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Discovery and the Work Product Doctrine

INTRODUCTION

Pre-trial discovery is an effective and necessary means of uncovering relevant facts.¹ The quest for knowledge of all relevant facts, however, is limited by an attorney's need for privacy in order to promote effective trial preparation.² The United States Supreme Court recognized the need for protection against unnecessary pre-trial intrusions into an attorney's files in *Hickman v. Taylor*.³ The work product doctrine was created as an outgrowth of that landmark decision.⁴ Three decades later, most state legislatures

1. The various instruments of discovery now serve (1) as a device . . . 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 facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial. *Hickman v. Taylor*, 329 U.S. 495, 501 (1946). See *Monier v. Chamberlain*, 35 Ill. 2d 351, 221 N.E.2d 410 (1966); *Bauter v. Reding*, 68 Ill. App. 3d 171, 385 N.E.2d 886 (1979) (concept of relevance in discovery is broader than relevancy for admission of evidence at trial); *Redmond v. Central Community Hosp.*, 65 Ill. App. 3d 669, 382 N.E.2d 95 (1978); *Biehler v. White Metal Rolling & Stamp Corp.*, 30 Ill. App. 3d 435, 333 N.E.2d 716 (1975); *Carlson v. General Motors Corp.*, 9 Ill. App. 3d 606, 289 N.E.2d 439 (1972); *Developments in the law—Discovery*, 74 HARV. L. REV. 940, 945 (1969) [hereinafter cited as *Developments*]. See also Phillips, *Anti-Monierism*, 55 ILL. B.J. 920 (1967) [hereinafter cited as Phillips]; Comment, *Discovery of Expert Information After Monier v. Chamberlin* [sic], 62 Nw. L. Rev. 624 (1967) [hereinafter cited as *Expert Information*]; Note, *Discovery of an Attorney's Work Product in Subsequent Litigation*, 1974 DUKE L.J. 799 (1974) [hereinafter cited as *Subsequent Litigation*]; Note, *Monier v. Chamberlain: Work Product—Further Erosion of the Work Product Sanctuary*, 1 J. MAR. J. PRAC. PROC. 146 (1967) [hereinafter cited as *Erosion of Work Product*].

2. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947); see *Southern Pacific Co. v. Superior Court*, 3 Cal. App. 3d 195, 83 Cal. Rptr. 74 (1968); *Eizerman v. Behn*, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956).

3. 329 U.S. 495 (1947).

4. The work product doctrine is codified by FED. R. CIV. P. 26(b)(3) which provides: (3) Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect

have formulated some variant of the work product doctrine.⁵ Although most jurisdictions follow the federal model, the Illinois statute granting work product protection represents a unique approach to the subject.⁶

This article will briefly compare the work product doctrine and the attorney-client privilege, recount the development of the federal and Illinois work product rules, and contrast the practical application of each. Finally, the overall effectiveness of the Illinois and federal approaches will be assessed, and general suggestions for improvement will be proffered.

WORK PRODUCT PROTECTION: PRIVILEGE OR IMMUNITY?

The work product doctrine is commonly referred to as a privilege which prevents disclosure of certain information in an attorney's files. The work product doctrine is quite distinct, however, from other traditional common law⁷ and statutory privileges.⁸ In

against disclosure of the mental impressions, conclusions, opinions, or legal theories of any attorney or other representative of a party concerning the litigation. In Illinois the doctrine is codified in ILL. REV. STAT. ch. 110A, § 201(b)(2) (1979) which provides:

All matters that are privileged against disclosure on the trial, including privileged communication between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.

Although work product protection is most frequently claimed in civil litigation, the work product doctrine is equally available in criminal litigation. *See, e.g., United States v. Nobles*, 422 U.S. 225 (1975). This article, however, focuses generally on work product protection in civil litigation.

5. *See, e.g.,* ARIZ. R. CIV. P. 26(b)(3); COLO. R. CIV. P. 26(b)(3); DEL. CT. COMM. PLEAS CIV. R. 26(b)(3); FLA. R. CIV. P. 1.280(b)(2); IDAHO R. CIV. P. 26(b)(3); IND. R. TRIAL P. 26(b)(2); ME. R. CIV. P. 26(b)(3); MASS. R. CIV. P. 26(b)(3); MICH. G. CT. R. 1963, 306.2; MINN. R. CIV. P. 26(b)(3); N.D. R. CIV. P. 26(b)(3); OHIO R. CIV. P. 26(b)(3); OKLA. R. DIST. CT. 14a; VT. R. CIV. P. 26(b)(3); WASH. R. CIV. P. 26(b)(2); WIS. STAT. ANN. § 804.01(2)(c) (West); WYO. R. CIV. P. 26(b)(3).

6. *See* Comment, *Texas Work Product Protection: Time for a Change*, 15 HOUS. L. REV. 112 (1977) [hereinafter cited as *Texas Work Product*] for a general discussion of work product protection in the state courts and a reference to Illinois' unique approach.

7. The attorney-client privilege in many jurisdictions, including Illinois and federal courts, is the major evidentiary privilege that is not codified by rule or statute.

8. Illinois statutory privileges include: accountants, ILL. REV. STAT. ch. 111 § 5533 (1977); husband and wife, ILL. REV. STAT. ch. 51, § 5 (civil) and ch. 38, § 155-1 (criminal) (1977); physician and patient, ILL. REV. STAT. ch. 51, § 5.1 (1977) (amended by Mental Health and Developmental Disabilities Confidentiality Act, Pub. Act, ch. 80-1508 (1978)); Ill. Legis. Serv. 1508, priest, ILL. REV. STAT. ch. 51, § 48.1 (1977); reporter's source of information, ILL. REV. STAT. ch. 51 § 111-119 (1977); social worker, ILL. REV. STAT. ch. 111, § 6324 (1977).

Other states have enacted statutes safeguarding a variety of relationships and situations.

fact, the common reference to "work product privilege" is probably a misnomer because the doctrine is more akin to an immunity than a privilege.

Evidentiary privileges are generally absolute in their protection.⁹ Once a privilege is established, barring waiver, it will not be set aside regardless of the importance of the privileged matter.¹⁰ In contrast, immunities are not absolute and can be overcome in certain circumstances.¹¹ To the extent the protection afforded an at-

See, e.g., corporation, COLO. REV. STAT. § 7-3-114 (1973); juvenile probation officer, N.M. REV. STAT. ANN. R. EVID. RULE 509 (1978); hospital & medical review committee, NEV. REV. STAT. § 49.265 (1971); psychologist, COLO. REV. STAT. § 13-90-107 (1973); school guidance counselor, NEV. REV. STAT. § 49-290 (1973); teacher, NEV. REV. STAT. § 49.290 (1973).

9. See *International Tel. and Tel. Corp. v. United Tel. Co. of Fla.* 60 F.R.D. 177, 180 (M.D. Fla. 1973); *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968); Burnham, *Confidentiality and the Corporate Lawyer: The Attorney-Client Privilege and Work Product in Illinois*, 56 ILL. B.J. 542, 549 (1968) [hereinafter cited as Burnham].

10. See, e.g., 8 WIGMORE § 2292, at 554 (MacNaughton rev. 1961) [hereinafter cited as *Wigmore* (MacNaughton rev.)] where Wigmore outlines the necessary elements of the attorney-client privilege:

Where legal advice of any kind is sought; from a professional legal advisor in his capacity as such; the communications relating to that purpose; made in confidence; by the client, are at his instance; *permanently* protected; from disclosure by himself, or his legal advisor; except the protection be waived. (emphasis added).

See *International Tel. and Tel. Co. v. United Tel. Co. of Fla.*, 60 F.R.D. 177 (M.D. Fla. 1973).

11. While the party asserting a privilege must demonstrate its applicability, the burden for overcoming an immunity falls squarely on the party attacking the immunity. The United States Supreme Court in *Hickman v. Taylor*, stated that the "burden rests on the one who would invade [the privacy of an attorney] to establish adequate reasons to justify production." 329 U.S. 495, 512 (1947); see *International Tel. and Tel. Corp. v. United States Tel. Co. of Fla.*, 60 F.R.D. 177 (M.D. Fla. 1973); *United States v. Real Estate Bd. of Metropolitan St. Louis*, 59 F.R.D. 637 (E.D. Mo. 1973); *Bird v. Pennsylvania Cent. Co.*, 61 F.R.D. 43 (E.D. Pa. 1973); *Thill Sec. Corp. v. New York Stock Exch.*, 57 F.R.D. 133 (E.D. Wis. 1972); *Arney v. George A. Hormel and Co.*, 53 F.R.D. 179 (D. Minn. 1971); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967).

Successfully invoking a putative immunity requires satisfying a three tier inquiry. First, is the material within the scope of the immunity? Second, if so, what degree of protection will be afforded? And third, has the requisite showing been made to overcome the immunity? In re Grand Jury Investigation, 599 F.2d 1224 (3rd Cir. 1979); see Comment, *Discovery of Attorney's Work Product*, 12 GONZ. L. REV. 284, 292 (1977) [hereinafter cited as *Attorney's Work Product*]; Comment, *The Potential for Discovery of Opinion Work Product Under Rule 26(b)(3)*, 64 IOWA L. REV. 103, 108 (1978) [hereinafter cited as *Opinion Work Product*]; cf. *Expert Information*, *supra* note 1 (Hickman rule requires court to follow a two-step process in determining whether information is to be protected from discovery). Consequently, even though material may fall within the ambit of the immunity, protection from disclosure cannot be assured.

In contrast, the applicability of a privilege involves the single inquiry whether the material falls within the scope of the privilege. An affirmative answer grants the material absolute protection, but a negative determination renders the material freely discoverable.

torney's work product must yield to disclosure upon certain showings of necessity, the work product doctrine is analogous to an immunity, and not a privilege.

A significant distinction between a privilege and the work product immunity is the underlying justification for each. The evidentiary privileges represent society's interest in safeguarding certain confidential relationships.¹² In recognition of the community's need to foster those important relationships, the community voluntarily foregoes the judicial disclosure of relevant data.¹³ In contrast, the work product immunity does not endeavor to promote any confidential relationship.¹⁴ Instead, the immunity facilitates good trial preparation by preventing the undue intrusion into an attorney's private files by opposing counsel.¹⁵ The importance of good trial preparation, however, will not always warrant the withholding of relevant facts from opposing parties.¹⁶

A privilege and the work product immunity also differ with re-

12. E. CLEARY, *McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE* § 72 at 152 (2d ed. 1972) [hereinafter cited as *McCORMICK* (2d ed.)]. See, e.g., *Wolfe v. United States*, 271 U.S. 7 (1934); *United States v. VanDrunen*, 501 F.2d 1393 (7th Cir. 1974); *People v. Doe*, 55 Ill. App. 3d 811, 813, 371 N.E.2d 334, 336 (1977); *Taylor v. Taylor*, 45 Ill. App. 3d 352, 354-55, 359 N.E.2d 820, 821 (1977); *People v. Barger*, 30 Ill. App. 3d 525, 535-36, 332 N.E.2d 649, 658 (1975).

13. *McCORMICK* (2d ed.), *supra* note 12, § 72 at 152. See, e.g., *Langswager*, 392 F. Supp. 783, 786 (N.D. Ill. 1975); *People v. Barger*, 30 Ill. App. 3d 525, 535-36, 332 N.E.2d 649, 658 (1975); *Golimas v. Fred Teitelbaum Const. Co.*, 112 Ill. App. 2d 445, 449, 251 N.E.2d 314, 317 (1969); WIGMORE (MacNaughton rev.), *supra* note 10, § 2291, at 554. See also E. Cleary, *Article V: Privileges*, 33 *FED. BAR. J.* 62 (1974); Krattenmaker, *Testimonial Privileges in Federal Courts: An Alternative to the Proposed Federal Rules of Evidence*, 62 *Geo. L.J.* 61, 85 (1973).

14. See *United States v. Nobles*, 422 U.S. 225 (1975); *Hickman v. Taylor*, 329 U.S. 495 (1947); *In re Murphy*, 560 F.2d 326 (8th Cir. 1977); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974).

15. Proper preparation of a client's case demands that he assemble information, sift what he considers to be relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their client's interests. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). See also *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926 (N.D. Cal. 1976); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974); *Southern Pacific Co. v. Superior Court*, 3 Cal. App. 3d 195, 83 Cal. Rptr. 74 (1968).

16. We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's files and where production of these facts is essential to the preparation of one's case, discovery may properly be had.

Hickman v. Taylor, 329 U.S. 495, 511 (1947). See also *Monier v. Chamberlain*, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966); *Stimpert v. Abdnour*, 24 Ill. 2d 26, 179 N.E.2d 602 (1962).

spect to the person each is designed to benefit. The attorney-client privilege is designed solely to protect the client.¹⁷ Although the attorney can claim the privilege on the client's behalf, the client is the true benefactor of the privilege.¹⁸ The work product immunity, on the other hand, is extended solely for the attorney's benefit. Although the client indirectly benefits from the immunity, the client has no right to assert the immunity on his own behalf.¹⁹

In light of these conceptual and practical differences between immunities and privileges, and the characteristics of the work product doctrine, it is not surprising several courts have labeled the work product doctrine's protection as a "qualified immunity" rather than a privilege.²⁰

17. During its early development, however, the privilege belonged solely to the attorney, and was used to preserve "honour among men." WIGMORE (MacNaughton rev.), *supra* note 10, § 2286 at 530-31. In 1776, the landmark case, *The Duchess of Kingston*, shifted the protection from the lawyer to the client. *Id.* Under present law, third parties cannot invoke the attorney-client privilege in their own behalf. Thus, where a client has revealed information to his attorney which may incriminate a third party, the third party may not invoke the privilege in order to bar the attorney's testimony. See *In re Langswager*, 392 F. Supp. 783 (N.D. Ill. 1975). Similarly, an attorney cannot assert the privilege on behalf of other clients or family members who are incriminated by his client's communications. See *People v. Doe*, 59 Ill. App. 3d 627, 375 N.E.2d 975 (1978).

18. See *Panter v. Marshall Field and Co.*, 80 F.R.D. 718 (N.D. Ill. 1978); *Duplan Corp. v. Deering Milliken, Inc.*, 487 F.2d 480 (4th Cir. 1973); *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963).

19. "The work product privilege, unlike the attorney-client privilege which belongs to the client, may be invoked only by the attorney." *Panter v. Marshall Field and Co.*, 80 F.R.D. 718, 725 n.7 (N.D. Ill. 1978); *Hercules, Inc. v. Exxon Corp.*, 434 F. Supp. 136, 156 (D. Del. 1977); see *Duplan Corp. v. Deering Milliken, Inc.*, 487 F.2d 480 (4th Cir. 1973).

20. Although courts have occasionally defined the work product doctrine as a "qualified privilege," this term is in contradistinction to the traditional protection afforded a privilege. *International Tel. and Tel. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 186 (M.D. Fla. 1973); *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968); *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962).

After articulating the distinction between privilege and immunity, several courts have held that an attorney's work product is subject to a "qualified immunity" rather than a privilege. *Lora v. Bd. of Educ. of City of New York*, 74 F.R.D. 565, 577 (E.D.N.Y. 1977); *American Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443, 446 (W.D. Mo. 1976); *International Tel. and Tel. v. United Tel. Co. of Fla.*, 60 F.R.D. 177, 186 (M.D. Fla. 1973) (while the attorney client privilege is relatively absolute, "the so-called 'work-product' privilege is not a privilege, but is a qualified immunity from discovery."); *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968) (lawyer's work product is subject to a "qualified immunity rather than a privilege, with qualifications to be determined upon the question of necessity or good cause as shown by the facts of each case."); *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962) ("[I]t is very important to keep in mind that the work product principle is not and cannot properly be described as a privilege . . . it is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of case.")

"Privilege has its basis in rules of evidence, which, according to the *Hickman* court,

HICKMAN v. TAYLOR

Unlike the traditional common law attorney-client privilege,²¹ the work product doctrine was recognized in American courts relatively recently.²² Prior to the landmark decision of *Hickman v. Taylor*,²³ an attorney's documentation of his opinions, mental impressions, and trial strategies was vulnerable to discovery.²⁴ In

should not control in every particular case," *Kirkland v. Morton Salt Co.*, 46 F.R.D. 28, 30 (N.D. Ga. 1968). Measured against the protection accorded an evidentiary privilege, see notes 9-11 *supra*, the work product doctrine more accurately extends protection equal to a qualified immunity from discovery, see notes 15-16 *supra*.

21. The attorney-client privilege originated in the 16th century. Originally the privilege was designed to protect the attorney's honor, not the client's confidences. Over the years, however, the privilege has evolved into a protection for confidential communications fostering free and open dialogue between counsel and client. WIGMORE (MacNaughton rev.), *supra* note 10, § 2286 at 530-31. *Contra*, Note, *Applicability of the Attorney-Client Privilege to Corporate Communications*, 48 *Cin. L. Rev.* 819, 819 (1979). (The origin of the attorney-client privilege has never been precisely determined. . . .)

22. *Hickman v. Taylor*, 329 U.S. 495, 500 (1947) (The concept of a "pre-trial deposition-discovery mechanism" is itself relatively new); *Hercules Inc. v. Exxon Corp.*, 434 F. Supp. 136, 150 (D. Del. 1977) ("The work product protection is a limited immunity of comparatively recent origin."); *cf.* *In re Murphy*, 560 F.2d 326 (8th Cir. 1977) (Attorney-client privilege and work product doctrine share the same common law origin). For a historical discussion of work product protection under the common law and under the federal rules prior to *Hickman*, see La France, *Work Product Discovery: A Critique*, 68 *DICK. L. REV.* 351 (1964); see generally Comment, *SEC v. National Student Marketing Corp., Work Product Immunity Inapplicable to Attorney-Defendant Where Work Product is at Issue and Former Client is No Longer an Interested Party in the Suit*, 6 *LOY. CHI. L.J.* 447 (1975) [hereinafter cited as *Work Product Immunity*].

23. 329 U.S. 495 (1947). *Hickman v. Taylor* involved a suit brought against certain tugboat owners to recover for the death of a seaman resulting from the sinking of the tugboat. The plaintiff filed numerous interrogatories seeking discovery of the contents of oral and written statements of crew members taken by defendant's attorney in the course of trial preparation. Plaintiff's attorney stated that he sought discovery of the material in question in order to aid his preparation for the examination of witnesses and to be certain he had not overlooked anything. The district court found defendant's counsel in contempt when he refused to produce the requested material. The Court of Appeals for the Third Circuit reversed on the ground that the material sought was privileged. The United States Supreme Court found that the materials fell outside the scope of the attorney-client privilege but nevertheless held that such materials were protected from discovery since they were the attorney's "work product." 4 F.R.D. 479 (E.D. Pa. 1945), *rev'd*, 153 F.2d 212 (3d Cir. 1945), *cert. denied*, 327 U.S. 808, *vacated*, 328 U.S. 876 (1946), *aff'd on other grounds*, 329 U.S. 495 (1947).

24. The original sections of the Federal Code of Civil Procedure which defined the scope of discovery did not provide for the protection of an attorney's trial preparation materials. Between the 1938 adoption of the Federal Rules and the United States Supreme Court's ruling in *Hickman v. Taylor*, there were more than sixty federal court decisions concerning the discovery of an attorney's work product. See 4 MOORE'S FEDERAL PRACTICE A 26.63 [4] (2d ed. 1976). Although most attempts at discovering trial preparation materials were unsuccessful, there were conflicting grounds for denying access to an attorney's work product. *Subsequent Litigation*, *supra* note 1, 802 n.17 (1974). In 1946, immediately prior to *Hick-*

1947, the United States Supreme Court held that effective preparation for litigation required protection against undue interference with an attorney's pre-trial files and strategies.²⁵ Because the traditional attorney-client privilege extended only to an attorney's communications with his clients, a separate protection had to be devised to encompass this broader class of materials. The Court, therefore, adopting the Third Circuit's phraseology, created the work product doctrine.²⁶

The *Hickman* ruling, however, did not accord an attorney's work product an absolute privilege. Materials covered by the doctrine are not forever insulated from disclosure.²⁷ Instead, discovery is permitted upon a party's showing that certain facts or materials contained in an attorney's files are essential to his case. Therefore, unlike the traditional common law privileges where the burden rests on the party seeking protection, the work product doctrine places the burden on the party seeking discovery of the protected material.²⁸

man, the advisory committee on the Federal Rules of Civil Procedure attempted to alleviate the confusion in the work product area. The Committee proposed an amendment to the rules which would have granted absolute immunity to any writings which reflected an attorney's mental impressions, conclusions, opinions, or legal theories. The proposed rule provided:

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

Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, reported in 5 F.R.D. 433, 456-57 (1946). The Supreme Court, however, rejected the proposed amendment. Instead, the court communicated its resolution of the work product doctrine in *Hickman*.

25. See note 15 *supra*.

26. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947). The Third Circuit labelled counsel's mental impressions, opinions, trial strategies and legal theories as the work product of the lawyer. The court, however, did not extend a special protection to these materials. Instead, the court found the materials to fall within the rubric of the attorney-client privilege. 153 F.2d 212 (3d Cir. 1945), *cert. denied*, 327 U.S. 808, *vacated*, 328 U.S. 876 (1946), *aff'd on other grounds*, 329 U.S. 495 (1947).

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

28. For example, both the attorney-client privilege and the husband and wife privilege require the party claiming the privilege to establish its applicability. *Hickman v. Taylor*, 329 U.S. 495, 512 (1947); see note 11 *supra*. The *Hickman* court placed the burden of challenging the immunity on the party seeking discovery, rather than the party claiming protection. *Id.* at 510.

Three practical considerations, expressed by the Court, prompted the decision to establish the work product immunity. First, an attorney must be free from unnecessary intrusions and assured of privacy during the preparation of a case.²⁹ According to the Court, failure to hold an attorney's thoughts inviolate would deter counsel from making written records. The Court reasoned the vulnerability of an attorney's thoughts would ultimately work to a client's detriment.³⁰

Second, free access to work product would promote inefficiency, unfairness, and sharp practices in rendering advice and preparing for trial.³¹ Finally, free access would have a demoralizing effect upon the legal profession which would lead to a decline in the general efficacy of the adversary system.³² The Court did not indicate which factor, if any, weighed most importantly.

The *Hickman* decision failed to provide any further guidelines for the work product doctrine. Consequently, courts subsequently applying the work product rule have predicated their decisions upon one or more of these three rationales.³³ Courts and commentators have taken disparate approaches in determining which rationale deserves primary importance.³⁴

29. *Id.* at 510.

30. *Id.* at 511.

31. *Id.*

32. *Id.*

33. The court decisions following *Hickman* were divergent in their explanations regarding the underlying rationale of the work product doctrine. In *Guilford Nat'l Bank v. Southern Ry.*, 24 F.R.D. 493 (M.D.N.C. 1960), the court focused on the language in *Hickman* concerning the privacy of a lawyer's "mental processes" and concluded that work product protection was intended primarily to safeguard an attorney's litigation strategy. The court in *Snyder v. United States*, 20 F.R.D. 7 (E.D.N.Y. 1956), took a broader view of the *Hickman* rationale and seems to have decided that the general efficacy of the adversarial system was the primary consideration, and thus held that the investigation need not be made by the attorney personally for protection to be granted. *Contra*, *Southern Ry. v. Lanham*, 403 F.2d 119 (5th Cir. 1969) (work product exemption should be narrowly construed and should not shield from discovery material obtained by insurance claims agents and others).

One commentator has stated that cases purportedly relying upon *Hickman* have branched into two schools of thought. One school emphasizes the protection of an attorney's trial strategy and thus protects only those materials which would reveal the attorney's mental processes and litigation strategy. The second school is broader in its protection. This view emphasizes protection of general trial preparation materials extending protection beyond materials personally obtained or prepared by the attorney if disclosure would hinder his trial preparation. *Expert Information*, *supra* note 1.

34. See *Attorney's Work Product*, *supra* note 11; *Opinion Work Product*, *supra* note 11 (court's discussion of the policies against disclosure is not altogether clear); *Expert Information*, *supra* note 1, at 626-27 (ambiguity of the court's reasoning concerning the scope and purpose of the work product doctrine has caused subsequent cases to take diverse positions

The scope of the immunity has varied in accordance with the justification selected. Unfortunately, the confusion surrounding the true policy behind the immunity has caused the scope of the privilege to be inconsistently defined. At least one jurisdiction has virtually abandoned the *Hickman* rationale altogether by construing it so liberally as to permit production of work product materials in instances where production would clearly appear unwarranted by the *Hickman* Court.³⁵ The *Hickman* progeny has therefore been labeled a "hugé jungle of conflicting decisions."³⁶

ORDINARY AND OPINION WORK PRODUCT

It is generally agreed that there are two categories of work product material, each subject to varying degrees of protection.³⁷ Commentators have recognized this distinction by labeling one "ordinary work product"³⁸ and the other "hard core"³⁹ or "opinion work product."⁴⁰ In many jurisdictions, the categorization of material determines the protection afforded.

Ordinary work product encompasses documents and other tangible items prepared in anticipation of litigation by a party or his representative.⁴¹ The second classification, hard core or opinion work product, includes the pre-litigation mental impressions, conclusions, opinions and legal theories of the attorney or other party-

while purportedly relying upon *Hickman*); *Subsequent Litigation*, *supra* note 3, at 806 (conflicting decisions probably attributed to an uncertainty about the rationale underlying the *Hickman* decision); Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333, 336 (1978) [hereinafter cited as *Work Product Under the Federal Rules*] (*Hickman* gave greater weight to the policies underlying the adversary system than to those associated with the discovery rules).

35. In *Monier v. Chamberlain*, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966) the court stated: "[T]he ascertainment of the truth and ultimate disposition of the lawsuit in accordance therewith is expedited. This . . . is the overriding consideration . . ." See *Stimpert v. Abdnour*, 24 Ill. 2d 26, 179 N.E.2d 602 (1962); *People v. Fisher*, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); *Day v. Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964); *Oberkircher v. Chicago Transit Auth.*, 41 Ill. App. 2d 68, 190 N.E.2d 170 (1963).

36. *Monier v. Chamberlain*, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966).

37. See, e.g., *Developments*, *supra* note 1, at 1028, *Attorney's Work Product*, *supra* note 11; *Work Product Under the Federal Rules*, *supra* note 34.

38. See, e.g., *Attorney's Work Product*, *supra* note 11, at 286 (also refers to ordinary work product as "peripheral" work product).

39. *Id.* at 290.

40. See, e.g., *Work Product Under the Federal Rules*, *supra* note 34, at 333.

41. FED. R. CIV. P. 26(b)(3); *Attorney's Work Product*, *supra* note 11, at 286. See generally *Opinion Work Product*, *supra* note 11, at 103; *Work Product Under the Federal Rules*, *supra* note 34, at 333.

representative.⁴² Because of the sensitive and revealing nature of the opinion work product materials, courts usually extend greater protection to these materials than to ordinary work product materials.

This two level delineation, however, receives diverse treatment in different statutes. For instance, Texas courts generally prohibit discovery of any work product materials.⁴³ Illinois courts, in contrast, permit discovery of all ordinary work product materials while absolutely protecting opinion work product materials.⁴⁴ Apparently, the federal approach allows discovery of both ordinary and opinion work product under certain circumstances.⁴⁵ The varying approaches taken by these representative jurisdictions reflect attempts by lawmakers to bring predictability to the doctrine while at the same time advancing the policies set forth in that jurisdiction. Perhaps the ambiguity engendered by the *Hickman* decision and the legislative responses to it can be best illustrated by comparing the Illinois and federal work product doctrines.

THE FEDERAL RULE

Responding to the *Hickman* decision, the drafters of the 1970 amendments to the Federal Rules of Civil Procedure adopted

42. *Attorney's Work Product*, *supra* note 11, at 290; *Opinion Work Product*, *supra* note 11, at 103; *Work Product Under the Federal Rules*, *supra* note 11, at 333.

43. Tex. R. Civ. P. 186a provides in part:

[T]he rights herein granted shall not extend to the work product of an attorney or to communications passing between agents or representatives or the employees of either party to the suit, or communications between any party and his agents, representatives, or employees, where made subsequent to the occurrence or transaction upon which the suit is based, and made in connection with the prosecution, investigation, or defense of such claim, or the circumstances out of which same has arisen, and shall not require the production of written statements of witnesses or disclosure of the mental impressions and opinions of experts used solely for consultation and who will not be witnesses in the case or information obtained in the course of an investigation of a claim or defense by a person employed to make such investigation.

One Texas commentator has stated that:

The present work product immunity in Texas . . . is a broad, absolute rule of privilege, ill-defined, inadequately justified, and capable of wreaking great injustice for little return. The rule, as are all rules of privilege, is at variance with the policy of liberal pretrial discovery and the goals of establishing all relevant facts.

Texas Work Product, *supra* note 6, at 121.

44. See note 64 *infra*. The Illinois rule grants absolute protection to hard core work product and no protection to ordinary work product. The rule defines work product as including *only* the mental impressions, theories, or litigation plans of the party's attorney.

45. See notes 47 through 58 *infra* and accompanying text.

Federal Rule 26(b)(3).⁴⁶ The need for uniformity in applying the *Hickman* standards prompted the adoption of the rule⁴⁷ which delineates two work product categories. First, the rule authorizes discovery of ordinary work product, such as documents and other tangible materials prepared in anticipation of litigation.⁴⁸ Discovery is permitted, however, only upon a showing of substantial need⁴⁹ for the materials in a party's own case preparation. Additionally, the party must demonstrate equivalent materials cannot be obtained from alternative sources without undue hardship.⁵⁰

The precise scope of protection afforded the attorney's opinion work product,⁵¹ however, remains uncertain in the federal courts. The federal rule simply states the court "shall" protect against disclosure of hard core work product.⁵² Some courts and commentators maintain that the rule establishes an absolute privilege against discovery;⁵³ other authorities indicate that protection of opinion

46. See Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 43 F.R.D. 211 (1967).

47. *Id.*

48. See note 4 *supra*.

49. See note 4 *supra*; see, e.g., *American Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443 (W.D. Mo. 1976) (sufficient showing made); *Rackers v. Siegfried*, 54 F.R.D. 24 (W.D. Mo. 1971) (plaintiff had substantial need of documents since there was no sufficient alternative source from which he could obtain the same information); *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967) (to assure counsel has not overlooked anything is insufficient showing). For general discussion regarding courts' determinations of what constitutes "substantial need," see *Attorney's Work Product*, *supra* note 11, at 289.

50. See note 4 *supra*; see, e.g., *Truck Ins. Exch. v. St. Paul Fire and Marine Ins. Co.*, 66 F.R.D. 129 (E.D. Pa. 1975); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974). It is important to note, however, that even if the document is protected by the work product immunity, the *existence* of the document cannot be denied if opposing counsel so inquires. Thus, the party seeking discovery may learn through discovery procedures if particular documents exist and who possesses the documents, even though the document itself may not be subject to disclosure. See, e.g., *Balistreri v. O'Farrell*, 57 F.R.D. 567 (E.D. Wisc. 1972); *La Rocca v. State Farm Mut. Auto. Ins. Co.*, 47 F.R.D. 278 (W.D. Pa. 1969). Work product immunity also may not extend to *facts* that opposing counsel or his agent have learned. See, e.g., *Lance, Inc. v. Ginsburg*, 32 F.R.D. 51 (E.D. Pa. 1962); *Smith v. Insurance Co. of North America*, 30 F.R.D. 534 (M.D. Tenn. 1962); *Baltimore Transit Co. v. Mezzanotti*, 227 Md. 8, 174 A.2d 768 (1961).

51. See notes 4, 39 and 40 *supra*.

52. *Id.*

53. See *In re Grand Jury Investigation*, 599 F.2d 1224 (3d Cir. 1979); *Town of North Kingstown v. Ashley*, 118 R.I. 505, 510, 374 A.2d 1033, 1036 (1977); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 732 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *United States v. Chatham City Corp.*, 72 F.R.D. 640, 643 n.3 (S.D. Ga. 1976); *Monier v. Chamberlain*, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966). See *Opinion Work Product*, *supra* note 11, for a discussion of the various approaches used by courts in determining the scope of hard core work product protection. See *Work Product Under the Federal Rules*,

work product, although relatively absolute, must yield to disclosure in rare situations.⁵⁴

Federal courts have proposed various guidelines for disclosure of opinion work product. According to several courts, the attorney's opinion work product is "at issue" when an attorney's actions form the basis of the suit itself. Therefore, the material is discoverable under a "crime or fraud" exception to the work product doctrine.⁵⁵ Other courts and commentators propose a balancing approach regarding the protection afforded opinion work product. Courts which have adopted this approach, determine the applicability of the immunity by balancing the need for the information against the need for privacy.⁵⁶ Other courts utilizing a balancing approach state that as the quantity of opinion work product increases the requisite showing of need increases proportionately.⁵⁷ Regardless of the approach ostensibly followed in the federal system, one generalization seems appropriate. Where an attorney's work product embodies facts critical to a party's case, federal courts may nevertheless order disclosure.⁵⁸

supra note 34.

54. See, e.g., *In re Murphy*, 560 F.2d 326 (8th Cir. 1977); *United States v. Pfizer, Inc.*, 560 F.2d 326 (8th Cir. 1977); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926 (N.D. Cal. 1976); *Opinion Work Product*, *supra* note 11; *Work Product Under the Federal Rules*, *supra* note 34.

55. See, e.g., *In re Murphy*, 560 F.2d 326 (8th Cir. 1977); *Truck Ins. Exch. v. St. Paul Fire and Marine Ins. Co.*, 66 F.R.D. 129 (E.D. Pa. 1975) (materials in attorney's file "at issue" since activity of counsel in underlying lawsuit was the basis of defendant's defense); *SEC v. National Student Mktg. Corp.*, 18 F.R. SERV. 2d 1302 (D.D.C. 1974). See also *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215 (4th Cir. 1976) where the court discussed a "crime of fraud exception" to hard core work product protection but determined that this issue was not before the court; *United States v. Pfizer*, 560 F.2d 326 (8th Cir. 1977). For a discussion of *Murphy* and the crime-fraud exception, see *Opinion Work Product*, *supra* note 11; see also *Work Product Under the Federal Rules*, *supra* note 34.

56. See, e.g., *Xerox Corp. v. International Business Machines Corp.*, 64 F.R.D. 367 (S.D. N.Y. 1974) (right of privacy of an attorney's notes must be balanced against critical need for the facts); *International Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177 (M.D. Fla. 1973) (court stated that hard core materials are entitled to greater protection than ordinary work product materials and concluded that plaintiff had not made a sufficient showing to invade the mental impressions of opposing counsel).

57. See *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487, 492 (7th Cir. 1970), *aff'd mem. by an equally divided court*, 400 U.S. 348 (1971); *Work Product Under the Federal Rules*, *supra* note 34.

58. *Xerox Corp. v. International Business Machines Corp.*, 64 F.R.D. 367 (S.D.N.Y. 1974) (documents containing attorney's thoughts, impressions, trial strategy and other similar information produced by attorney in anticipation of litigation will be protected when feasible, but not at the expense of hiding nonprivileged facts.) Courts have consistently held that work product protection does not extend to facts the attorney has learned, to identification of those from whom he learned the facts, or to the existence or nonexistence of docu-

COMPARING THE FEDERAL AND THE ILLINOIS RULE

The Illinois rule sharply contrasts the federal rule and represents a unique approach to work product protection. The Illinois Supreme Court's decision in *Monier v. Chamberlain*⁵⁹ ratified a decade of decisions which had gradually eroded work product immunity in Illinois.⁶⁰ The *Monier* decision, diverging from the national trend of adoption of the federal work product standard,⁶¹ narrowly defined the scope of the immunity.⁶² Shortly thereafter, the then existing Illinois statutory work product rule was amended to reflect the limited application of the immunity.⁶³

Unlike the federal rule, the Illinois rule grants protection only to "hard core" work product.⁶⁴ Consequently, the rule confers no immunity on ordinary work product materials. According to one Illinois appellate court, the rule fosters liberal discovery and narrowly circumscribes the work product protection.⁶⁵ The rule reflects the

ments, even though the documents themselves may qualify for work product protection. See WRIGHT AND MILLER, *FEDERAL PRACTICE AND PROCEDURE: Civil* § 2023 at 194 n.16 for case annotations. A conflict arises when facts are inextricably linked with work product. See notes 71 through 75 *infra* and accompanying text.

59. 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

60. See *Stimpert v. Abdnour*, 24 Ill. 2d 26, 179 N.E.2d 602 (1962); *Terry v. Fisher*, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); *Krupp v. Chicago Transit Auth.*, 8 Ill. 2d 37, 132 N.E.2d 532 (1956); *Oberkircher v. Chicago Transit Auth.*, 41 Ill. App. 2d 68, 190 N.E.2d 170 (1963); *Haskell v. Siegmund*, 28 Ill. App. 2d 1, 170 N.E.2d 393 (1960). See *Watson, The Settlement Theory of Discovery*, 55 ILL. B.J. 480 (1967); *Yates, Privileged Documentation*, 53 ILL. B.J. 946 (1965).

61. Many jurisdictions had adopted the federal standard for work product protection. See WRIGHT AND MILLER, *FEDERAL PRACTICE AND PROCEDURE: Civil* § 2022 for a listing of states which follow the federal rule, or the proposed federal amendment, and for a listing of states which do not follow the federal rule.

62. "We believe that narrowing the scope of the 'work product' doctrine—and rendering material encompassed thereby absolutely exempt from discovery; while at the same time freeing relevant and material evidentiary matter—is preferable to the Federal position." *Monier v. Chamberlain*, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966).

63. ILL. REV. STAT. ch. 110A, § 201(b)(2) (1979) (see Committee Comments).

64. FED. R. CIV. P. 26(b)(3) grants immunity to an attorney's ordinary work product subject to a showing of substantial need by opposing counsel. See notes 48 and 49 *supra*. The Illinois rule provides no protection for ordinary work product. "[The *Monier* court] narrowly defined work product, clothed it with an absolute exemption within the narrow area still allotted to it, and made all other relevant and non-privileged material freely subject to discovery procedure." *Erosion of Work Product*, *supra* note 1, at 152.

65. There can be little doubt that complete disclosure via the authorized discovery methods prescribed by Rule 201, is the order of the day and standard procedure in Illinois The Rule seems to us to be quite unequivocal and unambiguous: There is complete disclosure of any relevant matter. The *only* exceptions to this *all encompassing* and *totally inclusive* discovery rule are those provided for in (b)(2) of the rule, dealing with privileged matters and the work product of a party

concerns voiced by the *Monier* court that broader work product immunity would unduly impede discovery, hinder pre-trial settlements, increase the burgeoning caseload, and thwart the prompt disposition of law suits.⁶⁶

Unlike the work product protection of other jurisdictions, the protection afforded by the Illinois rule is in the nature of a privilege, as opposed to an immunity. Although the Illinois rule limits protection to hard core materials, these materials are absolutely shielded from discovery.⁶⁷ Under the federal rule, there is uncertainty whether a federal court is empowered to order disclosure of hard core materials in an appropriate case.⁶⁸ Unlike its federal counterpart,⁶⁹ the Illinois rule thus confers privilege-like work product protection in that only one level of inquiry is necessary; if the material falls within the narrow Illinois definition of work product, then it is unqualifiedly protected from disclosure. It is unnecessary to determine whether a substantial need for the material exists. On the other hand, if the material falls outside the definition, then it should be freely discoverable. The Illinois approach reflects the judiciary's commitment to the disclosure of all relevant facts rather than broad immunity for work product materials.⁷⁰

One question, although infrequently encountered, remains unresolved, under the Illinois work product doctrine. The difficult issue concerns whether disclosure should be compelled when non-privileged, relevant facts are inextricably linked with privileged opinion work product.⁷¹ Under the federal rule, the relevant facts would be excised if feasible.⁷² If such a distillation is impossible,

in preparation for trial.

City of Bloomington v. Quinn, 114 Ill. App. 2d 145, 147, 252 N.E.2d 10, 12 (1969).

66. *Monier v. Chamberlain*, 35 Ill. 2d 351, 359, 221 N.E.2d 410, 415 (1966).

67. See notes 4 and 64 *supra*.

68. See notes 52 through 57 *supra* and accompanying text.

69. See note 4 *supra*.

70. In a very real sense, modern American litigation is pretrial discovery. Lawyers spend an enormous amount of time taking depositions, asking, answering, and arguing over labyrinthine sets of interrogatories and chasing down and examining documents. The reward for effective pretrial discovery—to both courts and the litigants—is often a settlement, albeit on the courthouse steps . . . [pretrial discovery] is directed toward making the judicial process one of disseminating facts relevant to the issues and to the rendering of a just decision

Payne v. Coates-Miller, Inc., 68 Ill. App. 3d 601, 606, 386, N.E.2d 398, 402 (1979).

71. Illinois courts have not yet considered this issue.

72. [T]he basic thrust of *Hickman* and its progeny is that documents containing the attorney's thoughts, impressions, views, strategy, conclusions, and other similar information produced by the attorney in anticipation of litigation are to be protected *when feasible*, but not at the expense of hiding the nonprivileged facts

then the entire document may be subject to discovery.⁷³ Illinois, however, has not squarely addressed this issue. Although the Illinois courts clearly endorse the disclosure of *all* relevant facts,⁷⁴ the rule provides absolute privilege to the opinion or hard core work product of an attorney.⁷⁵ This issue, when presented to an Illinois appellate court, may eventuate the first exception to the absolute work product privilege rule. The following discussion concerns the practical application of the federal and Illinois work product doctrines.

APPLICATION OF THE FEDERAL AND ILLINOIS WORK PRODUCT RULES

Relevant Parties

The Illinois and federal work product rules share the same underlying objective of preventing unwarranted intrusions into an attorney's private files.⁷⁶ Ultimately, this assures effective trial preparation.⁷⁷ Because the protection is designed to assist the attorney, only the attorney can assert the exemption from discovery.⁷⁸ The

from adversaries or the court . . . the rights of privacy of an attorney's notes must be balanced against the critical need for the facts. Where the non-privileged facts are intertwined with information which conceivably is privileged, the critical factor becomes the availability of the non-privileged facts from other sources, and where no other sources exist, a balance must be struck in favor of distilling if possible, the non-privileged facts from the attorney's documents. *If such a distillation becomes impossible, however, then the entire contents of the documents must be produced.* (emphasis added).

Xerox Corp. v. International Business Machines Corp., 64 F.R.D. 367, 381 (S.D.N.Y. 1974).

73. *Id.*

74. Biehler v. White Metal Rolling and Stamping Corp., 30 Ill. App. 3d 435, 442, 333 N.E.2d 716, 722 (1975) (ascertainment of truth and ultimate disposition of the lawsuit is better accomplished when parties are well educated as to their respective claims in advance of trial); Monier v. Chamberlain, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966) (ascertainment of truth and ultimate disposition of lawsuit is overriding consideration); Stimpert v. Abdnour, 24 Ill. 2d 26, 31, 179 N.E.2d 602, 605 (1962) (as sympathetic as we are to the desirability of protecting lawyers from unnecessary intrusion upon their privacy in the preparation of a lawsuit, [protection] cannot extend to the suppression of material evidentiary facts); Oberkircher v. Chicago Transit Auth., 41 Ill. App. 2d 68, 72-73, 190 N.E.2d 170, 173 (1963) (court refused to extend protection over the suppression of relevant facts).

75. See notes 4 and 64 *supra*.

76. See Hickman v. Taylor, 329 U.S. 465, 511 (1947) where the court stated, "[N]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." Monier v. Chamberlain, 35 Ill. 2d 351, 221 N.E. 410 (1966).

77. See note 15 *supra*.

78. See, e.g., Hercules Inc. v. Exxon Corp., 434 F. Supp. 136, 156 (D. Del. 1977) (attorney-client privilege is the client's privilege, while work product immunity may be invoked only by an attorney); Radiant Burners Inc. v. American Gas Ass'n, 207 F. Supp. 771, 776 (N.D. Ill. 1962) (The attorney work product privilege, to be distinguished from the attorney-

client does not control work product protection and has no power to waive the protection.⁷⁹ Furthermore, when a client waives his right to the attorney-client privilege, the attorney does not sacrifice the protection of the work product rule.⁸⁰

The federal and Illinois rules diverge on one particular matter. The federal rule extends work product protection to materials obtained or gathered by the attorney *or other representative* of a party.⁸¹ The Illinois rule, on the other hand, does not expressly extend work product protection to materials prepared by an agent of the attorney. Instead, the State provision limits protection to the mental impressions, theories or litigation plans of the party's attorney,⁸² although the matter has not been definitively resolved by the Illinois courts.

Burden

The federal rule requires the party seeking discovery of ordinary work product demonstrate a substantial need for the materials.⁸³ The determination of substantial need is a matter wholly within the discretion of the court.⁸⁴ As for hard core work product, the federal rule fails to prescribe any standard for courts to determine

client privilege, is historically and traditionally a privilege of the attorney and not that of the client). It has also been determined that the work product doctrine applies not only to private attorneys, but also to corporate attorneys, *see* Burnham, *supra* note 9; and government attorneys, *see, e.g.,* Jordan v. United States Dept. of Justice, 591 F.2d 753 (D.D.C. Cir. 1978) (attorney's work product privilege applies to government attorneys and is not limited to private attorneys); United States v. Leggett and Platt, Inc., 542 F.2d 655 (6th Cir. 1976); United States v. J.B. Williams Co., 402 F. Supp. 796 (S.D.N.Y. 1975); Thill Securities Corp. v. New York Stock Exchange, 57 F.R.D. 133 (E.D. Wis. 1972).

79. *See* note 19 *supra*.

80. *See, e.g.,* Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976); Ceco Steel Prod. Corp. v. H.K. Porter Co., 31 F.R.D. 142 (N.D. Ill. 1962); Vilistor-Kent Theatre Corp. v. Brandt, 19 F.R.D. 522 (S.D.N.Y. 1956).

81. *See* note 4 *supra*. *See, e.g.,* Harper and Row Publishers, Inc., 423 F.2d 487 (7th Cir. 1970) (work product privilege might attach to a document prepared under the supervision of the attorney even though not drafted by the attorney himself); Alltmont v. United States, 177 F.2d 971 (3d Cir.), *cert. denied*, 339 U.S. 967 (1950).

82. Ill. Sup. Ct. Rule 201(b)(2) (ILL. REV. STAT. ch. 110A, § 201(b)(2) (1979)), provides in part, "Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the *party's attorney*." (emphasis added). *Contra*, Chapman, *Discovery, Federal Civil Practice*, ILL. INST. FOR CLE, 1978, §§ 7.23, 7.22.

83. *See* note 4 *supra*. *See, e.g.,* United States v. Chatham City Corp., 72 F.R.D. 640 (S.D. Ga. 1976); Truck Ins. Exchange v. St. Paul Fire and Marine Ins. Co., 66 F.R.D. 129 (E.D. Pa. 1975); Burlington Industries v. Exxon, 65 F.R.D. 26 (D. Md. 1974); American Standard, Inc. v. Bendix Corp., 71 F.R.D. 443 (W.D. Mo. 1976).

84. *See* note 49 *supra*.

whether to order disclosure.⁸⁵ Undoubtedly, however, the party seeking discovery must carry the burden of justifying the production of any work product documents.⁸⁶

In contrast, the Illinois work product rule, which makes ordinary work product material freely discoverable, requires no showing of need⁸⁷ and places the burden upon the party invoking its protection.⁸⁸ In order to successfully invoke the privilege, the party must establish that the material qualifies as opinion, as opposed to ordinary, work product and therefore should be protected from discovery.⁸⁹ The Illinois rule thus reflects traditional privilege doctrine in that the burden falls squarely upon the party asserting the privilege. The federal rule, which places the burden on the party seeking discovery, contravenes this traditional allocation of burden. This distinction further illustrates the operation of the Illinois rule as a privilege and operation of the federal rule as an immunity.

Scope

1. Basic Requirements

Both the Illinois and federal rule require the satisfaction of two initial conditions before work product protection may be triggered. The materials must be documents and tangible items,⁹⁰ and, fur-

85. See notes 4 and 52 *supra* and accompanying text.

86. *Hickman v. Taylor*, 329 U.S. 495, 512 (1947) (burden rests on one invading privacy of attorney to establish reasons justifying production). See also *International Tel. & Tel. Corp. v. United Tel. Co. of Fla.*, 60 F.R.D. 177 (M.D. Fla. 1973). (Plaintiff failed to make sufficient showing to invade mental impressions of the attorney's trial preparation materials).

87. See note 5 *supra*.

88. See, e.g., *Krupp v. Chicago Transit Auth.*, 8 Ill. 2d 37, 42, 132 N.E.2d 532, 536 (1956); *Shere v. Marshall Field & Co.*, 26 Ill. App. 3d 728, 730, 326 N.E.2d 92, 94 (1975) (one who asserts privilege has the burden of proving it; mere assertion that matter is privileged will not suffice).

89. *Id.*

90. See note 4 *supra*. ILL. SUP. CT. R. 201(b)(1) (ILL. REV. STAT. ch. 110A, § 201(b)(1) (1979)), defines "documents" as including papers, photographs, films, recordings, memoranda, books, records, accounts and communications. Under the Illinois and federal rules discovery procedures do not extend to oral statements. The interest in promoting liberal discovery does not justify compelling an attorney to write out his conversations. See *Hickman v. Taylor*, 329 U.S. 495, 513 (1947) (no showing of necessity could justify forcing an attorney to write out his oral communications with a witness because of the risk of inaccuracy and untrustworthiness); *Ford v. Phillips Electronics Instruments Co.*, 27 F.R. SERV. 2d 597 (E.D. Pa. 1979) (FED. R. CIV. P. 26(b)(3) in no way implies that mental impressions not embodied in documents are otherwise discoverable); *Miceikis v. Freed*, 37 Ill. App. 3d 763, 347 N.E.2d 320 (1976) (court denied plaintiff's request that defense counsel reduce to writing his conversations with witnesses. Court recognized great latitude afforded discovery in *Monier* but decided that *Monier* did not extend to such lengths).

thermore, they must be prepared in anticipation of litigation or for trial. Materials can be protected if litigation is anticipated even though a formal complaint has not been filed.⁹¹ Protected materials, however, will not include materials prepared in the ordinary course of business.⁹² The scope of protection of certain specific materials, however, has generated a substantial amount of concern and merits special attention.

2. Insurance Coverage

The federal rule expressly provides for the disclosure of insurance coverage so counsel for both sides can make a realistic appraisal of their cases.⁹³ Thus, settlement and litigation strategies are founded on actual knowledge and not on mere speculation.⁹⁴ This federal work product rule has withstood constitutional challenge based on an alleged privacy violation.⁹⁵

Unlike the federal rule, the Illinois rule does not expressly authorize disclosure of insurance information. Nevertheless, the cases indicate that the existence and details of a party's insurance policy fall outside the work product doctrine and, because of the rele-

91. The actual filing of a suit is not required to invoke work product protection. *See, e.g.*, 79 Civ. 2328-CSH slip opinion (S.D.N.Y. 1980); *Home Ins. Co. v. Ballinger Corp.*, 74 F.R.D. 93 (N.D. Ga. 1977); *Hercules v. Exxon Corp.*, 434 F. Supp. 136 (D. Del. 1977); *Sylgab Steel and Wire Corp. v. Imoco-Gateway Corp.*, 62 F.R.D. 451 (N.D. Ill. 1974) *aff'd* 534 F.2d 330 (7th Cir. 1976); *Arney v. George A. Hormel & Co.*, 53 F.R.D. 179 (D. Minn. 1971). In *United States v. The Upjohn Co.*, 27 F.R. Serv. 2d 1397 (6th Cir. 1979), the court held that work product protection does not apply to administrative summons issued under 26 U.S.C. § 7602. The IRS sought enforcement of its summons for documents in the course of an investigation. The IRS was investigating payments made by defendant and its subsidiaries which might affect defendant's federal income tax liability. Defendant directed its in-house counsel, along with outside counsel, to conduct an internal investigation of the payments. Defendant's management urged officers and employees to respond candidly to counsel's confidential questions. The responses were in the form of written questionnaires and in counsel's notes and memoranda describing oral interviews. It was these documents which the IRS sought to obtain and which defendant refused to relinquish on grounds of attorney-client privilege and work product protection. With respect to the claim of work product protection, the court denied protection because the work product doctrine was not applicable to documents sought through an administrative summons. This case is pending appeal before the Supreme Court.

92. *See, e.g.*, *Virginia Elec. and Power Co. v. Sun Shipbuilding and Dry Dock Co.*, 68 F.R.D. 397, 401-06 (E.D. Va. 1975); *Galambus v. Consolidated Freightways Corp.*, 64 F.R.D. 468 (N.D. Ind. 1974); *Miles v. Bell Helicopter Co.*, 385 F. Supp. 1029 (N.D. Ga. 1974); *Thomas Organ Co. v. Jadranska Slobodna Diovdba*, 54 F.R.D. 367 (N.D. Ill. 1972).

93. FED. R. CIV. P. 26(b)(2).

94. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 43 F.R.D. 211, 229 (1967).

95. *Helms v. Richmond-Petersburg Turnpike Auth.*, 52 F.R.D. 530 (E.D. Va. 1971).

vancy of the information, are readily discoverable.⁹⁶

3. Photographs

Federal courts have accorded disparate treatment to photographs. Several district courts have determined photographs do not constitute even ordinary work product and are therefore discoverable.⁹⁷ Other courts have held that photographs, although work product, must be discoverable since opposing counsel cannot obtain similar photographs due to changes of circumstance or passage of time. Therefore, the requisite showing of substantial need is usually satisfied rendering the photographs freely discoverable.⁹⁸

Under prior Illinois case law, photographs were protected by the work product doctrine.⁹⁹ Other jurisdictions, in contrast, encountered difficulty categorizing photographs as "documents" protected from discovery.¹⁰⁰ Illinois has circumvented these semantic difficulties by defining "documents" to include photographs.¹⁰¹ All relevant documents are now subject to full disclosure, including, *inter alia*, the existence and location of documents.¹⁰² Because photographs usually will fall outside the definition of Illinois work product, their discoverability should be determined by the overall relevancy of the photographs. An Illinois court therefore will routinely order that a party produce all photographs, slides or motion pictures pertinent to the litigation.¹⁰³

96. See, e.g., *Terry v. Fisher*, 12 Ill. 2d 231, 145 N.E.2d 588 (1957); *American Ins. Co. v. Formeller*, 123 Ill. App. 2d 244, 263 N.E.2d 262 (1970); *Washburn v. Terminal R.R. Ass'n*, 114 Ill. App. 2d 95; 252 N.E.2d 389 (1969).

97. See, e.g., *Hughes v. Groves*, 47 F.R.D. 52 (W.D. Mo. 1969); *Kagan v. Langer Transp. Corp.*, 43 F.R.D. 404 (S.D.N.Y. 1967); *Hikel v. Abdusy*, 41 F.R.D. 152 (D. Md. 1966); *Scuderi v. Boston Ins. Co.*, 34 F.R.D. 463 (D. Del. 1964). Generally, this is because photographs are often taken in the ordinary course of business before anticipation of litigation and not at the direction of an attorney.

98. When photographs are considered ordinary work product materials, they are usually discoverable because the requisite showing is satisfied. See, e.g., *Galambus v. Consolidated Freightways Corp.*, 64 F.R.D. 468 (N.D. Ind. 1974); *Kagan v. Langer Transp. Corp.*, 43 F.R.D. 404 (S.D.N.Y. 1967); *Scuderi v. Boston Ins. Co.*, 34 F.R.D. 463 (D. Del. 1964).

99. See, e.g., *Yowell v. Hunter*, 403 Ill. 202, 85 N.E.2d 674 (1949).

100. See, e.g., *Houdaille Industries, Inc. v. Cunningham*, 502 S.W.2d 544 (Tex. 1973); *Texas Work Product*, *supra* note 6; Comment, *Photographs are Not 'Written Communications' Within the Work-Product Exception of Rule 167 and, Therefore, Are Subject to Discovery in Texas*, 6 TEX. TECH L. REV. 201 (1974).

101. See note 90 *supra*.

102. ILL. REV. STAT. ch. 110A, § 201 (b)(2) (1975).

103. See *Justice v. Justice*, 114 Ill. App. 2d 254, 252 N.E.2d 493 (1969) (photographs discovered in defendant's file during pretrial discovery procedures were admissible as part of plaintiff's case in chief).

4. Surveillance Movies

Defense of personal injury suits often involves the use of surveillance films as impeachment evidence. Generally, defense counsel employs a person to film the plaintiff, without his knowledge or consent, engaging in physical activity which is inconsistent with the injuries claimed.¹⁰⁴ After capturing on film the compromising activity, defense counsel presents the film to the trier-of-fact after the plaintiff has testified as to the nature and extent of his injuries. Under the federal rule, films may fall within the rubric of ordinary work product if they are prepared by counsel or his agent in anticipation of litigation.¹⁰⁵ If films constitute ordinary work product, they receive only qualified immunity from discovery.¹⁰⁶ Thus, if plaintiff is able to satisfy the "substantial need" and "undue burden" requirements of the federal rule, the court will permit not only discovery of the film maker's identity and the facts surrounding the making of the film,¹⁰⁷ but also the actual pre-trial exhibition of the film.¹⁰⁸

Ordinarily, a plaintiff should be able to meet the requisite showings of substantial need and undue burden. The authenticity of a film is subject to editing, lighting, and camera angles. Plaintiff must be afforded the opportunity to ascertain the integrity of the film in order to prepare for cross-examination and rebuttal should the film prove false and misleading.¹⁰⁹ With respect to the "undue burden" requirement, the film is only available from the party who

104. See, e.g., *Martin v. Long Island R.R.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Blyther v. I.T.O. Corp. of Ameriport*, 61 F.R.D. 604 (S.D.N.Y. 1974); *Snead v. American Export-Isbrandtsen Lines*, 59 F.R.D. 148 (E.D. Pa. 1973).

105. See, e.g., *Martin v. Long Island R.R.*, 63 F.R.D. 53 (E.D.N.Y. 1974). *But cf.*, *Blyther v. Northern Lines, Inc. v. I.T.O. Corp. of Ameriport*, 61 F.R.D. 610 (E.D. Pa. 1973) (while the court holds that defendant's surveillance films are subject to discovery after defendant is permitted to depose plaintiff as to alleged injuries, the court does not consider the possibility that the films may qualify as work product materials which require a showing of need to justify their production).

106. See, e.g., *Martin v. Long Island R.R.*, 63 F.R.D. 53, 55 (E.D.N.Y. 1974) (court held that the "barrier of the work product rule" was "lifted" since plaintiff demonstrated a substantial need of the materials in preparing his case, and his inability to film the identical activities filmed by defendant).

107. See, e.g., *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D. Pa. 1973) (court held that defendants must answer plaintiff's interrogatories which sought to determine whether defendant had taken any "secret motion pictures" of plaintiff, and, if so, the details as to "how, when, where and by whom they were taken").

108. See, e.g., *Martin v. Long Island R.R.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D. Pa. 1973).

109. *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150 (E.D. Pa. 1973).

made the film¹¹⁰ and the activities and circumstances depicted in the film cannot be duplicated.¹¹¹ As a consequence, several courts have held that a claim of work product protection would not prevent inspection of the films by opposing counsel under such situations.¹¹²

The rationale for permitting pre-trial discovery of surveillance movies stems from the general advantages associated with liberal discovery. Pre-trial evaluation of such evidence facilitates settlement discussion and encourages the prompt and just disposition of the law suit.¹¹³

The pre-trial production of surveillance films necessitates the balancing of conflicting interests. Defense counsel usually argues pre-trial disclosure of the films negates its impeachment effectiveness, and plaintiff's counsel counters such disclosure must be permitted so he is adequately prepared to attack the image projected by the film if it is misleading or fraudulent.¹¹⁴ Generally, federal courts have concluded the plaintiff must offer the defendant the opportunity to depose the plaintiff as to the nature and extent of the injuries as a prerequisite to disclosure of the film.¹¹⁵ Once the plaintiff is deposed, the impeachment value of the film is not entirely removed.¹¹⁶ Furthermore, the possible existence of surveil-

110. *Id.*

111. *Id.* at 155.

112. *Martin v. Long Island R.R.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D. Pa. 1973).

113. The court in *Martin v. Long Island R.R.*, 63 F.R.D. 53, 54 (E.D.N.Y. 1974) stated that:

[M]eaningful settlement discussions will be facilitated if the magistrate and parties can evaluate possible evidence

Experience suggests that while surprise has a healthy prophylactic effect against possible perjury, on balance, cases are more likely to be decided fairly on their merits if the parties are aware of all the evidence. Both sides are then in a position to contradict opposing evidence and the adversarial process works most efficiently.

114. *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 150 (E.D. Pa. 1973).

115. *See, e.g., Martin v. Long Island R.R.*, 63 F.R.D. 53, 55 (E.D.N.Y. 1974); *Snead v. American Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148, 151 (E.D. Pa. 1973); *Blyther v. I.T.O. Corp. of Ameriport*, 61 F.R.D. 610, 612 (E.D. Pa. 1973).

116. Before any of these disclosures, however, the defense must be given an opportunity to depose the plaintiff fully as to his injuries, their effects, and his present disabilities. Once his testimony is memorialized in deposition, any variation he may make at trial to conform to the surveillance films can be used to impeach his credibility, and his knowledge at deposition that the films may exist should have a salutary effect on any tendency to be expansive.

Snead v. American Export-Isbrandtsen Lines, Inc., 59 F.R.D. 148, 151 (E.D. Pa. 1973).

lance film may discourage exaggerated claims.¹¹⁷

Illinois courts have not considered whether surveillance films may constitute work product material. Presumably, this is because films do not fall within Illinois' narrow definition of "work product." In fact, it appears pre-trial disclosure of such films routinely occurs.¹¹⁸ Illinois discovery rules provide that all relevant documents, defined to include films,¹¹⁹ are subject to full disclosure.¹²⁰ Consequently, surveillance films, like photographs,¹²¹ are not within the ambit of the work product privilege in Illinois and are therefore subject to discovery.

In comparison, other state courts have achieved the same result¹²² although their work product rules are more protective than Illinois'. For instance, the New Jersey Supreme Court found surveillance films qualified for ordinary work product protection under the statute but permitted discovery after the party satisfied the requisite showing of undue burden and substantial need.¹²³ The court also required the party who wished to examine the films to permit the adversary to depose him before inspection. Such a requirement conforms to the federal practice and fairly balances the conflicting interests.¹²⁴

117. *Id.*

118. Standard orders for production generally require a party to produce motion pictures taken subsequent to the alleged occurrence.

119. *See* note 90 *supra*.

120. ILL. REV. STAT. ch. 110A, § 201(b)(2) (1975).

121. Illinois courts have also held that motion pictures are a mere series of still photographs and are therefore authenticated for evidentiary purposes by the same questions used to authenticate photographs. *See, e.g.,* French v. City of Springfield, 30 Ill. App. 3d 584, 334 N.E.2d 181 (1975).

122. *See, e.g.,* Zimmerman v. The Superior Court of the State of Arizona, 98 Ariz. 85, 402 P.2d 212 (1965) (surveillance movies would not fall into the category of memoranda, briefs and related writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories); *contra*, St. Louis Public Service Co. v. McMillan, 351 S.W.2d 22 (Mo. 1961) (court held that surveillance films were immune from discovery since they qualified as the work product of the attorney). The Arizona Supreme Court in *Zimmerman* distinguished this Missouri case and stated that the Missouri work product rule was construed more broadly than the Arizona work product protection and that they would not subscribe to such a broad definition of work product.

123. Jenkins v. Rainner, 69 N.J. 50, 350 A.2d 473 (1976). N.J. Ct. Rules 4:10-2(c) adopt the federal standard requiring a showing of substantial need and undue hardship to justify disclosure of work product material. The *Jenkins* court stated that even though the films are the result of counsel's industry, they are not automatically protected from discovery solely because of the work product doctrine. *Id.* at 55, 350 A.2d at 475.

124. "As a general proposition, and always subject to the discretion of the trial court, simple fairness and full discovery generally require that any demand for surveillance motion pictures should be accompanied by a consent to be deposed *after* the movies have been

Illinois courts reject the notion of counsel's right to surprise his opponent at trial. Indeed, Illinois' liberal pre-trial discovery procedures are designed to eliminate surprise and promote the "joint search for truth."¹²⁵ Thus, Illinois courts should be unwilling to shield surveillance films from discovery in order to enhance any impeachment value with the element of surprise.

5. Appraiser Reports in Eminent Domain Cases

Appraiser reports in an eminent domain proceeding may be ordinary work product under the federal rule, but, nevertheless, are generally discoverable once the requisite showing is made to overcome ordinary work product protection. The justification for ordering production of appraiser reports is that the valuation question is the fundamental controversy in the eminent domain litigation, and therefore there exists substantial need of the reports prior to litigation.¹²⁶ Appraiser reports constitute the "substance" of the trial and appraiser opinions are "notoriously disparate."¹²⁷ If appraiser reports were immune from discovery, the parties would not be able to assess the merits of their case for settlement purposes, define

taken and before the films must be presented for the adversary's examination." *Id.* at 60, 350 A.2d at 478. See also notes 114 through 117 *supra* and accompanying text.

125. See, e.g., *Payne v. Coates-Miller, Inc.*, 68 Ill. App. 3d 601, 606, 386 N.E.2d 398, 402 (1979).

126. See, e.g., *United States v. Meyer*, 398 F.2d 66 (9th Cir. 1968) (The primary issue in condemnation cases is the amount of compensation to be paid the landowner. Pleadings in a condemnation case are "wholly uninformative" on this issue. The landowner is generally unable to determine from other sources the opinions of the government appraisers and their basis. Effective trial preparation requires pretrial disclosure of appraiser reports and the basis of their reports in condemnation cases).

127. Because land appraisal is complex and technical, usually evidence on the issue of value consists principally of the opinions of deposing experts. These opinions are notoriously disparate. The weight to which an appraiser's opinion testimony is entitled turns upon the validity of the appraiser's premises, procedures, and theories; the soundness of his factual determinations; the comparisons he has made; the methods he has followed, and the formulae he has applied. Basically, the trial of a condemnation suit consists of the admission into evidence of the opinions of the deposing appraisers and the factual and theoretical bases upon which they rest, and the testing of those opinions by cross-examination and rebuttal.

The appraiser's opinions and their factual and theoretical foundation are peculiarly within the knowledge of each appraiser and, to a degree, that of the party who employed him. The deposing party can detain this information in advance of trial only by discovery. Since this material will constitute the substance of the trial, pretrial disclosure is necessary if the parties are to fairly evaluate their respective claims for settlement purposes, determine the real areas of dispute, narrow the actual issues, avoid surprise, and prepare adequately for cross-examination and rebuttal.

Id. at 69.

areas of genuine dispute, or adequately prepare for trial.¹²⁸ Therefore, appraiser reports, and the methods used to determine valuation in federal eminent domain cases, may be subject to disclosure if the party seeking discovery is able to overcome the claim of work product protection.¹²⁹

Under the previous Illinois rule, appraisals made by expert witnesses in the real estate field, which were used by counsel in an eminent domain proceeding, were held to be privileged materials made in preparation for trial.¹³⁰ As a consequence of the judicial trend toward liberal discovery and the enactment of the current Illinois rule, however, appraiser reports are no longer shielded from discovery. Several Illinois courts have predicated their holdings on the narrowed definition of work product as well as the recognized relevance of the reports to the issues in an eminent domain proceeding.¹³¹

6. Scientific Test Results

Under the federal rule, objective scientific test results prepared in anticipation of litigation may constitute ordinary work product. If the results are classified as ordinary work product, then the party seeking discovery must make the requisite showing of need.

The Illinois rule, on the other hand, does not protect objective scientific test results from disclosure.¹³² Borrowing from the plain language of the rule, such disclosure does not include the mental impressions, litigation plans or theories of an attorney. At least one Illinois court, however, has distinguished objective scientific test

128. *Id.*

129. *See, e.g.,* *United States v. 23.76 Acres of Land in Anne Arundel County*, 32 F.R.D. 593 (D. Md. 1963) (disclosure of appraiser reports because need compelling).

130. *See, e.g.,* *City of Chicago v. Shayne*, 46 Ill. App. 33, 196 N.E.2d 521 (1964).

131. *See, e.g.,* *Department of Transp. v. Western Nat'l Bank*, 63 Ill. 2d 179, 347 N.E.2d 161 (1976); *City of Bloomington v. Quinn*, 114 Ill. App. 2d 145, 252 N.E.2d 10 (1969); *City of Chicago v. Albert J. Schorsch Realty Co.*, 95 Ill. App. 2d 264, 238 N.E.2d 426 (1968); *Department of Business and Economic Dev. v. Pioneer Trust and Sav. Bank*, 39 Ill. App. 3d 8, 349 N.E.2d 467 (1967).

132. In *Klick v. R.P. Werner Co.*, 38 Ill. App. 3d 575, 348 N.E.2d 314 (1976), plaintiff was injured allegedly as a result of the collapse of a defective ladder. The court held that plaintiff should have been allowed to have a representative present during the testing of the ladder pursuant to a production order by defendant, since the ladder formed the basis of plaintiff's product liability claim. The court stated that work product protection does not apply because it cannot be reasonably argued that an objective, scientific test discloses the "theories, mental impressions or litigation plans of the party's attorney." *See also* *Carlson v. General Motors Corp.*, 9 Ill. App. 3d 606, 289 N.E.2d 439 (1972) (disclosure of test results was necessary for plaintiff's adequate trial preparation and defendant failed to comply with the full disclosure requirements of Rule 201(b)(1)).

results from situations where counsel obtains expert advice about the interpretation of facts and technical information.¹³³ In the latter situation, counsel's consultation may constitute part of his litigation theory or strategy and therefore may be deemed work product material.

7. Party and Witness' Right to Statements

Often a party may obtain a statement from the eventual plaintiff before the person has retained counsel. After counsel is retained he may seek discovery of his client's previous statement which is in the possession of opposing counsel. Prior to the 1970 amendments to the Federal Rules of Civil Procedure there were conflicting decisions regarding whether counsel could obtain a copy of his client's previous statement from opposing counsel.¹³⁴ Presently, the federal rule permits an attorney to obtain his client's statement without any showing of need.¹³⁵ Even though such a statement may have been procured initially in anticipation of litigation and thereby qualifies as work product, the federal rule expressly creates an exception from the work product doctrine for a party who wishes to obtain a copy of his own statement. The underlying rationale is one of fairness¹³⁶ to the party, particularly since the statement is admissible against him substantively as an admission.¹³⁷

Illinois courts have also authorized parties' access to their own statements.¹³⁸ Even before the Supreme Court Rules were amended to reflect the liberal trend of pre-trial discovery, the Illinois Supreme Court had held such statements were subject to disclosure because they contained admissions of the defendant which could be admitted as material evidence.¹³⁹ The court refused to shield material and relevant evidentiary facts from discovery.

Under the federal rules, another exception has been carved out

133. *Klick v. R.P. Werner Co.*, 38 Ill. App. 3d 575, 579, 348 N.E.2d 314, 317 (1976).

134. *See, e.g., Taylor v. Central R.R. Co. of N.J.*, 21 F.R.D. 112 (S.D.N.Y. 1957); *Shupe v. Pennsylvania R.R.*, 19 F.R.D. 144 (W.D. Pa. 1956) (production denied); *Neff v. Pennsylvania R.R.*, 7 F.R.D. 532 (E.D. Pa. 1948), *aff'd*, 173 F.2d 931 (3d Cir. 1949) (production granted).

135. Fed. R. Civ. P. 26(b)(3).

136. *See, e.g., Straughan v. Barge MVL No. 802*, 291 F. Supp. 282, 285 (S.D. Tex. 1968); *Watts v. Superior Court*, 87 Ariz. 1, 347 P.2d 565 (1959).

137. *See, e.g., Straughan v. Barge MVL No. 802*, 291 F. Supp. 282 (S.D. Tex. 1968); *Belback v. Wilson Freight Forwarding Co.*, 40 F.R.D. 16 (W.D. Pa. 1966).

138. *See, e.g., Stimpert v. Abdnour*, 24 Ill. 2d 26, 179 N.E.2d 602 (1962); *Oberkircher v. Chicago Transit Auth.*, 41 Ill. App. 2d 68, 190 N.E.2d 170 (1963).

139. *See, e.g., Stimpert v. Abdnour*, 24 Ill. 2d 26, 179 N.E.2d 602 (1962).

of the work product immunity thereby allowing a non-party witness to obtain a transcript of his own previous statement without any showing of need.¹⁴⁰ The same justifications for granting a party automatic access to his own statement also apply to the non-party witness.¹⁴¹ Congress has determined it would be unfair to require a witness to testify without allowing him the opportunity to examine his previous statement.¹⁴² This exception does not enable a party to obtain a copy of a witness' statement without the requisite showing of need and undue burden. In actual practice, however, a party may obtain a witness' statement by simply asking the witness to obtain a copy of his own statement.¹⁴³

Earlier Illinois case law held that a witness' statement obtained in anticipation of litigation came within the work product protection.¹⁴⁴ Today, Illinois has no express provision concerning a witness' right to his own statement. Nevertheless, it is evident such statements do not fall within the scope of work product protection and, therefore, cannot be shielded from discovery on that ground. Indeed, the statements of non-party witnesses are freely discoverable as a matter of course in the Illinois courts.

Some commentators have urged all statements of witnesses should be routinely discoverable.¹⁴⁵ If witness' statements become admissible as substantive evidence under the proposal of the advisory committee on Rules of Evidence,¹⁴⁶ then all witness' statements would likely be discoverable under the principle that a party should have access to the evidence in his case. Regardless of the future of the above proposal, the federal rule should reflect actual practices. Therefore, since parties are currently obtaining non-party witness' statements through indirect means, the federal rule should be revised to allow parties access to these statements without witness intervention.

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

141. Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery. 48 F.R.D. 487, 503.

142. WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE: *Civil* § 2028.

143. See Blair, *A Guide to the New Federal Discovery Practice*, 21 DRAKE L. REV. 58, 63 n.25 (1971).

144. See, e.g., *Chapman v. Gulf, Mobile and Oil R.R.*, 337 Ill. App. 614, 86 N.E.2d 552 (1949).

145. See, e.g., Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269 (1969).

146. Proposed Federal Rules of Evidence § 8-01(c)(2), 46 F.R.D. 161, 331 (1969).

8. Expert Witnesses

An expert's opinions or knowledge of facts developed in anticipation of litigation were sometimes protected from discovery by federal courts because they were considered the attorney's work product.¹⁴⁷ Commentators opposed shielding such information¹⁴⁸ since pre-trial disclosure of an expert's opinions was necessary in order to prepare for adequate cross-examination or rebuttal.

In 1970 the Supreme Court adopted Federal Rule of Civil Procedure 26(b)(4) which currently governs the discovery of facts known and opinions held by experts. The advisory committee expressly rejected those decisions which had protected expert information from discovery on work product grounds.¹⁴⁹ The federal rule recognizes four categories of expert witnesses:¹⁵⁰ 1.) those who will testify at trial; 2.) those retained in anticipation of litigation or preparation for trial but not expected to testify at trial; 3.) those informally consulted in preparation for trial but not retained; and 4.) those whose information was not acquired in anticipation of litigation.¹⁵¹ With respect to the first category, the opposing party may learn the names of the expert witnesses as well as the substance of their anticipated testimony.¹⁵² The federal rule requires a showing of "exceptional circumstances" in order to justify the disclosure of facts known or opinions held by an expert who is retained in anticipation of trial, but who is not expected to be called as a witness.¹⁵³ The federal rule precludes discovery of the names

147. See, e.g., *Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp.*, 23 F.R.D. 257 (D. Neb. 1959).

148. See, e.g., *Friedenthal, Discovery and Use of an Adverse Party's Expert Information*, 14 STAN. L. REV. 455 (1962).

149. It was stated by the drafters of the Amendments that they "reject as ill-considered the decisions which sought to bring expert information, within the work product doctrine." Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D. 487, 505 (1970).

150. FED. R. CIV. P. 26(b)(4).

151. *Id.*

152. See, e.g., *Willett v. General Elec. Co.*, 113 N.H. 358, 306 A.2d 789 (1973); *Workman v. Public Service Co.*, 113 N.H. 422, 308 A.2d 540 (1973); *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972); *Rupp v. Vock and Weiderhold, Inc.*, 52 F.R.D. 111 (N.D. Ohio 1971).

153. The identity of such experts, however, is generally discoverable. See, e.g., *Weiner v. Bache Halsey Stuart, Inc.*, 76 F.R.D. 624 (S.D. Fla. 1977); *Baki v. B.F. Diamond Constr. Co.*, 71 F.R.D. 179 (D. Md. 1976); *Sea Colony Inc. v. Continental Ins. Co.*, 63 F.R.D. 113 (D. Del. 1974). *Contra*, *Penny v. W.S. Darley & Co.*, 54 F.R.D. 278 (E.D. Wisc. 1971). The opinions held by such witnesses, however, required a showing of "exceptional circumstances" to justify disclosure of such information. See, e.g., *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972); *Seiffer v. Topsy's Int'l, Inc.*, 69 F.R.D. 69 (D. Kan. 1975); *United States v. John R.*

or views of experts who are consulted during trial but not retained.¹⁵⁴ Expert opinions acquired prior to any anticipation of litigation, are freely discoverable under the federal rule.¹⁵⁵

The Illinois rule does not formally categorize expert witnesses as does the federal rule.¹⁵⁶ It is common practice, however, to produce the names, addresses and specialties of all expert witnesses who will testify at trial.¹⁵⁷ Generally, discovery is not permitted with respect to non-treating or purely consultant experts who are not expected to testify.

Opponents of the discovery of expert information cited the element of unfairness in permitting one party to benefit from the expert's services for which opposing counsel had paid. Courts have remedied this inequity by requiring the discovering party to reimburse his adversary for a fair portion of the expert's fee. Moreover, Federal Rule of Civil Procedure 26(b)(4)(c) adopts this remedy and provides for reimbursement of costs in proper cases.

Illinois Rule 201(b)(2) permits the court in its discretion to apportion the costs involved in securing all discoverable material.¹⁵⁸ Only one reported Illinois case involves a challenge to a court's discretionary allocation of costs.¹⁵⁹ Generally, such matters will not be litigated since the parties usually allocate the expenses themselves.

Piquette Corp., 52 F.R.D. 370 (E.D. Mich. 1971). One commentator, however, has noted that Rule 26(b)(4)(B) may be subject to abuse in that a party may categorize an expert as a non-trial expert in order to prevent discovery. "It [the rule] should not . . . condone a hiring for the express purpose of a present concealment." The commentator urges an amendment of Rule 26(b)(4)(B) which would permit liberal discovery of opinions held by experts who are hired but not expected to testify in order to prevent "concealment retentions." Comment, *A Proposed Amendment to Rule 26(b)(4)(B): The Expert Twice Retained*, 12 U. MICH. J.L. REF. 533, 552 (1979).

154. See, e.g., *Harasmowicz v. McAllister*, 78 F.R.D. 319 (E.D. Pa. 1978); *Baki v. B.F. Diamond Constr. Co.*, 71 F.R.D. 179 (D. Md. 1976); *Nemetz v. Deye*, 63 F.R.D. 66 (W.D. Pa. 1974).

155. See, e.g., *Grinnel Corp. v. Hackett*, 70 F.R.D. 326 (D.R.I. 1976) (expert obtained information in fulfillment of Master's degree thesis requirement and not in anticipation of litigation or for trial).

156. Unlike the Federal Rules of Civil Procedure, the Illinois Supreme Court Rules do not have a separate section dealing with pretrial discovery of opinions held by expert witnesses.

157. See, e.g., *Schaefer v. Sippel*, 58 Ill. App. 3d 816, 374 N.E.2d 1092 (1978); *Hansen v. Skul*, 54 Ill. App. 3d 1, 369 N.E.2d 267 (1973).

158. ILL. REV. STAT. ch. 110A, § 201(b)(2) (Sup. Ct. Rule 201(b)(2) (1979)).

159. *Alm v. General Tel. Co. of Ill.*, 27 Ill. App. 3d 876, 327 N.E.2d 523 (1975) (court found no abuse of discretion in lower court's allocation of discovery costs).

Duration

The duration of work product immunity is not necessarily coterminous with the duration of the case for which the work product was prepared. Illinois courts, unlike the federal courts, have not yet confronted the issue of whether the work product doctrine extends to subsequent, unrelated litigation.

The Fourth Circuit rendered the first decision in this difficult area.¹⁶⁰ The court ruled that work product documents prepared for litigation which had since terminated retained their qualified immunity from discovery in all subsequent and unrelated litigation.¹⁶¹ Acknowledging that the federal rule provided little guidance for the resolution of the issue,¹⁶² the court focused on the *Hickman* rationale for work product protection. The Fourth Circuit concluded that *Hickman* primarily reflected the Court's concern for maintaining the integrity of the adversary process.¹⁶³ Thus, the Court reasoned discovery must be denied in a subsequent case since an attorney would feel constrained by the specter of free discovery whether threatened in the case at hand or in subsequent litigation.¹⁶⁴

Several diverse approaches have been adopted by other courts when faced with the issue of work product protection in subsequent litigation.¹⁶⁵ In sharp contrast to the Fourth Circuit's decision,¹⁶⁶ other courts have held that discovery of materials prepared in one suit is permitted without qualification in a subsequent suit.¹⁶⁷ The latter approach, premised upon a narrow interpretation of the work product doctrine, is founded on the rationale that work product protection will not extend so as to exclude relevant materials from trial. Another court has adopted a middle position which extends work product protection to materials in subsequent

160. *Duplan Corp. v. Moulinage et Retoderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974).

161. *Id.*

162. *Id.* at 736.

163. *Id.* at 734.

164. In *Subsequent Litigation*, *supra* note 1, at 814-15, the author concurred that "if the outcome of an attempt at discovery cannot be ascertained with some degree of certainty at the time of preparation for the original suit, attorneys will be uncertain as to future protection of their work and may very well adjust their method of preparation."

165. See *Subsequent litigation*, *supra* note 1. See generally *Work Product Immunity*, *supra* note 22.

166. *Duplan Corp. v. Moulinage et Retoderie de Chavanoz*, 509 F.2d 730 (4th Cir. 1974).

167. See *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 207 F. Supp. 407 (M.D. Pa. 1962); *Honeywell, Inc. v. Piper Aircraft Corp.*, 50 F.R.D. 117 (M.D. Pa. 1970).

“closely related” cases.¹⁶⁸

The Illinois courts have not yet encountered the question of the propriety of work product protection in subsequent suits. It seems logical that if the materials qualify for absolute protection under the narrow Illinois definition of work product, then the protection should extend to subsequent litigation. If the courts, however, decide not to extend work product protection to subsequent litigation, the justification for such a position probably would be the necessity of disclosing all relevant facts and the ascertainment of truth.¹⁶⁹ These factors were the predominant considerations in the courts' earlier decisions to limit the scope of work product protection¹⁷⁰ and would probably continue as the primary justification for further limiting the work product doctrine. One commentator has stated, however, that such a position would be too narrow an interpretation of work product protection because it would permit discovery of all relevant materials while ignoring the needs of the adversarial system upon which the *Hickman* court placed great value.¹⁷¹

ACCESS TO DISQUALIFIED ATTORNEY'S WORK PRODUCT

Under the American Bar Association Code of Professional Responsibility, a party may seek the disqualification of the opposing party's counsel because of a breach of ethics.¹⁷² If disqualification is ordered, the abandoned client must incur the burdens of engaging another attorney, incurring the additional costs of retaining subsequent counsel, and beginning the case anew. Disqualification disrupts the litigation and may result in lengthy delays as discovery and other pre-trial procedures are prolonged or repeated. Permitting substituted counsel to obtain work product materials of the disqualified counsel would substantially reduce the detrimental effects on the client, particularly the financial burden. Whether subsequent counsel may gain access to the work product of the disqualified attorney remains a controversial issue which has gener-

168. *United States v. Pfizer, Inc.*, 560 F.2d 326 (8th Cir. 1977).

169. See note 74 *supra* and accompanying text.

170. *Id.*

171. *Subsequent Litigation*, *supra* note 1, at 813.

172. Canon 4 (“a lawyer should preserve the confidences and secrets of a client”); Canon 5 (“a lawyer should exercise independent professional judgment on behalf of a client”) and Canon 9 (“a lawyer should avoid even the appearance of impropriety”) are the Canons most often involved in disqualification proceedings.

ated several recent commentaries.¹⁷³

In deciding the discoverability issue, initial consideration must focus on the reasons behind granting the removal of the attorney. For example, if a former client establishes that the present litigation is "substantially related" to a prior representation, then the attorney may be disqualified in order to prevent the improper use of confidential information. Such information may be contained in the attorney's work product. Permitting access to this work product would thwart the underlying purpose of the disqualification.¹⁷⁴ Therefore, it is evident that adoption of a per se rule is neither wise nor appropriate.

Recently, the Seventh Circuit, *en banc*, held that the disqualified attorney's work product may be disclosed to the succeeding counsel under limited circumstances.¹⁷⁵ Prior to that decision, few courts had thoroughly addressed the issue of whether succeeding counsel should have access to the work product of disqualified counsel.¹⁷⁶ The Seventh Circuit, recognizing the harshness of automatically denying access to disqualified counsel's work product, adopted a case-by-case approach.¹⁷⁷ The court suggested that the test should be whether the transfer of work product materials would result in "any taint of confidentiality or *other* improper advantage" gained from the prior representation.¹⁷⁸ The court's standard has been called "unworkable"¹⁷⁹ and commentators have pro-

173. Note, *Attorney Disqualification and Access to Work Product: Toward a Principled Rule*, 63 CORNELL L. REV. 1054 (1978) [hereinafter cited as *Principled Rule*]; Note, *Civil Procedure—Access to Disqualified Counsel's Work Product*, 27 KAN. L. REV. 662 (1979); Comment, *Access to Work Product of Disqualified Counsel*, 46 U. CHI. L. REV. 443 (1979) [hereinafter cited as *Access to Work Product*]; Comment, *The Availability of the Work Product of a Disqualified Attorney What Standard?*, 127 U. PA. L. REV. 1607 (1979) [hereinafter cited as *Availability of Work Product*]; Note, *Access to the Work Product of an Attorney Disqualified for Opposing a Former Client: First Wisconsin Mortgage Trust*, 32 VAND. L. REV. 819 (1979) [hereinafter cited as *First Wisconsin*]; Comment, *Substitute Counsel's Access to Work Product of Disqualified Counsel*, 21 WM. & MARY L. REV. 307 (1979).

174. "The decision whether to allow access must focus upon whether denial will promote the policy served by a particular disqualification order." *Access to Work Product*, *supra* note 173, at 444.

175. *First Wis. Mortgage Trust v. First Wis. Corp.*, 584 F.2d 201 (7th Cir. 1978) (en banc). For a discussion of this case see *Principled Rule*, *supra* note 173 and *First Wisconsin*, *supra* note 173.

176. *Access to Work Product*, *supra* note 173, at 444.

177. *First Wis. Mortgage Trust v. First Wis. Corp.*, 584 F.2d 201, 202 (7th Cir. 1978) (en banc).

178. *Id.* at 209.

179. 584 F.2d at 212 (Castle, J., dissenting in part, concurring in part). *But cf. Avail-*

posed alternative methods for resolving the discoverability question.¹⁸⁰ Generally, it appears work product protection may not automatically extend to disqualified counsel in the federal courts. Illinois courts have not yet considered this issue.

WAIVER UNDER THE FEDERAL RULE

General Principles

The distinctions underlying the rationales of work product immunity and the attorney-client privilege evoke different standards with respect to waiver of each. Since the attorney-client privilege is designed to protect confidential communications, any disclosure will usually defeat the confidentiality and hence the privilege.¹⁸¹ The work product immunity, however, is not subject to such stringent waiver rules. Ordinarily, disclosure to certain parties will not result in interference with the attorney's case preparation, and, therefore, the protection will not be automatically destroyed.¹⁸² According to prevailing authority, work product immunity is waived if disclosure substantially increases the likelihood that opposing counsel will obtain the information.¹⁸³

Disclosure Among Common Interest Parties

Courts have declined to find waiver where work product material is revealed to a party sharing a common interest.¹⁸⁴ Applying the relevant standard, such disclosure does not substantially increase the probability an adversary will acquire the document.¹⁸⁵

ability of Work Product, *supra* note 173, at 1638 (author asserts that *First Wisconsin* decision was proper).

180. See, e.g., *Access to Work Product*, *supra* note 173.

181. See *Goldman Sachs & Co. v. Blondis*, 412 F. Supp. 286 (N.D. Ill. 1976); *In re Estate of Busse*, 332 Ill. App. 258, 75 N.E.2d 36 (1947).

182. See *American Standard Inc. v. Bendix Corp.*, 71 F.R.D. 443 (W.D. Mo. 1976) (disclosure to parties with common interest).

183. See, e.g., *American Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443 (W.D. Mo. 1976); *Stix Prods. Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334 (S.D.N.Y. 1969). Failure to make a timely assertion of work product protection may constitute waiver of the immunity. See, e.g., *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974) (claim of work product immunity denied because it was not raised in timely manner).

184. See, e.g., *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 27 F.R. Serv. 2d 819 (S.D.N.Y. 1979); *American Standard, Inc. v. Bendix Corp.*, 71 F.R.D. 443 (W.D. Mo. 1976); *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26 (D. Md. 1974); *Duplan v. Deering Milliken, Inc.*, 397 F. Supp. 1146 (D.S.C. 1974); *Stanley Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551 (N.D. Ill. 1964); *Transmirra Prods. Corp. v. Monsanto Chem. Co.*, 26 F.R.D. 572 (S.D.N.Y. 1960).

185. See *American Standard Inc. v. Bendix Corp.*, 71 F.R.D. 443 (W.D. Mo. 1976).

Work Product Used for Refreshing the Memory of a Witness

The use of work product documents to refresh a witness' memory may constitute a waiver of work product immunity.¹⁸⁶ Although some courts do not expressly deem this situation to be a waiver, practically, the result is the same after assessing the interaction of Federal Rule of Evidence 612 and work product protection. Federal Rule 612 authorizes opposing counsel to inspect the documents utilized to refresh a witness' memory. Consequently, a judicial determination that work product documents constitute memory refreshment materials may cause the documents to forfeit their protected status under application of Rule 612.¹⁸⁷

In *Berkey Photo, Inc. v. Eastman Kodak Co.*,¹⁸⁸ a New York district court further delimited work product protection. The Court held that all materials examined by a witness are subject to production whether or not actually used to refresh the witness' memory.¹⁸⁹ One commentator, noting that no inherent conflict exists

186. See *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972). For a full discussion of work product protection and memory refreshment of witnesses see Note, *Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules*, 88 YALE L.J. 390 (1978) [hereinafter cited as *Memory Refreshment Doctrine and Work Product Protection*].

187. See *Bailey v. Meister Brau, Inc.*, 57 F.R.D. 11 (N.D. Ill. 1972); cf. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977) (discovery motion to produce work product materials used to refresh witness' memory was denied but court stated that similar motions would be granted in the future).

188. 74 F.R.D. 613 (S.D.N.Y. 1977).

189. FED. R. EVID. 612 was interpreted by the court as including all materials shown to a witness prior to his or her testimony. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 615 (S.D.N.Y. 1977). Federal courts appear to make no distinction regarding material used to refresh a witness' memory *before* trial and materials used for this purpose *during* trial. See *Memory Refreshment Doctrine and Work Product Protection*, *supra* note 186 (goals of refreshment are the same regardless of when refreshment takes place). In contrast, Illinois courts generally deny discovery requests of materials allegedly used to refresh a witness' memory *prior* to trial while permitting inspection of documents used to refresh a witness' memory *during* trial. See *Cole v. Brundage*, 36 Ill. App. 3d 782, 344 N.E.2d 583 (1976). It is important to note that in deciding to protect materials used prior to trial for memory refreshment, the courts do not fully discuss whether the material qualified as work product. In *Cole v. Brundage*, the materials in question were "factual memoranda". Plaintiff opposed production of the memoranda claiming that the material was protected by the work product doctrine and the attorney-client privilege. The documents were prepared by plaintiff at the request of his attorneys. Although the court does not discuss whether the material was protected by the work product doctrine or the attorney-client privilege, it would appear that the documents were protected by the attorney-client privilege rather than the work product doctrine since the materials were factual in nature and not prepared by the attorney. Thus the materials did not reflect the attorney's mental impressions, litigation strategies, or theories and would not qualify as work product under the Illinois rule. In *Rose v. B.L. Cartage Co.*, 110 Ill. App. 2d 260, 249 N.E.2d 199 (1969), the court prohibited disclosure of materials

between Rule 612 and the federal work product rule, suggests the *Berkey Photo* court could have satisfied the goals of both memory refreshment and work product protection without seriously undermining the work product doctrine.¹⁹⁰

Work Product Directly in Issue in Litigation

Courts have refused to permit a party to raise the defense of erroneous legal advice which is evidenced in work product documents, while claiming immunity from discovery with respect to those documents.¹⁹¹ In *Panter v. Marshall Field & Co.*,¹⁹² for example, the defendant's reliance upon advice of counsel as justification for certain actions was a determinative issue in the litigation. Because the advice of counsel was directly in issue, production of counsel's work product was held to be "compelling" and plaintiff, therefore, overcame the defendant's claim of work product protection.¹⁹³ In short, when a party places "in issue" facts which are only contained in work product documents, then the party forecloses a claim of work product protection.¹⁹⁴

Crime or Fraud Exception to Work Product Protection

Opinion work product prepared in furtherance of a crime or fraud may be unprotected by the work product immunity, and, therefore, subject to discovery.¹⁹⁵ One appellate court, directly confronting this issue, held that the specific facts presented in the case

used to refresh a witness' memory prior to trial. In making this determination, the court expressly avoided the question of whether the materials qualified for work product protection. "Irrespective of whether the document in question was the work product of plaintiff's attorney, we conclude that it was not abuse of discretion and not error to deny defendant's request to see the report used by [the witness] prior to testifying and out of court to refresh his recollection." *Id.* at 276, 249 N.E.2d at 207.

190. See *Memory Refreshment Doctrine and Work Product Protection*, *supra* note 186, at 402.

191. See *Panter v. Marshall Field & Co.*, 80 F.R.D. 718 (N.D. Ill. 1978) (defendants' reliance upon advice of counsel as major justification for their actions rendered the advice a "central issue" which overcame work product protection); *Handgards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926 (N.D. Cal. 1976) (defendants asserted reliance on their attorney's advice in filing a previous patent infringement suit against plaintiff thus making attorneys' work product directly "at issue" in deciding whether the charge was filed in bad faith and was therefore not protected by the work product doctrine); *Bird v. Penn Central Co.*, 61 F.R.D. 43 (E.D. Pa. 1973) (nature of defense concerned advice of counsel thus making counsel's work product subject to discovery).

192. 80 F.R.D. 718 (N.D. Ill. 1978).

193. *Id.* at 726.

194. See note 55 *supra*.

195. See note 55 *supra*.

did not justify a crime or fraud exception. Nevertheless, the court delineated a two pronged test to determine whether such an exception might exist under different facts.¹⁹⁶ The court stated that a crime or fraud exception to opinion work product may arise not only where the attorney commits a crime or fraud,¹⁹⁷ but also where the client has participated in unlawful conduct.¹⁹⁸ According to the opinion, the party seeking discovery must establish both that when the client sought counsel's advice, a crime or fraud was occurring or anticipated, and that the opinion work product had a "close relationship" to the crime or fraud.¹⁹⁹

Whether the crime and fraud exception will fully evolve remains uncertain. In those jurisdictions which afford an absolute privilege to opinion work product, the crime or fraud situation may constitute the single exception to such protection. In contrast, in jurisdictions where hard core work product receives a qualified privilege, the need for facts surrounding the alleged crime or fraud may alone present the requisite showing to justify discovery of opinion work product.²⁰⁰

WAIVER UNDER THE ILLINOIS RULE

In Illinois, the issue of waiver has generated no reported decisions.²⁰¹ Presumably, the dearth of decisions results from the narrow scope of the work product doctrine. If the attorney establishes the materials warrant the privilege, he will not later waive his right to hold the mental impressions and theories inviolate.

Although Illinois courts have addressed the issue of whether documents used to refresh a witness' memory are discoverable,²⁰² the courts have not discussed any claim of work product protection in these situations because the documents in question would probably fall outside the scope of Illinois work product protection.

BROAD OR NARROW PROTECTION: THE PROBLEM AREAS

The distinctions between the Illinois work product privilege and the federal work product immunity are quite clear. The sharp contrast provided by both rules reflects the lack of uniform guidelines

196. In re Murphy, 560 F.2d 326, 338 (8th Cir. 1977).

197. *Id.* at 336 n.19.

198. *Id.* at 337-39.

199. See note 196 *supra*.

200. For a discussion of the Murphy decision and the crime or fraud exception to work product protection see *Opinion Work Product*, *supra* note 11.

201. Research has failed to disclose any reported Illinois case addressing this issue.

202. See note 189 *supra*.

and the differing policy considerations emphasized by each jurisdiction. While the federal and Illinois approaches each have merit, there remain unresolved problems.

The federal rule, embodying the principles enunciated in *Hickman*,²⁰³ confers broad protection on the attorney's work product enhancing the adversarial system in general. Nevertheless, the federal rule grants sufficient flexibility to allow a court to order disclosure of work product material upon proper showing of need.²⁰⁴ In this way, the rule encourages counsel to employ all available resources to obtain the essential information, but does not impose upon counsel an unduly harsh burden.

The flexibility of the federal rule also, however, evokes sharpest criticism. Although flexibility is desirable, the rule has engendered a plethora of inconsistent discretionary rulings which do not follow any established criterion.²⁰⁵ The problem is compounded as many discovery motions are decided without written opinions, thereby leaving the work product area without uniform precedential guidelines. Practitioners have no clear indication regarding what constitutes "substantial need" to justify production of ordinary work product.

Regrettably, the federal rule provides no direction for disclosure of hard core work product.²⁰⁶ Consequently, the decisions are conflicting, some holding that opinion work product is absolutely privileged, others holding to the contrary.²⁰⁷ Those courts which confer less than absolute immunity sometimes engage in a balancing process, considering the quantity of work product material sought in relation to the showing of need required.²⁰⁸ Other courts weigh the need for the particular facts sought versus the need for privacy.²⁰⁹ In order to attain predictability in this area, a definitive standard is needed. Although *in camera* inspections may alleviate some of the problem, they are not a panacea. Rather, the private judicial inspections are burdensome²¹⁰ and would themselves require uniform guidelines. Therefore, the preferable approach is a legislative

203. See notes 29 and 30 *supra*, and accompanying text.

204. See note 49 *supra*.

205. See notes 49 through 57 *supra*.

206. See note 52 *supra*.

207. See notes 49 through 57 *supra* and accompanying text.

208. See note 57 *supra*.

209. See note 56 *supra*.

210. See, e.g., *City of Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483 (E.D. Pa. 1962).

or judicial standard which would clarify the law concerning disclosure of work product material.

Initially, the *Monier* decision and the enactment of Illinois Supreme Court Rule 201(b) met with substantial criticism.²¹¹ Critics contended the broad discovery, flowing from narrow work product protection, rewarded the unprepared attorney, impaired the effectiveness of the adversarial system, and discouraged written trial preparation to the detriment of the client. Proponents, on the other hand, asserted that the ascertainment of truth and the disclosure of all relevant facts were the primary considerations.²¹² They argued that limiting work product protection fostered liberal discovery which minimized surprise, narrowed the issues, expedited trials, minimized the concealment of evidence, increased the probability of a case being decided on its merits, and encouraged pre-trial settlements.²¹³ The initial outcry against the *Monier* decision and Rule 201(b) has subsided.²¹⁴ One author recently called Rule 201(b) a courageous and realistic solution to the burgeoning case load in the courts.²¹⁵ Additionally, one court praised the rule for encouraging the truth-seeking process of trial and eliminating results based on a "battle of wits" between counsel.²¹⁶

The *Monier* court recognized the possibility that narrow work product protection might penalize diligent counsel while rewarding his "slothful" adversary.²¹⁷ The drafters of Rule 201(b), also recog-

211. See, e.g., Watson, *The Settlement Theory of Discovery*, 55 ILL. B.J. 480 (1967); *Erosion of Work Product*, *supra* note 1.

212. See, e.g., *Monier v. Chamberlain*, 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

213. See, e.g., *Monier v. Chamberlain*, 35 Ill. 2d 351, 221 N.E.2d 410 (1966); *Terry v. Fisher*, 12 Ill. 2d 231, 45 N.E.2d 588 (1957); *Wegmann v. Department of Registration & Educ.*, 61 Ill. App. 3d 352, 377 N.E.2d 1297 (1978); *People v. Szaba*, 55 Ill. App. 3d 866, 371 N.E.2d 117 (1977); *People v. Rayford*, 43 Ill. App. 3d 283, 356 N.E.2d 1274 (1976); *Phillips*, *supra* note 1; *Developments*, *supra* note 1.

214. Research has disclosed no recent articles which criticize the limited scope of work product protection in Illinois.

215. Kennelly, Chapman, and Chapman, *Deposition and Discovery, Illinois Civil Practice Before Trial*, ILL. INST. FOR CLE, at 17-19 (1973).

216. The underlying philosophy which gave impetus to the expansion and liberalization of our discovery rules was the desire of the courts to replace the traditional "combat" theory of litigation with the more equitable principle that litigation should be a joint search for the truth. Accordingly, pretrial discovery is designed to permit exploration and to avoid surprise. It is directed toward making the judicial process one of disseminating facts relevant to the issues and to the rendering of a just decision rather than promoting a battle of wits between counsel, where shock and surprise rule the result.

Payne v. Coates-Miller, Inc., 68 Ill. App. 3d 601, 606, 386 N.E.2d 398, 402 (1979).

217. *Monier v. Chamberlain*, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966).

nizing this possibility, sought to prevent such inequity by permitting a court to apportion initial discovery costs.²¹⁸ Accordingly, the rule prevents the unprepared attorney from "securing a free ride upon the diligence of his opponent."²¹⁹

Some critics attack the Illinois rule for eliminating the element of surprise from impeachment evidence.²²⁰ Nevertheless, the Illinois courts have decided that one objective of pre-trial discovery should be the elimination of surprise.²²¹ This determination is premised upon a belief that today's trial attorney should be less of a strategist and more of an investigator in search of the truth. Although on its surface the virtues of broad discovery seem compelling, the practical application of the Illinois rule further demonstrates the criticisms are somewhat questionable.

Certainly, the impact of impeachment evidence should not be underestimated. The evidence may prove highly prejudicial and be received by the jury as substantive evidence regardless of instructions to the contrary.²²² Broad pre-trial discovery of impeachment evidence allows a party to prepare for cross-examination and rebuttal if the integrity of the evidence is doubtful. Furthermore, prejudicial and misleading evidence may be prevented from reaching the jury by a motion *in limine*.

One commentator proposes that the effectiveness of impeachment evidence is lost if a party can prepare for it by fabricating an explanation.²²³ Besides making the doubtful assumption that parties are generally disposed to commit fraud and deception on the courts, that argument also does not account for the language in *Hickman* which intimated that work product material may be discoverable for impeachment or corroboration purposes.²²⁴

The Illinois rule also permits counsel to obtain material from his

218. ILL. REV. STAT. ch. 110A, § 201(b)(2), Committee Comments (Sept. 1, 1974).

219. Phillips, *supra* note 1, at 922.

220. See, e.g., Watson, *The Settlement Theory of Discovery*, 55 ILL. B.J. 480, 488 (1967).

221. See note 216 *supra*.

222. *Spencer v. Beverly*, 307 So. 2d 461, 462 (Dist. Ct. App. Fla. 1975):

"Much confusion exists as a result of the attempt to differentiate between substantive evidence and impeachment evidence. For example, here the movies are described by petitioner as impeachment evidence and therefore not subject to discovery. However, if they are at all effective will they not also be substantive evidence going directly to the petitioners' injuries and damages?"

223. See note 220 *supra*.

224. "We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases . . . Such written statements and documents might . . . be useful for purposes of impeachment or corroboration." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

opponent that is readily available from alternative sources. Unlike the federal rule which requires a showing of lack of alternative sources for the material, the Illinois rule reflects the courts' desire to eliminate duplicate efforts and to expedite trials.²²⁵

Unfortunately, the Illinois rule, as it presently exists, may discourage written documentation of important matters.²²⁶ An attorney's failure accurately to preserve pre-trial discovery and strategy can result in inadequate trial representation. Written documentation will inevitably lend accuracy to the attorney's preparation. Indeed, the need for precise, detailed and complete pre-trial preparation motivated the *Hickman* court to create the immunity.²²⁷ The Supreme Court recognized not only the attorney's critical need for privacy, but also the need for efficiency and competency through proper written documentation. The Illinois rule may contravene the *Hickman* rationale in discouraging such vital documentation. Yet, the Illinois legislature and courts have decided that the advantages of liberal discovery outweigh the concomitant disadvantages.

The disadvantages of liberal discovery, however, are not inconsequential. Although the Illinois rule permits the court to apportion initial discovery costs,²²⁸ it does not ensure that counsel will diligently pursue his or her case. The apportionment provision may resolve the monetary adjustment for discovery but that alone does not always compensate the better prepared attorney. Neither counsel should be permitted to rely on opposing counsel's diligent research and preparation. Moreover, it is arguable that opposing attorneys actively preparing their respective cases have a greater likelihood of gathering all relevant facts needed for an impending trial than would a single attorney.

While pre-trial settlements may reduce the growing number of lawsuits before the courts, this advantage cannot be accepted with-

225. ILL. REV. STAT. ch. 110A, § 201(a) (Sup. Ct. Rule 201(a)), Committee Comments (Sept. 1, 1974).

226. *Work Product Under the Federal Rules*, *supra* note 34, at 345. "Written preparation preserves an attorney's thoughts and opinions better than memory and promotes more thorough and higher quality service to clients." See *Subsequent Litigation*, *supra* note 34, at 808.

227. "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." 329 U.S. 495, 511 (1947).

228. Ill. Sup. Ct. Rule 201(b)(2) states in part that, "[t]he court may apportion the cost involved in originally securing the discoverable material, including when appropriate a reasonable attorney's fees, in such manner as is just."

out further consideration. Those persons advocating increased settlements erroneously equate settlement with the just disposition of a lawsuit. Although a party may have a genuine claim, the fear of extensive discovery and undue delay may compel him to settle his claim for a fraction of the damages he has actually suffered. Settlement is not the best resolution of all cases.

The *Hickman* Court probably contemplated a broader, more inclusive protection than the Illinois rule affords. The Illinois rule recognizes the importance of protecting an attorney's mental impressions and thoughts, but unmistakably attaches less importance to the value of the adversarial system than did the *Hickman* Court.

Although some commentators have praised the predictability²²⁹ of the Illinois rule, its inflexibility has proven a major deficiency. The Illinois rule permits discovery of all ordinary work product documents while absolutely protecting opinion work product documents.²³⁰ The flexibility of the federal rule, however, has fostered conflicting decisions because of the lack of uniform guidelines.²³¹

Both rules would benefit from statutory guidelines. Illinois law has not definitively accepted or rejected a crime or fraud exception to work product protection. Furthermore, neither the federal rule nor the Illinois rule addresses the new areas of work product controversy such as access to work product in subsequent cases and access to work product of disqualified counsel. Proposed guidelines should address these anticipated problem areas as well as others.²³²

229. See, e.g., Burnham, *supra* note 9, at 553. "The gains from the new Illinois rule—and the simple fact of greater clarity is one of them—should, therefore, not be overshadowed by melodramatic cries of anguish."

230. See note 65 *supra*.

231. See notes 49 through 57 *supra* and accompanying text.

232. The Pennsylvania Rules of Civil Procedure were recently amended to address problems not covered by the prior rules. At one time the Pennsylvania rules afforded an attorney's work product absolute protection. (PA. R. Civ. P. 4011(d)). In 1978, however, the scope of work product protection was radically changed in Pennsylvania. (PA. R. Civ. P. 4003.3, Explanatory note—1978). Under the Pennsylvania rule currently governing trial preparation materials, only hard core materials are protected. The explanatory note accompanying Rule 4003.3 expressly recognizes a "crime or fraud" exception to this protection, states that no showing of need or undue burden is required, and provides for discovery of work product materials in *subsequent litigation* by means of in camera review in order to "weed out" protected material.

In addition, one author has recently suggested the need for further clarification regarding the protection of an attorney's evaluation of a witness' credibility. While the author asserts that work product protection extends beyond the lawyer's mental impressions and opinions recorded in documents, to the lawyer's evaluation of a witness, the author does not extend work product protection to the substance of witness statements when sought through an

Following the format of the Federal Rules of Evidence, common situations should be highlighted.²³³ The proposed guidelines would provide substantial assistance to the practitioner in several ways.

For the federal practitioner, the critical terms must be further clarified. For example, "substantial need" must be defined, at least by way of illustration. A definitive guide must be established for disclosure of hard core work product. If it is to be absolutely protected, then that must be clarified. Those exceptions which will be permitted, if any, must be delineated. Finally, the law should resolve whether a showing of need will ever be sufficient to warrant disclosure of opinion work product, and if so, articulate the quantum of need. For the Illinois practitioner, the proposed guidelines should address work product issues which were not considered by the drafters of the rule. Eliminating absolute protection of opinion work product and providing illustrative guidelines would promote flexibility while preserving the predictability of the rule.

CONCLUSION

Because the Illinois and federal rules have differing underlying policy considerations, the scope of protection afforded by their rules will continue to differ. The Illinois courts, favoring liberal discovery, have placed less importance on the adversarial nature of

interrogatory under Federal Rule of Civil Procedure 33. Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1974).

233. In 1965, one year prior to the *Monier v. Chamberlain* decision, the Illinois Supreme Court Rules Committee circulated proposed civil discovery rules. (53 ILL. B.J. 572 (1965)). These proposed rules delineated specific exceptions to work product protection:

A writing or thing created by or for a party in preparation for litigation shall not be subject to discovery, except as follows:

- (i) On request, a party shall be provided with a copy of his own statement.
- (ii) The writing or thing is discoverable if its subject matter has been destroyed or materially altered through no fault of the party seeking discovery.
- (iii) The unprivileged statement of a person who is not a party is discoverable for the purpose of refreshing his recollection at his deposition, or when he is dead, incompetent, or otherwise unavailable.
- (iv) Although a writing or thing is not discoverable, nevertheless its existence, location, or custody is discoverable.

Notwithstanding the foregoing exceptions, the opinion of an expert obtained in preparation for litigation, or its existence, location, or custody is not discoverable. However, if the opinion is based upon facts learned through an investigation, those facts may be discoverable under the conditions set forth in clause (ii) of this subparagraph . . .

The rule granting work product protection, however, was subsequently amended to reflect the *Monier* decision (see ILL. REV. STAT. ch. 110A, § 201(b)(2), Committee Comments) and did not include express exceptions to the work product doctrine.

the system. Therefore, ordinary work product will probably remain discoverable in Illinois. Because the federal rule reflects greater commitment to an adversarial system, ordinary work product will probably retain a qualified immunity, although the federal rule should be amended to define the showing of need required to overcome the immunity.

The Illinois approach would be vastly improved by eliminating absolute protection of opinion work product. Guidelines, however, must be promulgated to address all the anticipated problems. This change would create somewhat more uncertainty in the rule's application, but would provide the necessary flexibility thus far lacking under the Illinois rule. Furthermore, illustrative guidelines should offset much of the uncertainty engendered by the elimination of absolute protection. The need is clear for updated work product rules which provide uniform standards, through the incorporation of illustrative examples in the rules themselves, for resolving the existing problem areas of work product protection.

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