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Discovery: Work Product and Good Cause Development Since Hickman v. Taylor

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DISCOVERY: WORK PRODUCT AND GOOD CAUSE DEVELOPMENT SINCE "HICKMAN V. TAYLOR"

Since the adoption of the Federal Rules of Civil Procedure, a great amount of conflict has arisen as to the applicability of the pre-trial discovery provisions when they are invoked to reach materials gathered or prepared by an adverse attorney for litigation. The first definitive statement of the governing principles in this area was set forth in the Supreme Court decision in *Hickman v. Taylor*.

The Court, while strictly limiting the attorney-client privilege to attorney client relations, created a quasi-privilege for information from non-client sources if obtained by an attorney in preparation for litigation. This work product exemption protects the material prepared by the attorney from discovery except upon a showing of special circumstances justifying such an invasion. This decision laid the groundwork for a myriad of other discovery problems. Although establishing the exemption, it did not delimit the purview of work product, nor did it determine what factors would constitute the good cause necessary to compel production of such material. The situation was very aptly described by Chief Justice Jones in *Viron v. Wheeling & Lake Erie R.R.*, when he said:

The Rules of Civil Procedure designed to simplify practice and procedure in the Federal District Courts have been the subject of more interpretative legal 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!

The Federal Rules afford three separate procedures which potentially constitute a basis for the invocation of the principles of *Hickman*. Rule 26 would seem to furnish the method most likely to invade work product since it may be directed to the attorney immediately and such materials would normally be within his control. The majority of the

2. *Id.* at 508.
3. *Id.* at 510.
5. Fed. R. Civ. P. 26, "Any party may take the testimony of any person . . . by deposition upon oral examination or written interrogatories. . . . The attendance of witnesses may be compelled by the use of subpoena as provided by Rule 45." Fed. R.
cases, however, have arisen under Rules 33 and 34. Although these rules may properly be directed only to parties, this does not mean that the information or material sought will necessarily lie outside the work product exemption. Emphasis has been placed on the control factor to fulfill the requirement of "possession, custody or control" demanded by Rule 34, material in the hands of the attorney being considered within the control of the party and subject to production provided all other conditions are met.\(^7\)

**Work Product**

As previously noted, two primary elements can be gleaned from the principles laid down in *Hickman*. First, that the matter must have been prepared in preparation for trial. What this preparation for or anticipation of litigation entails is not entirely clear. It has been held that the probability of litigation is sufficient,\(^8\) while other decisions indicate that actual preparation for trial is essential.\(^9\) Under the latter standard, preparation not only for trial but for trial in the instant case may be demanded.\(^10\) Secondly, the data must reflect the influence of the attorney's legal abilities. Conversely, work product characterization has been denied where the work was not that peculiar to an attorney and not demanding his skill and training\(^11\) or where only factual accounts of the

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Civ. P. 45(b): "A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein . . . ."

6. Fed. R. Civ. P. 33: "Any party may serve upon any adverse party written interrogatories to be answered by the party served. . . ."; Fed. R. Civ. P. 34: "Upon motion of any party showing good cause therefor . . . . the court . . . may order any party to produce . . . designated documents . . . in his possession, custody, or control."


sources of information were sought.\textsuperscript{12} The weight to be accorded these decisions, however, may be diminished in light of the expansion of the work product exemption in \textit{Alltmont v. United States}.\textsuperscript{13} While \textit{Hickman} would seem to indicate that these two standards should be concomitant elements of equal importance, a survey of the area will indicate instances where apparently one factor or the other has been primarily emphasized to arrive at the desired result.

As might have been anticipated the primary source of controversy in the work product area has involved the statements of witnesses obtained by attorneys.\textsuperscript{14} Materials obtained personally by counsel would seem at least \textit{prima facie} to carry the stamp of his influence. As will be evidenced, however, this \textit{prima facie} classification may be rebutted solely on the basis of the type and substance of the material involved.

It may be stated as a general rule that the written statements of witnesses taken by an attorney in preparation for trial are within the area of protection afforded work product.\textsuperscript{15} Since witnesses' statements would normally be obtained in preparation for litigation, the main area of contention here apparently concerns the reflection of the attorney's professional influence.\textsuperscript{16} Unsigned statements of witnesses prepared by an attorney\textsuperscript{17} and statements taken by an attorney in personal interviews also almost unanimously fall within the same general rule.\textsuperscript{18} Thus, protection would generally be accorded whether the statements are oral or written, signed or unsigned.\textsuperscript{19}

14. The Hickman decision was limited factually to the statements of witnesses taken by an attorney.
19. Hickman v. Taylor, 329 U.S. 495 (1947): The Court said, "Petitioner has made more than an ordinary request for relevant, non-privileged facts in the possession of his adversaries or their counsel. He has sought discovery as a matter of right, of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired. . . ." 329 U.S. at 508. "Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such it falls outside the area of discovery and contravenes the public policy underlying the orderly presentation and defense of legal claims. Not even the
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It may be important, however, to determine just what constitutes an oral statement. If a witness merely dictates a statement which is recorded verbatim, it would reflect the opinion and impressions of the witness rather than those of counsel. If it is not a verbatim recording or is the product of questioning by the attorney, it would fall within the area specially protected in the Hickman decision. It seems that only in the rare instance where the statement is solely the product of the witness without any influence of counsel is the theory laid down in Scourtes valid.

Other cases have used slightly different language, indicating that texts and resumés of witnesses' statements are not subject to production, but that the burden is upon the one objecting to show that the material constitutes such texts or resumés. It is not clear from the language of the cases whether "texts or resumés" refers to the witnesses' written statements or to summaries of the oral statements of a witness prepared by an interviewer. If the latter interpretation is correct, it falls within the strict prohibition of Hickman. The limitation to summaries of oral statements would add little to the work product concept as far as delineating its scope. If, however, the reference is to simple witnesses' statements solely the product of the witness, the holdings furnish authority for a slightly broader purview of work product.

The case perhaps second only to Hickman in importance and impact in the work product controversy is Allimont v. United States. The District Court held that the work product privilege was not applicable to copies of statements obtained by persons other than trial counsel. This holding, while in accord with the prevailing trend whereby statements

most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney." 329 U.S. at 510. Contra; see Scourtes v. Allbrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953). "The 'work product' of an attorney consists only of impressions, observations and opinions which he has recorded and transferred to his file. The written statement of a witness, whether prepared by him and later delivered to the attorney, or drafted by the attorney and adopted by the witness is not properly considered the work product of an attorney."

20. Scourtes v. Allbrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953); Molloy v. Trawler Flying Cloud Inc., 13 Fed. Rules Serv. 34.411, Case 6 (D. Mass. 1950). An account originally held to be a mere verbatim recordation on rehearing was held to be work product in that it was at least partially the work product of the attorney's questioning.


24. 177 F.2d 971 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950). Actually the case arose under Admiralty Rule 31, which is identical to F.R.C.P. 33.
taken by the defendant party,\textsuperscript{25} by a legal department,\textsuperscript{26} and by the F.B.I.,\textsuperscript{27} were held not to constitute work product, was reversed on appeal with the court stating that the Hickman rationale applied to all statements of a prospective witness which had been obtained for the use of trial counsel. Whether the Alltmont holding was based on the attorney's influence or his preparation for trial, the case would seem to indicate that a significant step was taken expanding the work product exemption to statements of witnesses, regardless of the status of the persons obtaining them. Thus, the Hickman protection has been extended to include agents other than an attorney who obtained statements for counsel's use,\textsuperscript{28} or who obtained the statements at the instance or under the direction of counsel.\textsuperscript{29} The other cases since Alltmont also seem generally to uphold its rationale, at least where statements of witnesses are sought.\textsuperscript{30}

Since this decision, expanding the scope of Hickman, the courts in determining whether investigators' reports are work product have relied more heavily upon the question whether the investigation was made in anticipation of or in preparation for litigation,\textsuperscript{31} leading to an inference that Alltmont was based on the attorney's influence. Even if it is found, however, that the material was obtained in preparation for litigation, a

\begin{itemize}
  \item \textsuperscript{25} DeBruce v. Pennsylvania R.R., 6 F.R.D. 403 (E.D. Pa. 1947).
  \item \textsuperscript{26} Hayman v. Pullman Co., 8 F.R.D. 238 (N.D. Ohio 1948).
  \item \textsuperscript{27} O'Neil v. United States, 79 F. Supp. 827 (E.D. Pa. 1948).
  \item \textsuperscript{28} Thompson v. Hoitsma, 19 F.R.D. 112 (D.N.J. 1956); Fay v. Stauffer Chem. Co., 19 F.R.D. 526 (N.D. Neb. 1956). The case also holds that the work product immunity continues despite the non-professional custody of the file from time to time. Floe v. Plowden, 10 F.R.D. 504 (E.D.S.C. 1950), (Investigator hired by insurer to furnish information to defendant's counsel). See also, Overly v. Hall-Neal Furnace Co., 12 F.R.D. 112 (N.D. Ohio 1951); Roach v. Boston Tow Boat Co., 19 F.R.D. 267 (D. Mass. 1956) which infers that such materials would be work product though production was granted on a showing of good cause sufficient for work product; McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955). Where the investigation was made by the agent of a non-party and apparently not for the counsel of either party, production was denied. However the holding was not based on the immunity of Hickman but rather on the ground that one party should not have the benefit of another's work.
  \item \textsuperscript{29} Bifferato v. States Marine Corp. of Delaware, 11 F.R.D. 44 (S.D.N.Y. 1951); Herbst v. Chicago, Rock Island & Pac. R.R., 10 F.R.D. 14 (S.D. Ia. 1950); Berger v. Central Vermont Ry., 8 F.R.D. 419 (D. Mass. 1948). Contra, Colorado Mining & Elevator Co. v. American Cyanamide Co., 11 F.R.D. 306 (W.D. Mo. 1951). The holding, however, was qualified to the extent that if the statements contained any material worked out by counsel, public policy would forbid their use.
  \item \textsuperscript{31} Connecticut Mutual Life Ins. Co. v. Shields, 16 F.R.D. 5 (S.D.N.Y. 1954). Where the material was turned over to trial counsel within one month, it was held to be in preparation for litigation, though the holding was partially based on the fact that legal skill had been used in preparing the report. Royal Exchange Assurance v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952). Material is not work product when obtained well prior to suit. McManus v. Harkness, 11 F.R.D. 402 (S.D.N.Y. 1951). Not in anticipation of litigation when obtained prior to time cause of action arose.
\end{itemize}
work product determination may involve further limitations.\textsuperscript{32} It seems clear that if the Alltmont doctrine is followed, investigators' reports should fall within the protected area. Alltmont also removed the area of doubt existing in regard to the opinions and test results of experts. Prior to the decision, the reports of experts engaged by counsel were deemed not to fall within the exemption afforded the lawyer's work product.\textsuperscript{33} Since that time, however, the reports of experts engaged by counsel and obtained under the direction and supervision of counsel,\textsuperscript{34} or prepared for their use,\textsuperscript{35} are, as a general rule, held to be imbued with the same status as the attorney's work product.\textsuperscript{36} There are a few cases to the contrary, especially where the reports contain only factual material,\textsuperscript{37} or are of a scientific nature completely unconnected with legal practice,\textsuperscript{38} but these cases again rely on the remoteness of the possibility that this type of report would reflect the attorney's influence.

There seems to be no question that materials produced independently by the attorney are part of the work product. Varying types of materials

\textsuperscript{32} United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954). Information must presently be part of the work files of the attorney before it is entitled to work product protection. \textit{But compare}, Connecticut Life Ins. Co. v. Shields, 16 F.R.D. 5 (E.D.N.Y. 1954) which holds that the work product limitation is not based upon the same considerations as the attorney-client privilege, and it is not waived by the fact that it is out of the attorney's possession and revealed to others. \textit{Accord}, \textit{e.g.}, Bohlin v. Brass Rail, 20 F.R.D. 224 (S.D.N.Y. 1957); Fay v. Stauffer Chemical Co., 19 F.R.D. 526 (D. Neb. 1956). Thus it appears that the Kelsey-Hayes case is wrong if it is based on waiver of the work product exemption because of any non-possession by the attorney. If, however, it says that material must be being used for trial preparation, it is probably justified. \textit{Keystone Coat \& Apron Mfg. Co. v. Home Insurance Co.}, 21 F.R.D. 32 (E.D. Pa. 1957), indicates that the material must contain opinions and observations before it is entitled to protection. \textit{But compare}, Scourtes v. Allbrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953). Here the court held that even if the data is gathered under the supervision of an attorney and in preparation for trial, it will not be protected if it contains merely the opinion and impressions of the witness rather than counsel.

\textsuperscript{33} Sachs v. Aluminum Co. of America, 167 F.2d 570 (6th Cir. 1948). The services of an expert retained in connection with a patent case were held not to fall within the attorney-client privilege protecting work product. (A number of cases, as here, loosely denominate the exemption, failing to properly distinguish the attorney-client privilege and work product protection); \textit{Cold Metal Process Co. v. Aluminum Co. of America}, 7 F.R.D. 425 (N.D. Ohio 1947).


have been included under this apparent rationale. Diagrams and sketches are held to be work product in that they constitute a portion of the impression of counsel, and such material prepared by others if it meets the qualifications of Allmont would seem to be entitled to protection. Questionnaires formulated by an attorney constitute work product, but there is some conflict as to whether the answers to such questionnaires are also protected. Where the movant already has a copy of the questionnaire, the policy behind refusal to grant production seems to be protection of the attorney's trial preparation rather than his impressions or theories. Attorney's memoranda fall within the work product exemption provided they are actually prepared in preparation for trial. Similarly correspondence between co-counsel falls within the scope of Hickman.

As noted previously, not all materials, even though obtained by an attorney are included in work product. Perhaps the largest area of exclusion in this area has arisen in connection with statements taken by members of a claims department. The expansion of work product as enunciated in Allmont has not been deemed to include statements obtained by a claims agent or department even if the agent is in fact an attorney. These decisions are primarily based upon a judicially created exception to the Hickman exemption nominated "in the regular course of business." Under this exception, statements or other materials are held not to be work product if they are obtained in accordance with the standard operating procedure of any enterprise. This exception applies even

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41. United States v. Swift & Co., 2 Fed. Rules Serv. 2d 34.411, Case 2 (N.D. Ill. 1959). The court denied work product protection on the ground that the answers did not constitute any of the attorney's impressions where the questionnaire was already in the hands of the movant. Contra, United States v. Deere, supra, note 40. Discovery denied though movant had copy.
to the legal department if it can be shown that the material sought was obtained in the regular course of business. Of course if the information is obtained in preparation for trial and not in the normal course of business, the *Hickman* doctrine will be applied. The determination in the type of case in which the legal department is ostensibly involved and the product is outside the regular course of business exception may turn upon the question whether in fact the attorneys are employees or are autonomous. As to statements taken by government investigator-attorneys, however, there is some conflict with the test of work product seeming to be whether or not the government has a duty to prosecute or defend a particular claim. The sole basis of this exception, since the *Alltmont* decision, seems to rest on the factor of preparation for actual litigation.

A homogeneous situation exists in regard to three types of data sought to be discovered which also are generally held not to be work product—names of witness, interrogation as to what material the opponent has, and requests for facts. There is, however, some conflicting authority in each area. The work product policy would seem to afford little basis for objection to the production of witnesses' names, and generally they may be obtained. Some courts distinguish between a simple request for names and a more extensive one and may deny an attempt to

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48. Cogdill v. T.V.A., 7 F.R.D. 411 (E.D. Tenn. 1947). The case distinguishes intrinsic privilege and work product, especially where it is not clear whether the relationship is that of attorney-client or employer-employee. Production was ordered, but on rehearing, after a showing that the attorney was autonomous, the material was held to be work product and production was denied.

49. Snyder v. United States, 20 F.R.D. 7 (E.D.N.Y. 1956). An Aircraft Accident Board investigation was held to be work product in that the results were obtained for the Attorney General who had a duty to defend and who maintained no force of investigators for each governmental subdivision. *Contra*, Durkin v. Pet Milk Co., 14 F.R.D. 385 (W.D. Ark. 1953). Instructions given by a Dept. of Labor attorney to an investigator were held not sufficient to make the statements taken by him work product. If the *Alltmont* rationale were followed, this would seem to be work product.

secure the more extensive information. The majority approach respecting inquiries as to what material the opponent has is that these are unobjectionable, but at least one court has protected this type of information. Generally neither may a party be precluded from the discovery of material facts. Such inquiry, however, is limited to facts, and, for example, an interrogatory may not pry into an attorney's theory. It seems also that facts communicated by an attorney to his client are work product.

Perhaps the conflict of authority in the area of names of witnesses, interrogation as to what materials the opponent has, and requests for facts may be explained by the courts' concept of the purpose and policy of the Hickman rule. If approached from the aspect of protecting the mental impressions and processes of the attorney, there would be little objection to allowing discovery since they could rarely be reflected in such data. If on the other hand the protection of the attorney's preparation is the predominant factor in the court's thinking, this type of material could well fall within the work product exemption though offering little indication of counsel's thought processes.

In contrast to the independent production of the attorney, some data, even if an attorney is instrumental in its procurement, is not susceptible of his influence. On this basis photographs and public or semi-


public records58 are excluded from work product. Private records also are generally not protected60 but may constitute work product if they contain matter relating to preparation for trial.60 Correspondence between co-defendants has also understandably been denied the safeguard of Hickman.64

In at least two areas the courts have generally failed to make any definitive determination of work product. The majority of cases, where the statement of the movant or of a party62 is sought, make no determination as to whether such a statement constitutes work product. Generally, the question is not reached, the case being decided on the basis of good cause alone.63 Sometimes the refusal to find work product is grounded on the regular course of business exception64 or on the fact that the statement was taken by a claims agent or other non-attorney.65 These latter cases are not inconsistent with a restrictive interpretation of Alltmont, since the language and facts there were limited to witnesses’ statements. Similarly no particularized determination of work product is made where the demand is so sweeping that there is no question but that to grant it would amount to a clear invasion of the attorney’s privacy and would be directly contrary to Hickman.66

PRODUCTION AND GOOD CAUSE UNDER RULES 26 AND 33

Preliminary to the survey of what constitutes good cause for the production of work product, some notice should be taken of the good

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61. Ibid.
65. New York Cent. R.R. v. Carr, 251 F.2d 433 (4th Cir. 1957); Szymanski v. New York, N.H. & H.R.R., 14 F.R.D. 82 (S.D.N.Y. 1952); Hudalla v. Chicago, M. St. P. & P.R.R., 10 F.R.D. 363 (D. Minn. 1950). Though the regular course of business exception was not specifically mentioned, a statement taken by a defendant’s insurer’s attorney was technically held not to be work product, the case being decided on good cause, with the inference, however, that under some circumstances it might be protected. Safeeway Stores Inc. v. Reynolds, 176 F.2d 476 (D.C. Cir. 1949).
cause requirement divorced from any work product consideration. As
the Rules of Civil Procedure now stand, there is no patent requirement
of any good cause for the production of documents under Rule 26 in con-
junction with Rule 45(b). Production would apparently be available as
a matter of right, and this is the position that has been taken by some
courts.\textsuperscript{67} The doctrine enunciated in Hickman would seemingly require
good cause only when discovery of work product is in question. There
is a growing tendency, however, for the District Courts to hold that the
same showing of good cause for the production of documents is neces-
sary under Rule 26 as is required under Rule 34.\textsuperscript{68} The rationale of this
position essentially follows that elucidated in North v. Lehigh Valley
Transit Co.\textsuperscript{69} There the Court reasoned that since the Federal Rules con-
stituted an integrated body of regulatory provisions, they were to be con-
sidered in \textit{pari materia}. Under this rule of construction it was deter-
mained that the procedure of 26-45(b) was simply a short cut to the pro-
duction of documents and that it was not intended that, although requir-
ing good cause under Rule 34, production might be had as a matter of
right under Rules 26 and 45(b). From the standpoint of the wider per-
missible reaches of Rule 26, it seems plausible that at least as great a
showing should be required as under Rule 34. Since Rule 26 may be
directed against a non-party, there would appear to be less justification
for invading his privacy without requiring any reason than that of a
party who has some real interest in the controversy.

Since Rules 26 and 34 provide for the production of documents, the
primary question in connection with Rule 33 is whether any documentary
production may be had at all. Secondarily, if production is allowed, need
good cause be shown as a prerequisite? The majority of courts, where
documentary production is sought from a party, hold that it must be ob-
tained through the procedures of Rule 34.\textsuperscript{70} Nevertheless, a few courts
have allowed the production of documents under Rule 33. This is true,
however, only in the technical sense, since they have considered the mo-
tions as though they had been made under Rule 34, granting production
upon a showing of good cause as a matter of expediency and to prevent

\textsuperscript{67} E.g., Shepard v. Castle, 20 F.R.D. 184 (W.D. Mo. 1956).
\textsuperscript{68} Mitchell v. Strauss, 1 Fed. Rules Serv. 2d 34.13. Case 5 (D.R.I. 1959);
360 (E.D. Tenn. 1955).
\textsuperscript{69} North v. Lehigh Valley Transit Co., 13 Fed. Rules Serv. 26b.211, Case 5 (E.D.
Pa. 1950).
\textsuperscript{70} E.g., Alltmont v. United States, 177 F.2d 971 (3d Cir. 1949), \textit{cert. denied},
undue delay.\textsuperscript{71} It is difficult to say that one position is more proper than the other. Admittedly the Rules should be followed, and there should be no objection to requiring strict conformance. This is true from a technical or mechanical point of view which would require that the attorney follow the proper procedure. When the problem is considered on a policy basis and the interests of the party are taken into account, however, the circumstances may militate more strongly for the more liberal view. But such liberality should not be extended to such a degree that the requirement of good cause would be obviated. A few cases seem to have gone to this extreme, requiring production of documents without any extrinsic showing of good cause or prejudice.\textsuperscript{72} These cases rationalize this liberality on the ground that the question is not one of production of documents, but of divulging facts, production being the best method of obtaining the facts.

This liberality to the extent of obviating good cause is much more difficult to justify. Where a separate procedure has been established for the production of documents upon a showing of good cause, it is difficult to see how production as a matter of right can be condoned. These two rules are essentially different. Interrogatories seek the facts as the party sees them and have the effect of admissions. Rule 34 seeks primary source material, without any limitation, explanation or interpretation.\textsuperscript{73} It is one thing to allow production where a party has misconceived the proper rule for his purpose but factually fulfills all the requirements. It is quite another to choose the proper rule and then seek to emasculate the more stringent requirements of an equally available rule.

**Good Cause for Work Product**

The tests contained in *Hickman* relative to what will constitute good cause for the production of work product are just as nebulous as those for determining work product itself. The statements for all practical purposes are limited to the broad extreme instances which will justify discovery.\textsuperscript{74} It would seem to be a reasonable conclusion that the good cause required by Rule 34 or the good cause for the production of work product when demanded under any of the three rules will necessitate the same factual showing regardless of the rule under which it is invoked.


\textsuperscript{72} O'Neill v. United States, 79 F. Supp. 827 (E.D. Pa. 1948). The case was qualified to the extent that if any privileged matter or opinion were contained in the statement, it should be edited by the judge.


\textsuperscript{74} Hickman v. Taylor, 329 U.S. 495, 511 (1947).
The line of demarcation between good cause and the good cause for work product is only vaguely defined. But theoretically, it seems clear that at least something above and beyond the good cause of Rule 34 is required. The work product good cause has been variously defined as "very good cause,"75 "a stringent standard of good cause,"76 "unusual circumstances,"77 "rare situations,"78 and other kindred statements.79

The good cause for Rule 34 is normally less stringent than that for work product, requiring a showing of such factors as time differential,80 exclusive knowledge, inequality of investigative opportunity, or the fact that the witness is hostile or relatively inaccessible.81 Similarly, practical convenience, facilitation of proof or progress at trial,82 and the fact that the objecting party controlled the circumstances surrounding the transaction have been held sufficient.83 The bare allegation, however, that such conditions exist is not sufficient.84 These instances serve to illustrate the differences between the good cause of Rule 34 and that required for work product. It seems clear that work product demands necessity or something bordering thereon,85 while expediency or the prevention of undue advantage are perhaps the underlying requirements of Rule 34.86 The separation of good cause, however, may not always involve such a clear-cut dichotomy. Several cases would differentiate the degrees of good cause required for work product.87

86. Generally, also, the courts hold that where the parties positions are equal or the movant's is superior, there is not possibility of showing the requisite necessity, as a rule making no determination of work product. E.g., O'Brien v. Equitable Life Ins. Co. of United States, 13 F.R.D. 475 (W.D. Mo. 1953); United States ex rel. T.V.A. v. Bennett, 14 F.R.D. 166 (E.D. Tenn. 1953); Cunningham v. Mutual Life Ins. Co., 11 F.R.D. 331 (E.D.N.Y. 1951).
87. United States v. Swift & Co., 2 Fed. Rules Serv. 2d 34.411, Case 2 (N.D. Ill. 1959). Where the factors supporting the claim of good cause are weak, the requisite showing of good cause is lessened accordingly. See also, Sturm v. Great A. & P. Tea Co., 16 F.R.D. 476 (D. Conn. 1954). A strong showing of good cause is necessary for oral statements, but a slight showing may suffice for written statements.
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There have been relatively few cases where sufficient good cause for the production of work product has been shown. It would seem that the courts in general fail to reach the work product question in cases where good cause is also in issue by denying production for failure to show the good cause required by Rule 34, or by granting production without further comment as to whether the good cause shown is that of Rule 34 or Hickman.88 Such an approach adds little to the appreciation of what circumstances will warrant discovery of an attorney’s work product. In the majority of cases where the work product question has actually been decided, production has been granted only after a determination that no work product was involved, thus requiring only the normal showing demanded by Rule 34.89

Generally the cases have allowed production of work product only where the standard of Hickman has been met, i.e., the identity of witnesses is unknown and the information sought is unavailable from any other source.90 Thus where the information may be compelled by other means or from other sources, or where no effort has been made, production will not be ordered.91

Thus any definite generalization other than in the extreme cases is difficult to make. A survey, however, of the particular circumstances which have been held to afford sufficient reason for the production of work product in various instances may furnish some broad, guiding principles.

91. Cleary Bros. v. Christie Scow Corp., 176 F.2d 37 (2d Cir. 1949); Walczak v. Detroit-Pittsburgh Motor Freight Inc., 140 F. Supp. 10 (N.D. Ind. 1956); Overly v. Hall-Neal Furnace Co., 12 F.R.D. 112 (N.D. Ohio 1951); Maryland ex rel Peters v. Baltimore & O.R.R., 7 F.R.D. 666 (E.D. Pa. 1947); Hanke v. Milwaukee Elec. Ry. & Transport Co., 7 F.R.D. 540 (E.D. Wisc. 1947). There is some conflict as to whether no other source should be interpreted to mean no other source of discovery or no other source apart from the discovery rules. Lindsay V. Prince, 8 F.R.D. 233 (N.D. Ohio 1948). Other discovery methods (deposition) were available, but discovery was allowed under Rule 34. Contra, Thompson v. Huitsma, 19 F.R.D. 112 (D.N.J. 1956), (Party lacks good cause when another method of discovery available); McManus v. Harkness, 11 F.R.D. 402 (S.D.N.Y. 1951). Good cause is not met when there is no showing that other discovery methods are not available.
Production is not warranted on the suspicion or possibility that the statements contain impeaching material, but if it is shown that actual impeaching material is present; this seems to be sufficient good cause. Neither is good cause shown on the mere allegation or conclusion that production is necessary for trial preparation. Nor does relevancy have any bearing on good cause as such; good cause deals with the reasons for compelling the production of relevant material.

Only in a few cases have the courts allowed discovery upon a showing that fell short of the requirement of necessity. The fact that statements were taken immediately after the occurrence in conjunction with the lapse of time, and the fact that statements would not be of equal value even if the witnesses were supplied have been held to be good cause. This position may be reconciled with the general rule, however, if information obtained almost contemporaneously with an event is deemed unique. Then it would possibly fall within the category of data unobtainable from any other source. This is as far as the courts have liberalized the requirement, and the cases seem to stand alone in extending or expanding the permissible circumstances sufficient to justify the production of work product.

93. Hauger v. Chicago, R.I.&P.R.R., 216 F.2d 501 (7th Cir. 1954); But compare, United States v. Great Northern Ry., 18 F.R.D. 357 (D. Colo. 1955). Circumstances may warrant a reasonable probability that impeaching material is present. Where plaintiff's employees refused to allow the movant to continue copying from a document, production was allowed, but only as to the document in question.
94. E.g., Martin v. Capital Transit Co., 170 F.2d 811 (D.D.C. 1948). There is no good cause where there are no supporting affidavits showing any of the considerations of Hickman or any other considerations evidencing need. (A blatant example is Silvetti v. United States, 8 F.R.D. 558 (E.D.N.Y. 1949). An affidavit to the effect that the movant would like to explore his adversary's files was understandably held to scarcely meet the requirement).
96. Roach v. Boston Tow Boat Co., 19 F.R.D. 267 (D. Mass 1956). Witnesses were available, but they had forgotten many of the details of the incident. The adverse party taken statements immediately after the accident. Herbst v. Chicago, R.I.&P.R.R., 10 F.R.D. 14 (S.D. Ia. 1950). The court held the material not work product but said such factors would constitute good cause if it were. Mark v. Gas Service Co., 168 F. Supp. 487 (W.D. Mo. 1958) would seem to be in accord, enumerating similar factors, i.e., complexity of the subject, immediacy of tests, lapse of time, but the holding seems rather based on the unavailability of vital facts from any other source. Dusha V. Pennsylvania R.R., 13 Fed. Rules Serv. 44.411, Case 10 (N.D. Ohio 1950) would seem to go further, but it seems to be completely a product of the court's discretion and is based on the fact that the statements "may be useful and serve in the interests of justice in the examination of witnesses." The Court held that while the showing of good cause was not all that could be desired, it would be deemed sufficient. Contra, Cogdill v. T.V.A., 7 F.R.D. 411 (E.D. Tenn. 1947). (Such factors not sufficient where the names of witnesses have been furnished.)
NOTES

PROTECTION AGAINST INVASION OF WORK PRODUCT

A party seeking protection against what he considers an improper attempt to reach work product may seek a protective order under Rule 30(b).\(^{97}\) Under this rule the trial judge is given the discretion to make a judgment as to whether discovery should be allowed.\(^{98}\) Since an interlocutory order is not appealable under the final order doctrine, 30(b) seems to be the only general recourse without following the "gallant Fortenbaugh" into contempt by a refusal to obey the order.\(^{99}\)

A quasi-review is, however, obtainable in that the party may petition the trial court for a rehearing of an adverse order.\(^{100}\)

Fentonbaugh has gathered few followers in his crusade. With almost complete unanimity, the parties accept the ruling of the trial court or petition for a rehearing rather than go into contempt. Only two cases were discovered in which the contempt procedure was invoked by the movant and in neither case was it enforced.\(^{101}\)

It is very unlikely that any relief will be had by assigning a discovery order as grounds for a new trial. The courts typically reject such grounds, holding that it is difficult to see what purpose would be served by a new trial after production of the document and a trial on the merits.\(^{102}\)

CONCLUSION

Generally the doctrine laid down in Hickman has proved to be a workable rule. There seem to be only minor deviations from a consistent series of holdings among the various districts and under the individual discovery rules. Work product determination has been made primarily dependent upon the factors set up by Hickman. The only really definitive holding possibly extending the scope of protection was that in

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99. But see, Cleary Bros. v. Christie Scow Corp., 176 F.2d 37 (2d Cir. 1949). The court ordered a dismissal unless interrogatories were answered in fourteen days. At the expiration of this period it was held to be a final order since there was no possibility of compliance. Alltmont also states that an interlocutory order in Admiralty is appealable.
101. Hauger v. Chicago, R.I. & P.R.R., 216 F.2d 501 (7th Cir. 1954). An order adjudging the defendant guilty of contempt was entered, but, like Fentonbaugh, he was found not guilty on the basis of a finding of work product. Virginia Metal Products v. Hartford Acc. & Indem. Co., 10 F.R.D. 374 (S.D.N.Y. 1950). The court refused to punish a party for contempt since he was acting under the advice of his counsel.
Alltmont which expanded work product to include material obtained for the use of counsel in preparation for trial.

There may be, nevertheless, a deviation from the policies of Hickman and Alltmont in the "regular course of business" exception. As applied to the strict course of normal business it is unobjectionable. When, however, the exception is applied to the normal course of business following an unusual occurrence, it is more difficult to justify, at least where the procedures carried on are those undertaken by an attorney. There seems to be little realistic distinction between preparation for specific litigation after suit and preparation for practically inevitable litigation before suit if the object of the work product rule is to protect the attorney's mental impressions and processes. Understandably, less criticism could be leveled at the exception if the material were obtained by one not an attorney, but under the Alltmont doctrine this, too, should be protected where gathered at the instance of counsel or under the supervision of counsel. Perhaps the courts have sought to counteract the expansive force of Alltmont by accenting preparation for actual litigation rather than the more liberal anticipation of litigation.

The end result attained, however, need not be censured. The result reached by the courts is probably desirable in those cases where production has been granted. The methods by which these results have been reached are what may be considered inconsistent. There is an apparent direct correlation between the existence of such circumstances as lapse of time and inequality of investigative opportunity or facilities and the application of the exception. While these factors constitute good cause under Rule 34, they are not generally held sufficient for work product. Perhaps the courts should extend good cause for the production of work product as has been done in a few cases to include such circumstances rather than to exclude such material generally from the Hickman rule. This would allow the courts to tailor production to the individual factual situation rather than to apply the exception generally. This the courts have failed to do. Good cause for work product except in a few, isolated instances has remained even more stable under the various rules than work product coverage. The holdings almost unanimously hew to the line of virtual necessity or unavailability of Hickman, allowing production in relatively few instances.

Perhaps the most appropriate summation of the current general tenor in the work product-good cause area would be a paraphrase of Justice Cardozo's famous statement. The assault on the citadel of work product is not continuing apace!