents. The "good cause" mentioned in the rule has not to do with the content of the documents, but with the reasons for calling upon the opposing party for the production of relevant material.

Id. at 619.

51. Crowe v. Chesapeake Ry., 29 F.R.D. 148 (E.D. Mich. 1961); Houdry v. Commonwealth, 24 F.R.D. 58 (S.D.N.Y. 1959); Connecticut Mut. Life Ins. Co. v. Shields, 17 F.R.D. 273 (S.D.N.Y. 1955); Gunderson v. Moran, 15 F.R.D. 111 (S.D.N.Y. 1953).

52. Burke v. United States, 32 F.R.D. 213 (E.D.N.Y. 1963); Taylor v. Atchinson, Topeka & Santa Fe Ry., 33 F.R.D. 283 (W.D. Mo. 1962); Williams v. Northern Pac. Ry., 30 F.R.D. 26 (D. Mont. 1962); Bullard v. Universal, 25 F.R.D. 342 (E.D.N.Y. 1960); Wilson v. David, 21 F.R.D. 217 (W. D. Mich. 1957); Shupe v. Pennsylvania Ry., 19 F.R.D. 144 (W.D. Pa. 1956).

53. Crowe v. Chesapeake Ry., 29 F.R.D. 148 (E.D. Mich. 1961).

54. 329 U.S. at 504-07.

55. See, *e.g.*, Mulligan v. Eastern S.S. Lines, 6 F.R.D. 601 (S.D.N.Y. 1946); Midland Steel v. Clark, 7 F.R.D. 132 (W.D. Mich. 1945).

56. Thiel v. Southern Pac. Ry., 6 F.R.D. 219 (N.D. Cal. 1946); Corbett v. Columbia Transp., 5 F.R.D. 217 (W.D.N.Y. 1946); Stack v. American Dredging, 3 F.R.D. 300 (E.D. Pa. 1943). Thus, a crew member's statement, though made as standard company policy, was deemed *not* made in "the ordinary course of business" since most companies are not in the business of preparing for trial.

In the cases denying discovery, three rationales were utilized to find a lack of good cause. The first was based on the stringent rules applied at trial for the admission and exclusion of evidence. The second found that discovery of trial preparations violated basic moral values by rewarding the lazy. The third seized upon the assumed needs of the adversary system, denying discovery on the grounds of attorney-client privilege.

The courts applying the first rationale assumed that discovery should be used only to obtain information which could be introduced at trial. Thus, some courts denied discovery because the data sought was not material evidence within the rules of admissibility at trial.[57] Applying these same rules, the early cases denied discovery of hearsay.[58] As already noted, other courts denied discovery of trial preparations because they were not within the customary business records exception to the hearsay exclusion rule.

The courts utilizing the first rationale showed a narrow conception of the role of discovery. They continued the emphasis of the trial which had been necessitated by practice prior to the Federal Rules. But the abandonment of strict pleading, and the adoption of liberal discovery procedures were designed to deemphasize the trial, making fact-revelation and issue-shaping precede, and perhaps avoid the trial stage through settlement.[59]

The second rationale was designed to protect moral values from the damage of wide-ranging discovery procedure. One widely quoted case denied discovery of trial preparations because an opposite result would "penalize the diligent and reward the lazy."[60] A similar objection was that discovery of work-product would result in unjust enrichment to the moving party.[61] This moralizing was apparently the motivation in those cases denying discovery on the grounds that the moving party had embarked on a "fishing expedition."[62]

There is a kind of attractiveness to the argument that discovery of trial preparations unjustly enriches the moving party at the expense of his adversary. However, in fact, the person subject to discovery is not thereby deprived of the fruits of his industry. He still has the use of his expert, or eye witness, or legal research.

Further, discovery is a two-way street. Both sides have a reciprocal right

57. *E.g.*, Corbett v. Columbia Transp., 5 F.R.D. 217 (W.D.N.Y. 1946). Rule 26(b), before amendment, incorporated materiality as a criterion for discovery.

58. Sarmento v. Edwards Taxi, 3 F.R.D. 171 (S.D.N.Y. 1944); Walling v. Richmond Co., 4 F.R.D. 265 (E.D.N.Y. 1943); Poppino v. Jones Stores, 1 F.R.D. 215 (W.D. Mo. 1940).

59. See Hickman v. Taylor, 329 U.S. at 500-01.

60. McCarthy v. Palmer, 29 F. Supp. 585, 586 (E.D.N.Y. 1940).

61. See Piorkowski v. Socony Vacuum, 1 F.R.D. 407 (N.D. Pa. 1940); State v. Pan-American, 1 F.R.D. 213 (D. Md. 1940).

62. *See* Kirsher v. Palmer, 7 F.R.D. 252 (S.D.N.Y. 1945); Schweinert v. Insurance Co. of No. Am., 1 F.R.D. 247 (S.D.N.Y. 1940).

to the other's trial preparations.[63] Thus, the only item lost through discovery is the benefit of surprise. But while surprise may cause one side to emerge victorious, it hardly seems essential or valuable in a system which seeks, not victors, but the truth.[64]

The courts which denied discovery of trial preparations on "moral" grounds were motivated by the obsolete morality of the common law. The Federal Rules were to do away with the concept of trials as a personal struggle, with victory going to the stronger. Rather, both sides were to be put on an equal footing, the better to find truth. A denial of discovery of trial preparations necessarily meant unequal preparation, and a return to the "sporting" concept of justice.

There were early dissents to the unjust enrichment rationale. One judge spoke out in favor of "fishing expeditions," since they permitted equal preparation for trial.[65] Still another judge, in 1941, expressed a surprisingly contemporary view:

> It has been held that permitting such an examination would "penalize the diligent and put a premium on laziness." Assuming that this necessarily follows, it must be kept in mind that the new Rules of Civil Procedure are fashioned to eliminate the old concept of litigation as a battle of wits and to provide the tools whereby litigants may bring before a court or jury all the facts from which the truth may be more easily ascertained, and substantial justice done. To the extent that this search for truth infringes on the convenience of litigants, such convenience must yield. . . .[66]

But these dissents, for the most part, went unheeded.

The third rationale was designed, in the interests of the adversary system, to protect attorneys from intrusions upon their privacy. Therefore, trial preparations were held to be privileged within the meaning of that term in Rule 26(b).[67] Thus, unlike the two preceding rationales, the third, by relying on privilege, had a specific basis in the Rules for finding a lack of good cause.

However, this reliance on the "privilege" exclusion in Rule 26 extended attorney-client privilege beyond its historic scope. Privilege was made to encompass the lawyer's preparations regardless of whether communications between client and attorney were involved. This doctrine of extended privi-

63. Pike and Willis, *Federal Discovery in Operation*, 7 U. CHI. L. REV. 297 (1939).

64. As to the value of surprise in the adversary system, see *infra*, discussion accompanying note 100.

65. Golden v. Arcadia Mut. Cas. Ins. Co., 3 F.R.D. 26 (N.D. Ill. 1941).

66. Seligson v. Camp Westover, 1 F.R.D. 733, 734 (S.D.N.Y. 1941).

67. Sano-Petroleum Corp. v. Shell Oil Co., 3 F.R.D. 467 (E.D.N.Y. 1944); Matthies v. Peter F. Connolly Co., 2 F.R.D. 277 (E.D.N.Y. 1941). This was the basis on which the district court denied discovery in *Hickman*. On appeal, the Supreme Court explicitly rejected this approach.

ege, while rooted in English practice,[68] immediately became the object of considerable criticism.[69] Certainly, an expansion of privilege to include all trial preparations ran counter to the established understanding that privilege attaches only to attorney-client communications.[70]

Because of the general reluctance of the courts to allow discovery of trial preparations, changes were recommended in the Rules. The Advisory Committee on the Federal Rules of Civil Procedure in 1944 suggested that Rule 30(b) be amended in order that designated restrictions be imposed upon inquiry into papers and documents prepared or obtained by the adverse party in the preparation of the case for trial.[71] In renewing this recommendation in 1945, the committee said:

> It is impossible, of course to list specifically the documents or information in such files which may be examined into and those which may not. It may be possible to state some general standard to carry out the idea that in exercising its discretion the court should forbid the inquiring into matters which, if obtained, might be the subject of abuse and which, if obtained, are of no great value to the party making the inquiry. . . . The committee believes that the courts can be trusted to exercise sound discretion in these matters and that the judges themselves may examine into these files.[72]

In 1946 the committee submitted the following proposed amendment to Rule 30(b):

> The court shall not order the production or inspection of any writing prepared or obtained 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 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.[73]

In its comments to this proposed amendment, the committee stated that it

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68. ODGERS, PLEADING AND PRACTICE 225 (13th ed.).

69. Taine, *op. cit. supra* note 47, at 1034. Criticism also came from the Advisory Committees on the Federal Rules. See also Wild v. Payson, 7 F.R.D. 495 (S.D.N.Y. 1946); Tolman, *Discovery Under the Federal Rules*, 58 COLUM. L. REV. 498 (1958).

70. In some states the privilege attaches to communications between a layman and a doctor or clergyman. See *infra*, the discussion accompanying footnotes 80 and 111.

71. A thorough account of the committee's activities appears in Tolman, *op. cit. supra* note 69, at 504-15.

72. PRELIMINARY DRAFT OF PROPOSED AMENDS. 39-40 (1945).

73. REPORT OF PROPOSED AMENDMENTS BY ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE 5 F.R.D. 433, 456 (1946).

rejected the holdings of the earlier cases to the extent that they were based on such catch phrases as "fishing expedition" and "premium on laziness."[74]

Possibly, the proposed amendment would have effected some uniformity in the opinions of the district courts. But its vagueness makes this seem unlikely. The amendment might also have made discovery of trial preparations easier, at least in the district courts which had denied such discovery altogether. However, this too, seems unlikely because of the two exceptions made in the amendment. The first, excluding writings prepared by the party or an agent, would have denied discovery in some cases where courts had allowed it. The second, absolutely denying discovery of anything reflecting an attorney's mental impressions, was so broad as to be virtually all-inclusive and therefor would pose an insuperable obstacle to discovery of work-product material.

The unsatisfactory treatment of discovery by the lower federal courts finally came to the attention of the Supreme Court in *Hickman v. Taylor* at about the same time the Advisory Committee submitted its proposal. The decision in *Hickman* made the proposal moot, and it was never acted upon.[75]

Hickman v. Taylor

In *Hickman* an action was brought for the death of a crew member in the sinking of the tug, J. M. Taylor. The statements of all the survivors had been taken at a public inquiry, and were available to the plaintiff. Nevertheless, the plaintiff sought production of written and oral statements which defendant had taken from the survivors a short time after the sinking. The defendant's attorney refused to make the statements available to the plaintiffs. For this, the district court found him in contempt.[76] The court of appeals reversed, terming the material "attorney's work-product," and holding it privileged within Rule 26.[77]

In its opinion, the Supreme Court recognized at the very outset both the importance of the question involved and its novelty. Although it was unclear as to which procedural devices were involved, the Court treated this problem as irrelevant, since:

> The deposition-discovery rules create integrated procedural devices. And the basic question at stake is whether *any* of those devices may be used to inquire into materials collected by an adverse party's counsel in preparation for litigation.[78]

74. *Id.* at 457.
75. Taine, *Discovery of Trial Preparations in the Federal Courts*, 50 COLUM. L. REV. 1026, 1029 (1950).
76. Hickman v. Taylor, 4 F.R.D. 479 (E.D. Pa. 1945).
77. Hickman v. Taylor, 153 F.2d 212 (3d Cir. 1945).
78. Hickman v. Taylor, 329 U.S. at 505.

The Court dealt with this basic question by first rejecting some of the arguments put forward for dealing with work-product discovery. It had been argued that individual plaintiffs, when suing corporate defendants, were at a disadvantage, due to inequality of financial and investigative resources. Therefor, the plaintiff in *Hickman* should be treated with great solicitude and granted discovery. The Court rejected this view, saying that discovery is a two-way street and, in addition, it is usually the plaintiff who has the advantage, since only he knows why he is suing.[79]

The Court also rejected the contention that the materials sought were within the privilege described in Rule 26, as the court of appeals had held.

> The protective cloak of privilege does not extend to information which an attorney secures from a witness while acting for his client in anticipation of litigation. Nor does this privilege concern the memoranda, briefs, communications, and other writings prepared by counsel for his own use in prosecuting his client's case; and it is equally unrelated to writings which reflect an attorney's mental impressions, conclusions, opinions, or legal theories.[80]

A third possible approach which the Court rejected was the "moralizing" technique described earlier. This included such catchwords as "fishing expedition," "penalizing the diligent," and "the time-honored cry of unjust enrichment."[81] The old emphasis on a personal contest of strength, secrecy, and surprise was no longer a part of the Federal Rules, as, indeed, it never should have been.

> 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. The deposition-discovery procedure simply advances that stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.[82]

The Court also noted that certain explicit restrictions are placed on discovery by the Rules. Rule 30(b), in particular, prohibits discovery when the examination "is being conducted in bad faith, or in such a manner as to annoy, embarrass, or oppress the party subject to discovery."[83] But the Court nowhere indicated that this prohibition was the basis of its decision to deny discovery in *Hickman*.[84]

By rejecting the arguments which had previously been made in cases like

79. *Id.* at 506-07.
80. *Id.* at 508.
81. *Id.* at 507.
82. *Ibid.*
83. *Id.* at 508.
84. *Cf. id.* at 512.

Hickman, the Court left itself unbound by prior practice. Thus, two alternatives remained. First, the Court could have allowed discovery of trial preparations in the same manner as other material. Second, it could have put forth a new theory for denying discovery in cases involving trial preparations. It chose the second alternative.

The Court's new theory for denying discovery can be termed one of "sufficient cause," for want of a better term. The "good cause" requirement in Rule 34 is minimal; although more than mere relevancy, it is still less than hardship or necessity. But the Supreme Court indicated in *Hickman* that something *more* than ordinary good cause must be shown in the unusual case where discovery is sought of work-product-material. Only hardship from a denial of discovery would be "sufficient cause" to warrant discovery of trial preparations.[85]

The Court, in formulating its sufficient cause test, looked to the policy behind the Federal Rules.

> Historically, a lawyer is an officer of the Court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his client. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel . . . (his) work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the court of appeals in this case as the "work-product of a lawyer." 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 cause of justice would be poorly served.[86]

The Supreme Court found a lack of "sufficient cause" in *Hickman*, since the plaintiffs had access to the records of the public inquiry at which all of the survivors had testified. The plaintiffs also had directed a series of searching interrogatories to the defendant. Under these circumstances the Court felt the discovery motion was so wanting in justification that it was no more than a demand as of right.[87]

The "sufficient cause" which might have justified discovery was not made clear. The Court, however, did make some general observations. Discovery may be had of relevant, non-privileged facts in an attorney's file when neces-

85. *Id.* at 509-14
86. *Id.* at 510-11.
87. *Id.* at 519.

sary to the preparation of a case. Such documents might be admissible in evidence, useful for impeachment or corroboration, or lead to other relevant facts. Further, discovery of work-product might be justified where witnesses were no longer available.[88] But under no circumstances could an attorney be compelled to write down his recollection of an oral statement.[89]

The Supreme Court's opinion in *Hickman* may be criticized because the Court did not define "work-product" adequately. The Court suggests simply that work-product consists of documents (e.g., witness statements) requiring legal skill, prepared by an attorney with an eye towards litigation.[90] However, the Court did not define "legal skill." It cannot be contended that the same amount of legal skill is involved in taking a witness' statement, searching a title, or researching a point of law. Nor did the Court indicate whether the work-product protection would be accorded materials prepared by a non-attorney (for example, an employee of an attorney, or an employee of the party, or the party himself). Also, the Court did not answer any of the following questions: Is an expert's labor work-product? How imminent must the litigation be? Will work-product status be lost if the materials were prepared "in the ordinary course of business"?[91]

Vagueness, too, is apparent in considering the Court's description of the "sufficient cause" which will justify discovery of work-product. What of the prohibitive expense of alternatives if discovery is denied to the moving party? Is "sufficient cause" shown by the desire to refresh a witness' recollection with a statement taken by the adversary? May the uniqueness of material ever be "sufficient cause," as for example, with statements of eyewitnesses given immediately following an event?[92]

The Court's treatment of "sufficient cause" is also subject to the criticism that it seems self-contradictory. As noted above, the Court suggests that discovery of trial preparations might be warranted if it would make possible the corroboration or impeachment of witnesses. This, presumably would mean better preparation by the moving party. Yet, the Court paradoxically denied discovery in *Hickman* specifically because the moving attorney only wanted "to better prepare himself."

Thus, the vagueness of the standards in *Hickman* left the state of discovery more confused than before. The concepts of "sufficient cause" and

88. *Id.* at 511.
89. *Id.* at 512-13.
90. This seems to be the accepted interpretation of the holding in *Hickman* on this point. See MOORE, FEDERAL PRACTICE § 34.08 (2d ed. 1950); Taine, *op. cit. supra* note 75, at 1045-06; Tolman, *Discovery Under the Federal Rules*, 58 COLUM. L. REV. 498, 507-08 (1958).
91. The district courts have attempted to resolve these questions as discussed *infra*.
92. *Ibid.*

"work-product," insofar as they raise more questions than they answer,[93] can hardly be said to provide sure guideposts for the district courts.

In addition to vagueness of standards, a still more basic problem exists in the fundamental assumptions made by the Court in *Hickman*. The Court denied discovery because it was fearful of the impact upon the adversary system.[94] That impact would come about through the "demoralization" of the legal profession.

> The primary effect of the practice advocated here would be on the legal profession itself. But it is too often overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefor of prime consequence to society, which would feel the consequences of such a practice as petitioner urges secondarily but certainly.[95]

If the Supreme Court's view is accurate, then discovery of work-product is certainly undesirable. Obviously, the adversary system presupposes that its advocates will perform their duties efficiently.

> [I]f a sound process of decision of controversies depends upon the availability of all relevant information, it seems to depend no less upon the industry and efficiency of counsel in procuring and preparing that information.[96]

However, it is far from certain that discovery of work-product material would demoralize the legal profession, as the Court asserts. Nor is it clear that attorneys would leave unwritten that which should be written, thereby coming to trial ill-prepared. The preparation which is done now presumably is done out of necessity, and this necessity will continue whether or not discovery of work-product material is allowed.

The feared consequences of work-product discovery seem groundless. Even assuming that discovery of an attorney's preparation will aid his adversary, such preparation is still necessary, and will still aid the person

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93. Virmonti v. Wheeling Ry., 10 F.R.D. 45 (N.D. Ohio 1950).

> These questions are somewhat difficult as well as burdensome to resolve. The Rules of Civil Procedure, designed to simplify practice and procedure . . . have been the subject of more interpretative literature than almost any branch of law . . . and more particularly did the case of *Hickman* v. *Taylor* account for a large part of it—a veritable Pandora's Box!

Id. at 47.

94. See Comment, 74 HARV. L. REV. 940, 1027-08 (1960).

95. Hickman v. Taylor, 329 U.S. at 515 (concurring opinion of Mr. Justice Jackson).

96. See Comment, 74 HARV. L. REV. 940, 1029 (1960). The authors of this article seem to support the Supreme Court's position in *Hickman*.

performing it. Further, discovery of trial preparations should result in *better* preparation of both parties, not worse. Once an attorney must disclose his research and investigation, he can no longer afford errors and omissions. If defects persist, they will be capitalized upon by his opponent. Thus, the attorney subjected to discovery will not cease work. Nor will the attorney who brought discovery proceedings. True, he is benefited by his adversary's labors, but it can hardly be said that he will rely on an opposing view of the case in formulating his own.[97] The necessities of adversary litigation will compel him to research his own case. This is especially true, since the attorney who has benefited by discovery will, in turn, be faced with discovery, and any omissions on his part will be capitalized upon by *his* adversary.

Consider a specific example. Most courts and commentators agree that the report of an expert, working under the directions of a party's trial counsel, comes within the work-product protection of *Hickman*.[98] Yet, if subjected to discovery, such reports would still be taken, since in many cases they are indispensable. Where food is contaminated, or a boiler blows up, or medical malpractice is claimed, or property value is in question, expert testimony is inescapably necessary.

Consider still another example. Many discovery cases involve witness statements taken as a matter of course by a party's agents immediately following an accident. Under *Hickman*, these statements are work-product.[99] Yet railroads, ship and bus companies would still require their crew members and claim agents to obtain such statements even though subject to discovery, since such statements are necessary to the preparation of the company's case. Contemporary records are the best and sometimes the only means of getting the details that may be critical in future litigation.

The Court in *Hickman* did not seem to take into consideration that the extent to which work-product materials reflect an attorney's mental impressions, personal beliefs and theories varies considerably with the type of work-product materials in question. With witness statements and experts' opinions, it may be de minimus. Yet, these are most frequently involved in work-product discovery cases. At the other end of the scale are legal memoranda and briefs. While these certainly reflect an attorney's legal theories, and should, perhaps,

97. This is contrary to Mr. Justice Jackson's fears about a "learned profession functioning on borrowed wits." Hickman v. Taylor, 329 U.S. at 516 (concurring opinion).

98. [T]his expansion of the *Hickman* doctrine seems to be in clear accord with the rationales of the *Hickman* opinion. Such an expansion would mean that the work-product of experts and other nonlawyers who participate in the preparation of cases for trial would be prima facie protected under the work-product concept, but would be subject to discovery where a showing of good cause can be made.

Taine, *op. cit. supra* note 75, at 1052. See footnote 132 *infra*, as to the desirability of allowing discovery of an expert's opinion.

99. See, *e.g.*, Alltmant v. United States, 177 F.2d 971 (3d Cir. 1949).

be protected, the broad work-product concept is not necessary for that purpose. This would seem to be true because *no* demand has been made for such materials in *any* reported case.[100]

Thus, the Court's fears of unjust enrichment seem unwarranted. Protecting the legal theories in witness and expert statements actually means protecting very little. To protect legal memoranda and briefs, if it is necessary, a more precise concept could be fashioned. Such a concept would, of course, permit better factual preparation through less limited discovery by the moving party.

The Court's desire in *Hickman* to protect attorneys seems to be based on one premise. The premise is that an attorney prepares for trial only to surprise his adversary. Discovery violates an attorney's secrecy, thereby dispelling any opportunity for surprise. Ergo, the Court concludes, discovery would discourage adequate preparation for trial.

But this reasoning presupposes that secrecy is essential to an adversary system. The argument in support of this view states that secrecy permits surprise, and surprise is a potent weapon for separating truth from falsehood. The honest person, so the reasoning runs, has no fear of surprise, since he knows the truth. The dishonest may be discredited by sudden and unexpected confrontation. If, however, the dishonest witness knows the truth in advance, he will lie. Thus, full discovery, by dispelling secrecy, serves only to insulate dishonesty from exposure.[101]

However, the technique of surprise confrontation does not always discriminate between the honest and dishonest witness. An honest person may well forget what he said in the past.[102] He may also be surprised by a statement inaccurately attributed to him.

It should be remembered that one of the aims of the Federal Rules was the elimination of surprise as a weapon of advocacy.[103] Our judicial system functions on the premise that most people are honest.[104] For those who are dishonest, there are techniques of exposure, such as cross-examination and impeachment. In addition, where dishonesty is feared, a deposition may first be taken of the moving party. This procedure would prevent a witness from fabricating a story in the light of prior inconsistent statements, yet, still apprises him of the inconsistencies.[105] In any event, the argument favoring the

100. But see Ceco Steel Prods. Corp. v. H. K. Porter Co., 31 F.R.D. 142 (N.D. Ill. 1962).

101. See Hawkins, *What's So Wrong About Surprise?* 39 A.B.A.J. 1075 (1953).

102. See McCoy v. General Motors Corp., 33 F.R.D. 354 (W.D. Pa. 1963).

103. The Court in *Hickman* paradoxically emphasizes this point.

104. See, *e.g.*, United States v. 23.76 Acres of Land, 32 F.R.D. 593 (D. Md. 1963).

105. This procedure utilized in Parla v. Matson Co., 28 F.R.D. 348 (S.D.N.Y. 1961) and McCoy v. General Motors Corp., 33 F.R.D. 354 (W.D. Pa. 1963) for just this purpose.

continued use of secrecy and surprise as truth seeking devices in the trial should not be used as a justification for keeping legal theories and arguments secret. Full disclosure of these was long a desire of even common law procedure and is certainly a part of modern practice. Yet, *Hickman* holds that such materials must be protected as part of an attorney's "legal thinking."

It would seem that one fundamental conviction weighs heavily against the Supreme Court's decision in *Hickman*. It is the belief that a trial is a search for truth, and that truth may best be found if both sides are equally and adequately informed. Such preparation is possible only if inequality of resources is, to some extent, mitigated. Discovery can do this. The Supreme Court, by denying discovery in *Hickman*, prevented equal preparation by the parties. Thus, this action not only was unwarranted, as discussed above, but also did positive harm. Not only was the moving party denied a chance for better preparation, but so also was the other party. Discovery is a two-way street.

Hickman operates to prevent adequate preparation in many typical discovery cases, where discovery would mean better preparation. Discovery would put a party in a better position to impeach opposing witnesses. It would mean that he would know of, and be prepared to explain, apparent inconsistencies in his own case. Such discovery of work product would also mean that both sides would have accurate pictures of the strengths and weaknesses of each position, thereby encouraging realistic settlements.

Discovery of work-product in a typical case would involve a witness statement. True, a party may frequently take his own statement of a witness. However, the witness may have forgotten important details,[106] in the interim; or he may be uncooperative; or the attorney may fail to ask the proper questions and thereby not strike the spark of recollection. In such cases denial of discovery would mean that one party is left in the dark as to vital facts.

In weighing the merits of the proceeding discussion, the following remarks by Judge Frank seem appropriate.

> We hear some of them complaining that the new Federal Rules of Civil Procedure with their hospitality to pre-trial discovery have engendered fraud and perjury. The answer is that no one knows. Unfortunately, there was perjury and coaching of witnesses in the old days, no data is available to show whether those evils have waxed or waned in these newer days. Some lawyers also grumble, saying that it is unfair that a lawyer who has diligently prepared his case should be obliged to let counsel for the adversary scrutinize his data. But the reformers are surely right in replying that "unfairness" to a diligent lawyer is of no importance as against much needed improvement in judicial ascertainment of the "facts" of the case; the public interest in such ascertainment is paramount. The supporters of lib-

106. See, *e.g.*, McCoy v. General Motors Corp., 33 F.R.D. 354 (W.D. Pa. 1963).

> erality in discovery assert that it tends to bring about settlements and to reduce litigation. Whether that is true, again we do not know; the experiment is in full operation, but the returns are not yet in.
>
> At any rate, the old "fixed" principle of keeping the opponent in the dark as to the tenor of the evidence in one's possession is now out of date.[107]

In sum, the *Hickman* Court seems to have been tilting at windmills. The materials which they felt reflected "legal thinking" may actually reflect very little. The fear that such materials will not be prepared, if subjected to discovery in the same manner as other data, seems unwarranted. Furthermore, all this error is not harmless, for the *Hickman* doctrine may well mean in many cases that the moving party is forced to go to trial "in the dark" as to important aspects of the case. If this is true, then *Hickman*, indeed is a considerable step backward to the antiquated and atavistic values of the common law.

Discovery Under the Hickman "Work-Product" and "Sufficient Cause" Doctrines

Since *Hickman* many of the old objections to discovery of trial preparations have been discarded.[108] Thus, cries of "fishing expedition," "reward the lazy," "punish the diligent," "unfairness," and "unjust enrichment" are no longer accorded a sympathetic ear by the federal courts.[109] In addition, the tests of admissibility, hearsay, and materiality no longer apply, in part due to *Hickman* and in part due to amendments of Federal Rules 26 and 34.[110] The defense of privilege is still used but only in the mistaken sense that work-product is a form of privilege.[111]

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107. Hoffman v. Palmer, 129 F.2d 976 (2d Cir. 1945).

108. See generally Taine, *op. cit. supra* note 75, at 1036-40.

109. See, *e.g.*, Tower v. Southern Pac. Ry., 11 F.R.D. 174 (N.D. Cal. 1951); Bifferato v. States Marine Corp. of Del., 11 F.R.D. 44 (S.D.N.Y. 1951); O'Donnell v. Breuninger, 9 F.R.D. 245 (D.D.C. 1949). But the old rules are occasionally revived for an encore. See O'Brien v. Equitable Life Ins. Co., 13 F.R.D. 475 (W.D. Mo. 1953); Schuyler v. United Air Lines Assur. Soc. of United States, 10 F.R.D. 111 (N.D. Pa. 1950).

110. The requirement of admissibility has been abolished by the express language of Rule 26, and the requirement of materiality has been deleted from Rule 34 by amendment. Hearsay, however, occasionally reappears as an objection to discovery. *But cf.* Blair v. Travelers Ins. Co., 9 F.R.D. 99 (W.D. Mo. 1949). So also does admissibility. S.E.C. v. R.A. Holman & Co., 34 F.R.D. 139 (S.D.N.Y. 1963).

111. See, *e.g.*, City of Philadelphia, Pa. v. Westinghouse Corp., 32 F.R.D. 350 (E.D. Pa. 1962); Ceco Steel Prod. Corp. v. H. K. Porter Co., 31 F.R.D. 142 (N.D. Ill. 1962). Testimonial privilege, unlike work-product status, is absolute, and cannot be defeated. Privilege pertains only to attorney-client communications, while work-product encompasses not only this but all work done by an attorney for his client. Privilege is waived by publication; work-product protection is not. Where the two overlap, one may be waived while the other remains. Privilege extends only to the work of attorneys, while some courts have extended work-product to non-attorneys. Finally, in

Since *Hickman* a standard procedure has been utilized by the district courts in discovery cases. First, the moving party must show that ordinary good cause (usually little more than relevancy)[112] is present. The adverse party then has the burden of showing that work-product material is involved. If it is, then the moving party must show "sufficient cause" (usually necessity).[113] If the showing is made, discovery is allowed. The district courts have generally recognized this distinction between ordinary good cause and the "sufficient cause" necessary for discovery of work-product material.[114]

The vagueness of the *Hickman* work-product standard has given the district courts difficulty. Particularly is this true in fact situations which differ from *Hickman*. In *Hickman*, the adverse party was an independent attorney. The lower federal courts have sometimes treated house counsel the same as independent counsel. Yet, it may well be that the impact of work-product discovery on the two is different, a possibility not considered by the district courts.[115]

In fact situations different from *Hickman*, the district courts have attempted to follow the Supreme Court by according work-product status where they feel discovery would discourage trial preparation. The district courts reason that our adversary system depends on the use of certain skills, but leaves it to the parties to provide them. If it ceases to be to the advantage of a party to provide the skills, the system must fail.[116] The point at which providing the skills becomes disadvantageous for a party is that point at which his efforts benefit his adversary. That benefit might come through discovery. Thus, the district courts protect materials involving "legal skill." In applying

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Scourtes v. Fied W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953),

> The purpose of the attorney-client privilege is to encourage full disclosure of information between an attorney and his client by guaranteeing the inviolability of their confidential communications. The work-product of an attorney, on the other hand, is accorded protection for the purpose of preserving our adversary system of litigation by assuring an attorney that his files, except in unusual circumstances, shall remain free from encroachments of opposing counsel.

Id. at 58. See also Transmiria Prods. Corp. v. Monsanto Chem. Co., 26 F.R.D. 572 (S.D.N.Y. 1960); Carpenter-Trant Drill Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257 (D. Neb. 1959); Vilaster-Kent Theater Corp. v. Brandt, 19 F.R.D. 522 (S.D.N.Y. 1956), Blank v. Great No. Ry. Co., 4 F.R.D. 213 (D. Minn. 1943); Note, GEO. WASH. L. REV. 371 (1957).

112. See discussion accompanying notes 49-52 *supra.*

113. See discussion accompanying notes 85-93 *supra.*

114. See, *e.g.*, Crowe v. Chesapeake & Ohio Ry. Co., 29 F.R.D. 148 (E.D. Mich. 1961); Sturm v. A. & P., 16 F.R.D. 476 (D. Conn. 1961); United Airlines Inc. v. United States, 26 F.R.D. 213 (D. Del. 1960); Connecticut Mut. Life Ins. Co. v. Shields, 16 F.R.D. 5 (S.D.N.Y. 1954); Herbst v. Chicago, Rock Island & Pac. R.R. Co., 10 F.R.D. 14 (S.D. Iowa 1950).

115. Georgia-Pac. Plywood Co. v. U.S. Plywood Co., 18 F.R.D. 463 (S.D.N.Y. 1955); Connecticut Mut. Life Ins. Co. v. Shields, 16 F.R.D. 5 (S.D.N.Y. 1954); Berger v. Central Vt. R.R. Co., 8 F.R.D. 419 (D. Mass. 1948).

116. See Comment, 74 HARV. L. REV. 940, 1029 (1960); 329 U.S. 515 (Mr. Justice Jackson's concurring opinion).

this principle, the district courts have, for example, distinguished between a general list of witnesses to an event and a list of those a party intends to call at the trial. Only the latter involves "legal skill" and is classified as work-product.[117]

Similarly, the district courts have drawn distinctions based on the amount of legal skill present in a witness statement. If the statement was recorded verbatim, or in response to a previously prepared questionnaire, it will not be considered work-product.[118] If, however, the statement is the result of intensive questioning by an attorney, it is protected as work-product.[119]

As with the Supreme Court in *Hickman*, the district courts have developed no consensus as to what constitutes "legal skill" or when and by whom it is exercised. In addition, the use of this criterion is misleading, for some things which certainly require legal talents cannot be kept secret and free from discovery. If the contrary were true, even the pleadings would be unknown to the parties.[120] Indeed, even the courts using the "legal skill," test deny work-product status to materials which arguably involve legal talents. For example, the names of all the witnesses to an event may be discovered.[121] So also, the facts of an adversary's claim may be sought out.[122] Yet, seeking witnesses and sifting facts are chores normally performed by lawyers, and in some degree, require legal skill.

Furthermore, the "legal skill" test seems to be defective in its basic assumption. It does not seem probable that lawyers will actually stop preparing materials involving legal skill because discovery of such materials is allowed. They will still determine which witnesses to call and will still take statements from witnesses. If this is so, denial of discovery serves only to prevent adequate preparation.

In applying *Hickman*, the district courts have evolved another standard for determining whether work-product materials are involved. This second criterion takes the form of a requirement that the materials must be prepared in anticipation of litigation.[123] Information that would be gathered regardless

117. Richards v. Maine Cent. Ry., 21 F.R.D. 595 (D. Me. 1957); McNamara v. Erschen, 8 F.R.D. 427 (D. Del. 1948); Taine, *op. cit. supra* note 75, at 1047.

118. Diamond v. Mohawk Rubber Co., 33 F.R.D. 264 (D. Colo. 1963); City of Philadelphia, Pa. v. Westinghouse Corp., 32 F.R.D. 350 (E.D. Pa. 1962).

119. Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953); Lundberg v. Welles, 11 F.R.D. 136 (S.D.N.Y. 1951); Molloy v. Trawler Flying Cloud Inc., 10 F.R.D. 158 (D. Mass. 1950); United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949).

120. Hartfield v. Gulf Oil Corp., 29 F.R.D. 163 (E.D. Pa. 1962).

121. Taylor v. Atchinson Topeka & Santa Fe Ry., 33 F.R.D. 283 (W.D. Mo. 1962).

122. B. & S. Drilling Inc. v. Halliburton Oil Well Cementing Co., 24 F.R.D. 1 (S.D. Texas 1960).

123. See, *e.g.*, Harvey v. Eimco Corp., 28 F.R.D. 380 (E.D. Pa. 1960); E. I. DuPont DeNemours Co. v. Phillips Petroleum Corp., 24 F.R.D. 416 (D. Del. 1959); Lichter v. Mellon-Stuart Co., 24 F.R.D. 397 (W.D. Pa. 1959); Browner v. Fireman's

of whether suit is brought is not classified as work-product material.[124] This is true even though the material is gathered by an attorney using legal skill. For example, work-product status has been denied where an attorney, using legal skill, gathered witness statements ordinarily gathered by a corporate claims agent.[125]

The district courts have utilized this second criterion to allow discovery against large corporations. Such entities as railroads, bus companies and shipping lines constitute their employees as agents to take statements of witnesses when an accident happens in their presence. They also have claims departments which conduct investigations. Materials thus gathered "in the ordinary course of business" are not considered work-product by the district courts.[126]

The argument used to justify the use of this second criterion is rooted in the adversary system. The adversary system, so the reasoning goes, must avoid discouraging the use of legal skills. But material prepared in the ordinary course of business will be prepared regardless of whether discovery may ultimately be allowed.[127] Thus, such material does not need work-product protection.

However, there are several objections which may be made to this reasoning. The first is that this standard of "preparation for litigation" is vague. For example, how near must litigation be in order for one to prepare for it? Must a pleading have already been filed?[128] In addition, the broad assumption that all material prepared for litigation must be protected or it will not be prepared, does not accord with the necessities of litigation. Most material, such as expert's reports and witness statements, is indispensable. It therefore, will be prepared regardless of whether or not discovery is allowed.

The second objection to the reasoning of the district courts is fundamental The district courts accord work-product protection to material prepared in anticipation of litigation. They say, however, that this does not include material

Ins. Co. of Newark, N. J., 9 F.R.D. 609 (S.D.N.Y. 1949); United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949); Smith v. Washington Gas Light Co., 7 F.R.D. 735 (W.D. La. 1948).

124. See, *e.g.*, Burns v. New York Cent. Ry. Co., 33 F.R.D. 309 (N.D. Ohio 1963).

125. Bifferato v. States Marine Corp. of Del., 11 F.R.D. 44 (S.D.N.Y. 1950); Reiss v. British Gen. Ins. Corp., 9 F.R.D. 610 (S.D.N.Y. 1949); Newell v. Capitol Transit, 7 F.R.D. 732 (D.C. 1948).

126. See, *e.g.*, Burke v. United States, 32 F.R.D. 213 (E.D.N.Y. 1963); United Airlines Inc. v. United States, 26 F.R.D. 213 (D. Del. 1960); Vilastor-Kent Theater Corp. v. Brandt, 19 F.R.D. 522 (S.D.N.Y. 1956); Henderson v. Southern Pac. Ry., 17 F.R.D. 349 (E.D. Tenn. 1955); Brown v. New York, N.H. & Htfd. Ry. Co., 17 F.R.D. 324 (S.D.N.Y. 1955); Humphries v. Pennsylvania Ry. Co., 14 F.R.D. 177 (N.D. Ohio 1953); Donnhardt v. Holman, 12 F.R.D. 79 (D. Colo. 1951); Tower v. Southern Pac. Ry., 11 F.R.D. 174 (N.D. Cal. 1951); Reiss v. British Gen. Ins. Co., 9 F.R.D. 610 (S.D.N.Y. 1949); Newell v. Capitol Transit Co., 7 F.R.D. 732 (D.D.C. 1948).

127. Comment, 74 HARV. L. REV. 940, 1030 (1960).

128. The case of Burke v. United States, 32 F.R.D. 213 (E.D.N.Y. 1963) answered this question affirmatively.

prepared "in the ordinary course of business." This distinction is false. Such material as claims agents' reports, crew members records, and witness statements, are prepared for litigation.[129] This is the very reason for them. Yet, they are also prepared "in the ordinary course" specifically because this is the most efficient means of preparing for trial.

It is significant that the district courts have employed such a specious distinction in order to allow discovery. It indicates dissatisfaction with the *Hickman* assumption that discovery will discourage preparation. In contrast, the district courts seem to have concluded that discovery will not affect trial preparations in the large number of cases where a large corporate entity is involved.

Most courts agree that material requiring legal skill to prepare and prepared in anticipation of litigation is work-product, if an attorney was responsible for the preparation. But if someone other than an attorney has prepared the material, the courts split. Thus, material prepared by agents hired by an attorney and working under his supervision, may or may not be within the work-product protection.[130] Similarly, material may or may not be work-product material when gathered by the party or its agents independently of attorneys.[131] The only material accorded work-product status with substantial regularity is that material prepared by experts.[132]

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129. See cases collected in note 126, *supra.*

130. Cases granting work-product status: Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949); Snyder v. United States, 20 F.R.D. 7 (E.D.N.Y. 1956); Slifka Fabrics v. Providence Washington Ins. Co., 19 F.R.D. 374 (S.D.N.Y. 1956); Thompson v. Hoitsma, 19 F.R.D. 112 (D.N.J. 1956); Thomas v. Trawler Red Jacket Inc., 16 F.R.D. 349 (D. Mass. 1954).

Cases denying work-product status: Diamond v. Mohawk Rubber Co., 33 F.R.D. 264 (D. Colo. 1963); Durkin v. Pet Milk Co., 14 F.R.D. 385 (W.D. Ark. 1953); Royal Exchange Assur. v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952); Colorado Milling & Elevator Co. v. American Cyanamid Co., 11 F.R.D. 306 (W.D. Mo. 1951). A similar problem arises when a party seeks discovery of material in the possession of someone in interest with an adversary (e.g. an adversary's insurer, or a potential co-defendant). The courts' treatment of such outsiders has been inconsistent. They have sometimes treated them as parties and thus subject to discovery. Lichter v. Mellon-Stuart Co., 24 F.R.D. 397 (W.D. Pa. 1959); Wilson v. David, 21 F.R.D. 217 (W.D. Mich. 1957); Shepard v. Castle, 20 F.R.D. 184 (W.D. Mo. 1957); Fey v. Stauffer Chem. Co., 19 F.R.D. 526 (D. Neb. 1956); Donnhardt v. Holman, 12 F.R.D. 79 (D. Colo. 1951); Bingle v. Liggett Drug Co., 11 F.R.D. 593 (D. Mass. 1951); Simper v. Trimble, 9 F.R.D. 598 (W.D. Mo. 1949); Martin v. N. V. Nederlandsche Amerikaansche St. M., 8 F.R.D. 363 (S.D.N.Y. 1948).

131. Cases granting work-product status: Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949); Safeway Stores Inc. v. Reynolds, 176 F.2d 476 (D.C. Cir. 1949); Cleary Bros. v. Christie Scow Corp., 176 F.2d 370 (2d Cir. 1949).

Cases denying work-product status: Blanchet v. Colonial Trust Co., 23 F.R.D. 118 (D. Del. 1958); Henderson v. Southern Ry. Co., 17 F.R.D. 349 (E.D. Tenn. 1955); Sturm v. A. & P., 16 F.R.D. 476 (D. Conn. 1954); Meadows v. Southern Ry. Co., 14 F.R.D. 164 (E.D. Tenn. 1953); Broomshire v. Pennsylvania Ry. Co., 14 F.R.D. 154 (N.D. Ohio 1953).

132. Lee v. Crown Cent. Petroleum Corp., 33 F.R.D. 11 (S.D. Tex. 1963); United

Holding that only attorneys can come within work-product protection is an extremely narrow reading of *Hickman*.[133] If the Supreme Court's fundamental assumptions are accepted, then that case must apply to non-attorneys.

> [W]e think its rationale has a much broader sweep and applies to all statements of prospective witnesses which a party has obtained for trial counsel's use . . . we can see no distinction between statements secured by a party's trial counsel personally in preparation for trial and those obtained by others for the use of the party's trial counsel. . . .[134]

If discovery does, in fact, discourage preparation, then it should be as effective

States v. 4.724 Acres of Land, 31 F.R.D. 290 (E.D. La. 1962); United States v. 900.57 Acres of Land, 30 F.R.D. 512 (W.D. Ark. 1962); E. I. DuPont DeNemours & Co. v. Phillips Petroleum Corp., 24 F.R.D. 416 (D. Del. 1959); American Oil Co. v. Pennsylvania Petroleum Prod. Co., 23 F.R.D. 680 (D. R.I. 1959); Carpenter-Trant Drill Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257 (D. Neb. 1959); United States v. 6.82 Acres of Land, 18 F.R.D. 195 (D.N.M. 1955); Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D. N.J. 1954); Golden v. R. J. Schofield Motors, 14 F.R.D. 521 (N.D. Ohio 1953); United States v Bennett, 14 F.R.D. 166 (E.D. Tenn. 1953); Colonial Airlines v. Janus, 13 F.R.D. 199 (S.D.N.Y. 1952); United States v. 5 Cases, 9 F.R.D. 81 (D. Conn. 1949); Cold Metal Process Co. v. Aluminum Co. of Am., 7 F.R.D. 684 (D. Mass. 1947); Lewis v. United Airlines Transport Corp., 32 F. Supp. 21 (W.D. Pa. 1946); 4 MOORE, FEDERAL PRACTICE & PROCEDURE § 26.64 (2d ed. 1962). Where discovery of an expert's work-product has been allowed, it has been restricted to the factual basis for the expert's work. Such discovery is allowed only when the factual basis has been destroyed or is otherwise unavailable to the moving party. United States v. 48 Jars, 23 F.R.D. 192 (D.D.C. 1958); Julius Hyman & Co. v. American Motorists Ins. Co., 17 F.R.D. 386 (D. Colo. 1955); Golden v. Schofield Motors, 14 F.R.D. 521 (N.D. Ohio 1952). There have been exceptions. Some courts allow discovery of *all* of an expert's report where the moving party agrees to pay part of the expert's fee. This has the merit of fairness. It also guarantees equal preparation of the parties. The court in Henlopen Hotel Corp. v. Aetna Ins. Corp., 33 F.R.D. 306 (D. Del. 1963) followed this approach, stating:

> [P]retrial examination may reveal such major defects in the reasoning and conclusions of the experts of one side or the other as to lead to settlement or, at the very least, enable counsel to prepare a searching and informative cross-examination for the purpose of laying bare the relative abilities of the various experts so that a jury of laymen can best weigh and assess the value of their testimony.

Id. at 308. The courts denying discovery of an expert's opinion, as distinguished from its factual basis, do so on the theory that the opinion is not unique, like an eye-witness' statement. Thus, they reason, discovery is unnecessary and only contributes to unjust enrichment. But, in fact, the opinion of every expert is unique.

> From the very nature of the questions eliciting opinions sought to be answered, there is no basis to believe that the information sought to be elicited, since it is subjective in nature, might be obtained by the defendants except by the questons being answered by the only person, the expert, who has such information. It is to be noted that . . . one of the express uses of depositions is that of cross examination, Rule 26(d)(1), and it needs no citation of authority to say that an expert is the most difficult witness to cross examine, particularly if one is unaware until trial of the substance of his testimony.

United States v. 23.76 Acres of Land, 32 F.R.D. 593, 596 (D. Md. 1963).

133. Slavish dedication to the requirement that an attorney must have prepared the material results in absurd hair-splitting. E.g., must he be a member of the local bar? *See* Georgia-Pacific Ply. Co. v. U.S. Ply. Co., 18 F.R.D. 463 (S.D.N.Y. 1955).

134. Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949). See Note, 42 ILL. L. REV. 238, 241 (1947).

with non-attorneys as it is with attorneys. For example, attorneys might cease hiring and directing private investigators or experts, if their work is subject to discovery. Similarly, corporations might cease relying on claims agents or crew members. That this is a logical implication of *Hickman* seems clear. But it points up, again, the errors in the basic assumptions of that case. Discovery will not, for example, discourage the use of experts or private investigators, since in many cases they are indispensable. Likewise, crew members who witness an accident will still be required to submit contemporary reports, since such reports are invaluable in preparing a case.

If the fear is that these people will continue to be employed but will not *write down* their findings,[135] thereby hoping to avoid discovery, a simple remedy is at hand. The attorney, or the employee could be compelled to write down his recollection of his findings. There is nothing novel in this. Discovery by interrogatories, whether of witnesses or parties, frequently compels the respondent to perform the same act.

Once the district courts find that work-product material is involved, they require a showing of more than ordinary good cause before allowing discovery. This requirement, "sufficient cause," is not satisfied by a showing of mere curiosity or convenience.[136] Indeed, even ordinary good cause would not be so satisfied. Also it is not enough that the moving party wishes to assure himself that he has made no errors in preparing for trial.[137] This was made clear in *Hickman.* Furthermore, there is no showing of sufficient cause where the moving party may gain the materials sought by the same means as the adverse party, as with public records or expert testimony.[138] Finally, a desire to impeach, or avoid impeachment, is not sufficient cause.[139]

The decision in *Hickman* compels the foregoing results. But in spite of *Hickman,* many district courts have made an effort to find sufficient cause wherever discovery was important to the moving party's case. For example, if a critical witness has disappeared following an accident, a statement taken

135. This was the fear the Supreme Court expressed in *Hickman.*

136. Gebhardt v. Isbrandtsen Co., 10 F.R.D. 119 (S.D.N.Y. 1950).

137. See, *e.g.,* Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949); McSparran v. Bethlehem-Cuba Iron Mines Co., 26 F.R.D. 619 (E.D. Pa. 1960).

138. Williams v. Northern Pac. Ry. Co., 30 F.R.D. 26 (D. Mont. 1962); McSparran v. Bethlehem-Cuba Iron Mines Co., 26 F.R.D. 619 (E.D. Pa. 1960); Endte v. Hermes Export Co., 20 F.R.D. 162 (S.D.N.Y. 1957); Wilson v. Capitol Airlines, 19 F.R.D. 263 (N.D.N.C. 1956); Hilton v. Contiship Corp., 16 F.R.D. 453 (N.D. Cal. 1954).

Inequality of investigative resources is, however, sometimes "sufficient cause." Burns v. New York Cent. Ry. Co. Inc., 33 F.R.D. 309 (N.D. Ohio 1963); Cairns v. Chicago Express Inc., 25 F.R.D. (N.D. Ohio 1960); United States v. Swift & Co., 24 F.R.D. 280 (N.D. Ill. 1959); Henderson v. Southern Ry., 17 F.R.D. 349 (E.D. Tenn. 1955); Royal Exch. Assur. Co. v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952).

139. See, *e.g.,* Lester v. Isbrandtsen Co., 10 F.R.D. 338 (S.D. Texas 1950); Hudalla v. Chicago, M., S. P. & P. R. Co., 10 F.R.D. 363 (D. Minn. 1950). *Contra,* Seven-Up Co. v. Get-Up Corp., 30 F.R.D. 550 (N.D. Ohio 1962).

from that witness may be discovered.[140] Where a witness has become practically unavailable, as where he is hostile[141] or has moved a great distance,[142] discovery may be had of any statements taken by opposing counsel. In such cases as these, the lower courts will nevertheless sometimes deny discovery where the moving party should have foreseen and avoided the supervening impossibility.[143]

The district courts have sometimes found sufficient cause even where a witness was equally available to both sides. *Hickman* would leave the moving party to discovery through depositions of the witness. The lower federal courts will, in contrast, order production of a statement taken from an eye-witness immediately after an accident. This is especially true if the witness' recollection has become hazy through the passage of time.[144] Usually such a witness has a general recollection of the outlines of the event. Thus, the moving party seeks only to better prepare himself, a motive condemned in *Hickman*. But such preparation is essential, because forgotten details may be of critical importance and may be revealed only in contemporaneous statements. Such statements, some of the district courts have said, are unique.

> In cases of this sort, where much may depend upon the necessarily uncertain memory of a few individuals as to what occurred in the space of a few minutes or a few seconds, it is important and indeed necessary that both parties should have access to such more or less contemporaneous record of events as may exist. Statements taken at about the time of the accident are unique . . . There can be no duplication by further statements or depositions that rely on memory.[145]

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140. See, *e.g.*, Roach v. Boston Tow Boat Co., 19 F.R.D. 267 (D. Mass. 1956).

141. Diamond v. Mohawk Rubber Co., 33 F.R.D. 264 (D. Colo. 1963); Broomshire v. Pennsylvania Ry. Co., 14 F.R.D. 154 (N.D. Ohio 1953); Dusha v. Pennsylvania Ry. Co., 10 F.R.D. 150 (N.D. Ohio 1950). *Contra*, Tandy v. Peerless Gas Co., 20 F.R.D. 223 (S.D.N.Y. 1957); Lindsay v. Prince, 8 F.R.D. 233 (N.D. Ohio 1948). However, the moving party must have made an actual attempt to take a deposition of the hostile witness. Burns v. New York Cent. Ry. Co., 33 F.R.D. 309 (N.D. Ohio 1963).

142. Allan v. Denver-Chicago Trucking Co., 32 F.R.D. 616 (W.D. Mo. 1962); Carpenter-Trant Drill Co. v. Magnolia Petroleum Co., 23 F.R.D. 257 (D. Neb. 1959); Wilson v. David, 21 F.R.D. 217 (W.D. Mich. 1957). *Contra*, Tandy v. Peerless Gas Co., 20 F.R.D. 223 (S.D.N.Y. 1957).

143. Wilson v. David, 21 F.R.D. 217 (W.D. Mich. 1957); Thomas v. Trawler Red Jacket Inc., 16 F.R.D. 349 (D. Mass. 1954). This represents a return to the "unjust enrichment" and "punish the diligent" philosophy already discussed, and hardly seems warranted by the Federal Rules, *Hickman*, or common sense. Cairns v. Chicago Express Inc., 25 F.R.D. 169 (N.D. Ohio 1960).

144. See, *e.g.*, Williams v. Northern Pac. Ry. Co., 30 F.R.D. 26 (D. Mont. 1962); Roach v. Boston Tow Boat Co., 19 F.R.D. 26 (D. Mass. 1956); Henderson v. Southern Ry., 17 F.R.D. 349 (E.D. Tenn. 1955); Tannenbaum v. Walker, 16 F.R.D. 570 (E.D. Pa. 1954); Thomas v. Trawler Red Jacket Inc., 16 F.R.D. 349 (D. Mass. 1954); Herbst v. Chicago, Rock Island & Pac. Ry. Co., 10 F.R.D. 14 (S.D. Iowa 1950).

145. Guilford Nat. Bank of Greensboro v. Central Ry. Co., 24 F.R.D. 493 (N.D. N.C. 1960). See also Taylor v. Central Ry. Co. of N. J., 21 F.R.D. 112 (S.D.N.Y. 1957);

Some district courts have refused to follow this "uniqueness" approach. Their objection is that this need is present in most cases where one side begins preparation before the other. This has also been the position of the courts of appeals.[146] Since the Supreme Court has emphasized that only in the exceptional case will discovery of work-product be allowed, these courts feel bound to find an absence of "sufficient cause" no matter how genuine the need of the moving party may be. This reasoning, compelled as it is by *Hickman*, constitutes a serious indictment of that case.

The district courts will sometimes allow discovery of witness statements in one other instance where the witness is equally available to both sides. Where a party seeks discovery of his own statement, taken perhaps by the agents of a party or his insurer.[147] "Sufficient cause" in such cases may be found if the statement was obtained while the party did not have counsel,[148] was the product of over-reaching or false pretenses,[149] or where the party's memory has failed substantially.[150]

Some courts have found that a showing of "ordinary" good cause is insufficient to allow work-product discovery because it would encourage perjury.[151] However, that danger always exists with discovery, whether of work-product material or ordinary material. Furthermore, if the danger is substantial, the present recollection of the moving party's witnesses can be preserved by deposition, before discovery is allowed. This would prevent these witnesses from conforming their statements to prior inconsistent positions.[152]

CONCLUSION

The Federal Rules were intended to work a quiet revolution. To the extent that they have been successful, modern federal practice is vastly superior

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Brown v. New York, N.H. & Htfd. Ry., 17 F.R.D. 324 (S.D.N.Y. 1955); Pennsylvania Ry. Co. v. Julian, 10 F.R.D 452 (D. Del. 1950).

146. See, *e.g.*, Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949).

147. Chatman v. American Export Lines Inc., 20 F.R.D. 176 (S.D.N.Y. 1956). There is no reason, beyond the possible benefit to the defendant of surprise, why plaintiff's statement should not be produced. The purpose of the Federal Rules is to avoid the element of surprise by requiring full disclosure. *Id.* at 178. Some lower federal courts allow discovery here as of right. *See* Cannon v. Aetna Freight Lines Inc., 11 F.R.D. 93 (E.D. Pa. 1950).

148. McCoy v. General Motors Corp., 33 F.R.D. 354 (W.D. Pa. 1963); Pasternak v. Lehigh Valley Ry. Co., 28 F.R.D. 383 (E.D. Pa. 1961); Parla v. Matson Navigation Co., 28 F.R.D. 348 (S.D.N.Y. 1961); Sharon Steel Corp. v. Westinghouse Elec. Corp., 26 F.R.D. 113 (N.D. Ohio 1960); United States v. Myers, 18 F.R.D. 299 (E.D.N.Y. 1955). *Contra*, Safeway Stores v. Reynolds, 176 F.2d 476 (D.C. Cir. 1949).

149. *E.g.*, Sharon Steel Corp. v. Westinghouse Elec. Corp., 26 F.R.D. 113 (N.D. Ohio 1957).

150. See Taylor v. Central Ry. Co. of N. J., 21 F.R.D. 112 (S.D.N.Y. 1957); Dinero v. United States Lines Co., 21 F.R.D. 316 (S.D.N.Y. 1957).

151. See, *e.g.*, Parla v. Matson, 28 F.R.D. 348 (S.D.N.Y. 1961). *Contra, e.g.*, McCoy v. General Motors Corp., 33 F.R.D. 354 (W.D. Pa. 1963).

152. See discussion at notes 101-05, *supra.*

to its common law predecessor. But old habits die hard. The same conservatism which restrained the common law courts motivates their successors, and modern pre-trial techniques are subject to the cautious criticisms of old. In particular, the fear that a clean sweep would collapse the house motivated the Supreme Court in *Hickman* to limit sharply the range of discovery within the Rules. Yet, broad discovery would not destroy the adversary system. On the contrary, it might impel its practitioners to greater diligence.

It is plain that *Hickman v. Taylor* has not provided adequate guides for the lower federal courts. Furthermore, these courts have found it difficult to live with the fundamental assumptions of that case and have, in some instances, repudiated them. It would seem that an abandonment of the step backward represented by *Hickman v. Taylor* is in order.