North Dakota Law Review

Volume 37 | Number 1 Article 5

1961

Discovery: Hickman v. Taylor, a Decade Later

David F. Knutson

NOTES

DISCOVERY: HICKMAN V. TAYLOR, A DECADE LATER

It has now been well over a decade since the historical decision of *Hickman v. Taylor*[1] was handed down by the Supreme Court. This controversial case stirred up an entire new realm of thinking, debate, and confusion within the field of discovery. Undoubtedly, no other case within the field is so often cited. It will be the scope of this study to analyze, as well as possible, some of the more pertinent repercussions of the *Hickman* decision.

I. PRIVILEGE

One of the prime purposes of the court in the *Hickman* case was to limit the meaning of privilege within the field of discovery. In so doing, they restricted the idea of privilege, not to work done by the attorney for his client, but solely to the actual communications of the client to the attorney.[2] This aspect of the *Hickman* decision has been largely followed by the subsequent decisions. Courts agree that the privilege applies to communications between client and attorney,[3] but not to communications between attorney and third parties,[4] such as statements of witnesses.[5] The privilege has been said to apply to communications between client's agents and attorney.[6] Instead of the attorney-client privilege, the *Hickman* decision established the work product protection, which was an entirely different concept than privilege.[7] While most courts have decided that privilege is to be decided as in the laws of evidence,[8] the work product protection is a vague generality which seems to depend largely upon the interpretations of the individual courts. But before passing on to this hard to define concept called "work product", a few more comments on the remnants of the privilege theory might be appropriate.

Not all courts have completely abandoned the principle,[9] nor has

1. 329 U.S. 495 (1947).
2. Hickman v. Taylor, 329 U.S. 495 (1947).
3. See Brookshire v. Pennsylvania R. Co., 14 F.R.D. 154 (N.D. Ohio 1953).
4. Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 425 (N.D. Ohio 1947).
5. Mills Music v. Cromwell Music, 14 F.R.D. 411 (S.D. N.Y. 1953); Stone v. Grayson Shops Inc., 8 F.R.D. 101 (S.D. N.Y. 1948).
6. Danisch v. Guardian Life Insurance Co. of America, 18 F.R.D. 77 (S.D. N.Y. 1955).
7. Hickman v. Taylor, 329 U.S. 495 (1947); Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953); See also Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257 (D. Neb. 1959).
8. Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257 (D. Neb. 1959); Wild v. Payson, 7 F.R.D. 495 (S.D. N.Y. 1946).
9. See Brush v. Harkins, 9 F.R.D. 681 (S.D. Mo. 1950).

their terminology in referring to the "work product" theory been technically accurate. Many courts continue to insist upon calling it "work product" privilege,[10] "work product" immunity,[11] or else combine the two and imply equal protection.[12] But other courts have used the more accurate term of protection,[13] which seems to give the right connotation that the material will be given special consideration but will not be absolutely immune. Procedurally, the courts have stated that if the attorney-client privilege is pleaded and not proven, the "work product" protection will not be presumed by the court.[14] Nor does a waiver of the attorney-client privilege waive the work product protection, for again the reasons for the two rules are different.[15]

II. WORK PRODUCT

Just what is this work product to which the *Hickman* decision allows a limited protection? Basically, it is the work an attorney does for his client, but a more specific definition appears to have eluded the courts. An analysis will be made of some of the more paramount issues involved in this concept.

A. *Preparation for Trial.* Most courts refuse to call it work product unless it is in preparation for trial or in anticipation of litigation.[16] However, just what this means seems to be the difficulty. It has been said that ordinary course of business,[17] and work done by agents and investigators in routine work,[18] even if gathered by an attorney,[19] are not to be considered in preparation. Even though the work done may ultimately be used at trial, it is still not considered work product.[20] Also, it must presently be part of the work files of the attorney whether gathered in preparation or not.[21] It is stated, though, that routine work done by claim agents and the like

---

10. See Slifka Fabrics v. Providence Washington Insurance Co., 19 F.R.D. 374 (S.D. N.Y. 1956); Smith v. Washington Gas Light Co., 7 F.R.D. 735 (D.D.C. 1948); Cold Metal Process Co. v. Aluminum Co. of America, 7 F.R.D. 425 (N.D. Ohio 1947).
11. See Vilastor-Kent Theatre Corp. v. Brandt, 19 F.R.D. 522 (S.D. N.Y. 1956).
12. See Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953); Leonia Amusement Corp. v. Loew's Inc., 13 F.R.D. 438 (S.D. N.Y. 1952).
13. See Tobacco and Allied Stocks v. Transamerica Corp., 16 F.R.D. 534 (D. Del. 1954); Scourtes v. Fred Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio, 1953).
14. Humphries v. Pennsylvania R. Co., 14 F.R.D. 177 (N.D Ohio 1953).
15. Connecticut Mut. Life Ins. Co. v. Shields, 16 F.R.D. 5 (S.D. N.Y. 1954).
16. Zenith Radio Corp. v. Radio Corp. of America, 121 F.Supp. 792 (D. Del. 1954). *Cf.* Henderson v. Southern Railway Co., 17 F.R.D. 349 (E.D. Tenn. 1955); Rediker v. Warfield, 11 F.R.D. 125 (S.D. N.Y. 1951); Brauner v United States, 10 F.R.D. 468 (E.D. Penn. 1950).
17. Morrone v. Southern Pac. Co., 7 F.R.D. 214 (S.D. Calif. 1947).
18. Hughes v. Pennsylvania R. Co., 7 F.R.D. 737 (E.D. N.Y. 1948).
19. Park & Tilford Distillers Corp. v. United States, 20 F.R.D. 404 (S.D. N.Y. 1957).
20. Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953).
21. United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461 (E.D. Mich. 1954)

should be considered in preparation and anticipation of trial, because this is the only purpose of such work.[22]

B. *Work Done by Agents of the Attorney.* One of the most debated features of the work product theory is whether work done by laymen agents of the attorney should be called work product. Undoubtedly the leading case on this question is *Alltmont v. United States*[23] which draws no distinction between statements taken by counsel himself and those taken by others for his use in preparation for trial. But there are a considerable number of courts which do not recognize it as work product.[24] This is only one of the highly unsettled ramifications of the *Hickman* decision.

C. *Work of Experts.* Another question is whether the work of experts hired by the attorney should be considered part of his work product. Such work has been considered to be work product,[25] which can be reached only under the most unusual circumstances;[26] however, it still should be in preparation for trial.[27] Before the *Hickman* decision a 1940 case set a different tenor.[28] They held that to allow another attorney to obtain such material would be the same as taking his property without compensation. This public policy approach has had some following since the *Hickman* decision.[29] Other courts do not discuss either work product or public policy but simply hold the material undiscoverable,[30] or only discoverable under absolute necessity.[31] At least one court[32] attempted to form a synthesis by saying that if the expert was the person responsible for deciding all matters from which the cause of action arose, it could be discovered.

D. *Legal Skill.* The courts quite often also require that the work involve the legal skill and training of the attorney.[33] This appears

22. Safeway Stores v. Reynolds, 176 F.2d 476 (D.C. Cir. 1949).
23. 177 F.2d 971 (3d Cir. 1949). *Accord,* Thompson v. Hoitsma, 19 F.R.D. 112 (D. N.J. 1956); Snyder v. United States, 20 F.R.D. 7 (E.D. N.Y. 1956).
24. United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Calif. 1954); Szymanski v. New York, N. H. and H. R. Co., 14 F.R.D. 82 (S.D. N.Y. 1952); Panella v. Baltimore & O. R. Co., 14 F.R.D. 196 (N.D. Ohio 1951).
25. Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp., 23 F.R.D. 257 (D. Neb. 1959); Schuyler v. United Airlines, Inc., 10 F.R.D. 111 (N.D. Penn. 1950).
26. Colden v. R. J. Schofield Motors, 14 F.R.D. 521 (N.D. Ohio 1952).
27. Schuyler v. United Airlines, Inc., 10 F.R.D. 111 (N.D. Penn. 1950).
28. Lewis v. United Airlines Transport Corp., 32 F.Supp. 21 (W.D. Penn. 1940).
29. Roberson v. Graham Corp., 14 F.R.D. 83 (D. Mass. 1952); Gold Medal Process Co. v. Aluminum Co., 7 F.R.D. 684 (D. Mass. 1947).
30. Hickey v. United States, 18 F.R.D. 88 (E.D. Penn. 1952).
31. United States v. 48 Jars More or Less, 23 F.R.D. 192 (D.D.C. 1958).
32. Moran v. Pittsburgh-DesMoines Steel Co., 6 F.R.D. 594 (W.D. Penn. 1947).
33. Scourtes v. Fred W. Albrecht Grocery Company, 15 F.R.D. 55 (N.D. Ohio, 1953); Molly v. Trawler Flying Cloud, Inc., 10 F.R.D. 158 (D. Mass. 1950); Brush v. Harkins, 9 F.R.D. 681 (S.D. Mo. 1950); United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949).

contradictory to the fact that the work of experts and agents can be considered work product.[34]

III. SOME APPLICATIONS OF THE WORK PRODUCT DOCTRINE

It might be well to stop for a moment and see just how this work product doctrine applies to some particular aspects of the attorney's preparation for trial.

A. *Statements.* Most of the cases dealing with the work product doctrine either directly or indirectly involve statements taken from prospective witnesses. The biggest controversy surrounding statements is whether they actually involve the legal skill of the attorney. Courts have stated, by way of dictum, that when the statement is simple recordation,[35] or verbatim transcribing of the witness's words[36] the statement cannot be considered as work product. But it has been said that the framing of questions by an attorney involves his legal skill, as only he knows what might be important.[37] Purely factual accounts have been called non-work product.[38] Again, the courts emphasize the requirement that the statements be taken in preparation for trial to be called work product and deny the protection to statements taken in the routine course of business,[39] even though the person taking the statement is an attorney.[40] Copies of statements which reflect the opinion or mental impression of an attorney are protected.[41]

B. *Photographs, Maps, Diagrams.* Photographs taken by or at the direction of, an attorney have normally been discoverable,[42] at least if the scene of the photo has changed[43] or the other party had a better opportunity to take the pictures.[44] But it has been said that if there was once opportunity to take the photo, the party cannot now claim discovery of it,[45] it has also been suggested that photographs can reflect the legal skill of the attorney and can be treated as work product.[46] In at least one instance diagrams have

34. See Leding v. United States Rubber Company, 23 F.R.D. 220 (D. Mont. 1959).
35. See Molloy v. Trawler Flying Cloud, Inc., 10 F.R.D. 158 (D. Mass. 1950).
36. See Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953).
37. United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949).
38. Lundberg v. Welles, 11 F.R.D. 136 (S.D. N.Y. 1951).
39. Brown v. New York, New Haven and Hartford Railroad Co., 17 F.R.D. 324 (S.D. N.Y. 1955); Pannella v. Baltimore and O. R. Co., 14 F.R.D. 196 (N.D. Ohio 1951); Tower v. Southern Pacific Co., 11 F.R.D. 174 (N.D. Calif. 1951).
40. Newell v. Capital Transit Co., 7 F.R.D. 732 (D.D.C. 1948).
41. Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953).
42. Helverson v. J. J. Newberry Co., 16 F.R.D. 330 (W.D. Mo. 1954). See Brush v. Harkins, 9 F.R.D. 681 (S.D. Mo. 1950) (dictum).
43. Helverson v. J. J. Newberry Co., 16 F.R.D. 330 (W.D. Mo. 1954).
44. Cogdill v. Tennessee Valley Authority, 7 F.R.D. 411 (E.D. Tenn. 1947).
45. United States v. Great Northern Railway Co., 18 F.R.D. 357 (N.D. Calif. 1955).
46. See Shields v. Sobelman, 64 F.Supp. 619 (E.D. Penn. 1946) (dictum).

been said to reflect the attorney's impression of the scene and therefore were protected.[47]

C. *Legal Opinions or Conclusions.* Authority upon this point is scanty, but a comparison of two points of view might reflect the possible outcome of any attempt to obtain such information. A request for the basis of an allegation of contributory negligence can be discovered,[48] but a question asking whether the allegation will be res ipsa loquitur will not.[49] The court in the latter situation felt that a layman could not think of this assertion; therefore, it reflected legal skill.[50]

IV. RULE 33 OR *34?*

Another issue raised by the *Hickman* case is whether or not the statements or other information sought can be obtained by requesting that said information be attached to the answers to interrogatories.[51] In brief, may the petitioner circumvent Rule 34,[52] and obtain a statement under Rule 33,[53] by asking that said statement be attached to answers to interrogatories asking if they are in existence? The problem involved is that the former requires a showing of good cause, while the latter does not.

Some of the courts adhere to a strict procedural technique denying the production under Rule 33 and requiring a new motion under Rule 34.[54] Others state that if good cause has been shown, the request will be allowed under Rule 33,[55] giving quite often as a reason that this will facilitate a quicker trial.[56] Occasionally, a court will allow the motion under Rule 33 without a mention of good cause.[57] North Dakota rules allow the discovery under Rule 33 without explicitly mentioning that good cause is necessary.[58]

V. THE DISCOVERY OF A PARTY'S OWN STATEMENT

Although not a part of the *Hickman* decision, the question of

47. Brush v. Harkins, 9 F.R.D. 681 (S.D. Mo. 1950).
48. Forsythe v. Baltimore and O. R. Co., 15 F.R.D. 191 (W.D. Penn. 1954).
49. Cleimshaw v. Beech Aircraft Corporation, 21 F.R.D. 300 (D. Del. 1957).
50. For an excellent discussion see B. & S. Drilling Co. v. Hallibuton Oil Well Cementing Co., 24 F.R.D. 1 (S.D. Tex. 1959).
51. Hickman v. Tayor, 329 U.S. 495 (1947).
52. Fed. R. Civ. P. 34.
53. Fed. R. Civ. P. 33.
54. Alltmont v. United States, 177 F.2d 971 (3rd Cir. 1949); Harris v. Marine Transport Lines, 22 F.R.D. 484 (E.D. N.Y. 1958); Kluchenac v. Oswald and Hess Co., 20 F.R.D. 87 (W.D. Penn. 1957); Lester v. Isbrandtsen Co., 10 F.R.D. 338 (S.D. Tex. 1950).
55. New York Central Railroad Co. v. Carr, 251 F.2d 433 (4th Cir. 1957); Novick v. Pennsylvania Railroad Co., 18 F.R.D. 296 (W.D. Penn. 1955); Hesch v. Erie R. Co., 14 F.R.D. 518 (N.D. Ohio 1952).
56. Kennedy v. Mississippi Valley Barge Line Co., 7 F.R.D. 78 (E.D. Tenn. 1946); Novick v. Pennsylvania Railroad Co., 18 F.R.D. 296 (W.D. Penn. 1955).
57. Hayman v. Pullman Co., 8 F.R.D. 238 (N.D. Ohio 1948).
58. N.D. R. Civ. P. 33.

whether or not a party can discover his own statement which he has given to adverse counsel is frequently connected with this general problem. The courts have tended to treat this issue on its own merits and have often raised the issue of work product.

It has been said that the discovery of such a statement is not an automatic right, but it is dependent upon the showing of good cause.[59] Good cause has been shown in some cases where the party was not represented by counsel at the time he gave the statement,[60] but this is not always considered good cause.[61] Many courts have denied production when the petitioner failed to show that fraud, deceit, or duress were employed in the obtaining of the statement.[62] A showing of good cause has quite uniformly been refuted when a party only wants to check what he said,[63] but dimming of memory has been held sufficient reason.[64] One court has said, that if anything, such a statement should be more difficult to obtain than those of third party witnesses.[65]

VI. DOCTRINE APPLIED TO INTERROGATORIES

Although this analysis is more directly concerned with attempts to obtain documents considered the work product of the attorney, it might be well to stop and briefly discuss the work product concept as it has been applied to interrogatories.

The work product doctrine does not apply to a question of the existence of such work product, but only to its contents.[66] Also it is not necessary to show good cause in an attempt to secure such information as to its existence.[67] However, as shall be seen, not all courts apply this rule in a liberal sense. The greatest controversy in this field is the attempt by counsel to obtain the names of witnesses. It has been quite uniformly held that the names of witnesses to be used at trial are not discoverable,[68] but some courts have permitted

59. Shupe v. Pennsylvania Railroad Co., 19 F.R.D. 144 (W.D. Penn. 1956).
60. Novick v. Pennsylvania Railroad Co., 18 F.R.D. 296 (W.D. Penn. 1955); Goldner v. Chicago and N.W. Ry. System, 13 F.R.D. 326 (N.D. Ill. 1952); Miehle v. United States, 11 F.R.D. 582 (S.D. N.Y. 1951).
61. Safeway Stores v. Reynolds, 176 F.2d 476 (D.C. Cir. 1949).
62. Bixler v. Proctor Academy, 15 F.R.D. 503 (D. N.H. 1954); Lester v. Isbrandtsen Co., 10 F.R.D. 338 (S.D. Tex. 1950); Raudenbush v. Reading, 9 F.R.D. 670 (E.D. Penn. 1950).
63. Safeway Stores v. Reynolds, 176 F.2d 476 (D.C. Cir. 1949); Lester v. Isbrandtsen Co., 10 F.R.D. 338 (S.D. Tex. 1950); Raudenbush v. Reading, 9 F.R.D. 670 (E.D. Penn. 1950).
64. New York Central Railroad Company v. Carr, 251 F.2d 433 (4th Cir. 1957).
65. Safeway Stores v. Reynolds, 176 F.2d 476 (D.C. Cir. 1949).
66. McCall v. Overseas Tankship Corp., 16 F.R.D. 467 (S.D. N.Y. 1954).
67. Chatman v. American Export Lines, 20 F.R.D. 176 (S.D. N.Y. 1956).
68. Central Hide & Rendering Co. v. B-M-K Corporation, 19 F.R.D. 294 (D. Del. 1956); Aktiebolaget Vargos v. Clark, 8 F.R.D. 635 (D.D.C. 1949). See B & S Drilling Co. v. Hallibuton Oil Well Cementing Co., 24 F.R.D. 1 (S.D. Tex. 1959) (dictum).

counsel to obtain the names of people who gave statements[69] or those known to have knowledge of the facts.[70] However, it has been said that such information is privileged if learned in the course of preparation for trial.[71]

One court first denied the information because it asked for the names of witnesses obtained by the defendant,[72] stating this was an invasion of counsel's files. The court stated that the identity and location of such persons having knowledge of relevant facts should have been asked. But later, when the question was thus framed, the information was denied because it called for a mere conclusion.[73]

As to the contents of a document, it has been held that if the document itself cannot be obtained, information contained in it need not be revealed,[74] but a 1959 decision[75] was so liberal in allowing the attorney to obtain the information contained in the documents and also the conclusions of the adverse attorney, that it seemed to allow substantially the same information to be obtained by interrogatory that the work product doctrine attempts to protect.

VII. GOOD CAUSE

This finally brings us to the question of good cause, and just what constitutes sufficient reason to invade the private files of the attorney and obtain information which he has secured in preparation for trial for his client. The major difficulty in this field is that while most courts speak of good cause, they do not always discuss whether they are referring to the requirement of Rule 34, or whether they are considering what good cause is necessary to obtain the work product of the attorney. For that reason the concept will be discussed under three headings: those courts which are definitely discussing work product, those which are definitely discussing Rule 34, and those which do not definitely state to which they are referring.

A. *Good Cause Under Work Product Doctrine.* Many courts have followed the spirit of the *Hickman* decision and declared that the work product, though protected, is not immune from dis-

69. B & S Drilling Co. v. Hallibuton Oil Well Cementing Co., 24 F.R.D. 1 (S.D. Tex. 1959); Klop v. United Fruit Company, 18 F.R.D. 310 (S.D. N.Y. 1955); McNelley v. Perry, 18 F.R.D. 360 (E.D. Tenn. 1955).

70. B & S Drilling Co. v. Hallibuton Oil Well Cementing Co., 24 F.R.D. 1 (S.D. Tex. 1959).

71. Walczak v. Detroit-Pittsburgh Motor Freight, 140 F.Supp. 10 (N.D. Ind. 1956).

72. Sunday v. Gas Service Co., 10 F.R.D. 185 (W.D. Mo. 1950).

73. O'Brien v. Equitable Life Assur. Soc. of United States, 13 F.R.D. 475 (W.D. Mo. 1953).

74. Connecticut Mut. Life Ins. Co. v. Shields, 16 F.R.D. 5 (S.D. N.Y. 1954).

75. B & S Drilling Co. v. Hallibuton Oil Well Cementing Co., 24 F.R.D. 1 (S.D. Tex. 1959).

covery,[76] when rare or unusual circumstances are present.[77] Some have stated that a stringent standard of good cause should be shown equivalent to the stringent policy that protects the attorney's files.[78] Some jurisdictions have properly drawn a distinct line between the good cause necessary under Rule 34 and the unusual circumstances that would constitute the good cause necessary to obtain the work product of the attorney.[79] Though the courts that definitely establish the existence of work product may agree on the foregoing principles, they seldom agree to just what factual situations warrant discovery under the stricter good cause principle. The following are some of the factual situations in which good cause was discussed.

The work of experts, considered by the courts as work product, was discoverable when the subject of the expert's report was no longer in existence.[80] Anticipated hostility of the witnesses is not considered good cause,[81] but actual hostility may be.[82] Inequality of funds or facilities of the client,[83] or greater hardship,[84] has been rejected as constituting good cause. Unavailability of witnesses is not good cause.[85] The fact that a witness is out of the state is insufficient,[86] but being at sea has been considered acceptable.[87] Loss of memory by witnesses has been called good cause for obtaining his statement.[88] Hope of impeachment is not sufficient.[89] More liberal courts have allowed discovery when witnesses are unavailable[90] or simply unknown.[91]

B. *Good Cause Decided Under Rule 34.* By contrast, it is interesting to note the factual situations which do or do not constitute

76. Connecticut Mut. Life Ins. Co. v. Shields, 16 F.R.D. 5 (S.D. N.Y. 1954).
77. Vilastor-Kent Theatre Corp. v. Brandt, 19 F.R.D. 522 (S.D. N.Y. 1956); Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953); United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949); State of Maryland v. Baltimore and O. R. Co., 7 F.R.D. 666 (E.D. Penn. 1947)
78. Vilastor-Kent Theatre Corp. v. Brandt, 19 F.R.D. 522 (S.D. N.Y. 1956); Connecticut Mut. Life Ins. Co. v. Shields, 16 F.R.D. 5 (S.D. N.Y. 1954).
79. See Marks v. Gas Service Company, 168 F.Supp.487 (W.D. Mo. 1958); Zenith Radio Corp. v. Radio Corp. of America, 121 F.Supp. 792 (D. Del. 1954); Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953).
80. Walsh v. Reynolds Metals Co., 15 F.R.D. 376 (D. N.J. 1954); Colden v. R. J. Schofield Motors, 14 F.R.D. 521 (N.D. Ohio 1952).
81. Tandy & Allen Construction Co. v. Peerless Casualty Co., 20 F.R.D. 223 (S.D. N.Y. 1957); Portman v. American Home Products Corp., 9 F.R.D. 613 (S.D. N.Y. 1949).
82. See Tandy & Allen Construction Co. v. Peerless Casualty Co., 20 F.R.D. 223 (S.D. N.Y. 1957).
83. Lester v. Isbrandtsen Co., 10 F.R.D. 338 (S.D. Tex. 1950); Portman v. American Home Products Corporation, 9 F.R.D. 613 (S.D. N.Y. 1949).
84. Portman v. American Home Products Corporation, 9 F.R.D. 613 (S.D. N.Y. 1949).
85. Lester v. Isbandtsen Co., 10 F.R.D. 338 (S.D. Tex. 1950).
86. Berger v. Central Vermont Ry., 8 F.R.D. 419 (D Mass. 1948).
87. Bifferato v. States Marine Corp. of Delaware, 11 F.R.D. 44 (S.D. N.Y. 1951).
88. Thomas v. Trawler Red Jacket, Inc., 16 F.R.D. 349 (D. Mass. 1954).
89. Carpenter-Trant Drilling Co. v. Magnolia Petroleum Corp. 23 F.R.D. 257 (D. Neb. 1959).
90. Atlantic Greyhound Corporation v. Lauritzen, 182 F.2d 540 (6th Cir. 1950).
91. Stone v. Grayson Shops, Inc., 8 F.R.D. 101 (S.D. N.Y. 1948).

good cause under Rule 34. A few examples should illustrate that in some cases this standard is not greatly different from that applied by courts deciding under the work product test, while in others the definition of good cause is much more liberal. It has been held that if the statements were taken before memories dimmed that good cause was shown.[92] Also, if parties were grief-stricken[93] or hospitalized for a long period after the accident,[94] good cause is provided. Good cause is also indicated under Rule 34 due to witnesses' unavailability[95] or hostility,[96] indication of dishonest answers at deposition,[97] lapse of memory,[98] lack of technical knowledge sufficient to ask intelligent questions,[99] or just relevancy and sole possession by adversary.[100] Yet in other cases, good cause has not been shown by hostility of witnesses[101] nor a witness's being out of state.[102] It has also been held that the taking of a deposition precludes discovery of a statement.[103]

C. *When Issue Not Decided.* A great difficulty arises in that many courts do not distinguish between good cause under the work product doctrine and under Rule 34; and where it is not clear from the language of the court or the facts of the case whether or not work product is involved, it is impossible to determine what standard of cause these cases are applying. The matter is further complicated because some courts appear to be interpreting *Hickman* as a definition of good cause under Rule 34.[104]

Some of these courts have felt good cause to exist when material is in sole possession of the adversary,[105] when witnesses are dead[106] or hostile,[107] when there is lapse of memory of witnesses,[108] or where

92. Marks v. Gas Service Company, 168 F.Supp. 487 (W.D. Mo. 1958); Brown v. New York, New Haven & Hartford Railroad Co., 17 F.R.D. 324 (S.D. N.Y. 1955).
93. Dulansky v. Iowa-Illinois Gas & Electric Co., 10 F.R.D. 146 (S.D. Iowa 1950).
94. Henderson v. Southern Railway Co., 17 F.R.D. 349 (E.D. Tenn. 1955).
95. See United States v. Great Northern Railway Co., 18 F.R.D. 357 (N.D. Calif. 1955) (dictum).
96. Hanke v. Milwaukee Electric Ry. and Transport Co., 7 F.R.D. 540 (E.D. Wis. 1947).
97. See United States v. Great Northern Railway Co., 18 F.R.D. 357 (N.D. Calif. 1955) (dictum).
98. Roach v. Boston Two Boat Company, 19 F.R.D. 267 (D. Mass. 1956).
99. Brauner v. United States, 10 F.R.D. 468 (E.D. Penn. 1950).
100. Zenith Radio Corp. v. Radio Corp. of America, 121 F.Supp. 792 (D. Del. 1954); Hirshorn v. Mine Safety Appliances Co., 8 F.R.D. 11 (W.D. Penn. 1948).
101. Burns v. Philadelphia Transp. Co., 113 F.Supp. 48 (E.D. Penn. 1953).
102. Reeves v. Pennsylvania R. Co., 8 F.R.D. 616 (D. Del. 1949).
103. Weaver v. Erie R. Co., 15 F.R.D. 257 (E.D. N.Y. 1954).
104. See Safeway Stores v. Reynolds, 176 F.2d 476 (D.C. Cir. 1949); Hudalla v. Chicago, M.S.P. & P.R. Co., 10 F.R.D. 363 (D. Minn. 1950).
105. G. & P. Amusement Co. v. Regent Theatre Co., 9 F.R.D. 721 (N.D. Ohio 1949); Rockett v. John J. Casele, Inc., 7 F.R.D. 575 (S.D. N.Y. 1947).
106. Hesch v. Erie R. Co., 14 F.R.D. 518 (N.D. Ohio 1952).
107. Brookshire v. Pennsylvania R. Co., 14 F.R.D. 154 (N.D. Ohio 1953).
108. Tannenbaum v. Walker, 16 F.R.D. 570 (E.D. Penn 1954).

the party did not know who had given statements.[109] However, good cause was not shown when allegation was on the grounds of mere convenience,[110] witnesses would not speak privately,[111] or documents were not readily available.[112] Also good cause was not shown when a party had the opportunity to take his own tests[113] or statements.[114]

VIII. HICKMAN IN STATE COURTS

Finally, it might be interesting to note how the *Hickman* decision has been received in some of the state courts. Arizona and Connecticut[115] appear to follow the case quite completely, although the latter does make absolute exemption to the opinions and theories of the attorney.[116] California does not consider the work of experts a work product,[117] and by gratis dictum in the same case they state that the *Hickman* decision may not be so fully applicable in California as they still rely more extensively on the pleadings.[118] Delaware seems to have followed the true spirit by stating that greater cause for the production of work product will be required.[119] Florida apparently interprets the *Hickman* case as making the work product immune and not simply protected.[120] Minnesota, by amendment to their rules, has made the work product absolutely immune.[121] Utah has amended their rules to state that the production of the work product will not be required except under undue hardship or injustice, and documents that reveal the attorney's opinions or theories will never be discoverable.[122]

IX. CONCLUSION

The *Hickman* case attempted a general statement of classification, and as such it necessarily must be applied in greatly varying ways when specifics are encountered. The courts have had difficulty in determining just what work product is, and even more difficulty in deciding what unusual circumstances should warrant its discovery. Other courts have not even attempted to follow the *Hickman*

109. Bennett v. New York Centr. R. Co., 9 F.R.D. 17 (N.D. N.Y. 1949).
110. Hilton v. Contiship Corporation, 16 F.R.D. 453 (S.D. N.Y. 1954).
111. Watn v. Pennsylvania Railroad, 19 F.R.D. 358 (E.D. Penn. 1956).
112. Dellameo v. Great Lakes S. S. Co., 9 F.R.D. 77 (N.D. Ohio 1949)
113. United States v. 5 Cases, 9 F.R.D. 81 (D. Conn. 1949).
114. Aetna Life Ins. Co. v. Little Rock Basket Co., 14 F.R.D. 383 (E.D. Ark. 1953).
115. See Prizio v. Penachio, 115 A.2d 340 (Conn. 1955).
116. Dean v. Superior Court, 324 P.2d 764 (Ariz. 1958).
117. Grand Lake Drive In, Inc. v. Superior Court, 3 Cal.Rptr. 621 (1960).
118. *Ibid.* at 627 (dictum).
119. Frank C. Sparks Company v. Huber Baking Company, 114 A.2d 657 (Del. 1955).
120. See Florida Atlantic Coast Line R. Co. v. Allen, 40 So.2d 115 (Fla. 1949).
121. Minn. R. Civ. P. 26.02, 34. For a discussion see Brown v. Saint Paul City Ry. Co., 62 N.W.2d 688 (Minn. 1954).
122. Utah R. Civ. P. 30(b). For a discussion of this rule see Mower v. McCarthy, 245 P.2d 224 (Utah 1952).

decision. It seems that only through experience will the work product doctrine become more defined, and its application more uniform.

DAVID F. KNUTSON.

SOME NEW CONCEPTS OF THE JOINT BANK ACCOUNT

Entering a bank, A deposits money in a savings account and instructs the teller to list the depost in the passbook and on the bank records as standing to the account of "A *or* B." This situation as well as the equally common situations where deposits are made to the account of "A *and* B," "A *and/or* B," and "A *and* B *or the survivor,*" as well as other variant forms, presents complex and baffling questions of law which have lately been engaging the attention of courts, practitioners, and legal scholars.[1] The critical inquiry in most instances is as to the nature of the interests held by A and B in the funds which have been deposited. Is there a right of survivorship so that if either A or B dies the surviving depositor is entitled to all the money? Does B possess a right of present withdrawal with regard to the funds on deposit? Do the foregoing arrangements violate the Statute of Wills? It is widely agreed that the answers to these questions depend primarily upon the intention of the depositor,[2] but a question may arise as to what evidence is material to show this intent.[3] On the other hand, if the dispute arises over the existence of a right of survivorship, it is possible to find cases saying that intent to create such a right is insufficient standing alone, and that compliance with the requirements for creation of a joint tenancy — *i. e.*, that the joint tenants must share the unities of time, title, interest, and possession — must also be shown.[4]

1. See generally Bogert, *The Creation of Trusts by Means of Bank Deposits*, 1 Cornell L. Q. 159 (1916); Jones, *The Use of Joint Bank Accounts as a Substitute for Testamentary Disposition of Property*, 17 U. Pitt. L. Rev. 42 (1955); Kepner, *The Joint and Survivorship Bank Account — A Concept Without a Name*, 41 Calif. L. Rev. 596 (1953); Townsend, *Creation of Joint Rights Between Husband and Wife in Personal Property*, 52 Mich. L. Rev. 779 (1954); 1957 U. Ill. L. F. 655.

2. Kennedy v. Kennedy, 169 Cal. 287, 146 Pac. 647 (1915); *In re* Murdock's Estate, 238 Iowa 898, 29 N.W.2d 177 (1947); Napier v. Eigel, 350 Mo. 11, 164 S.W.2d 908 (1942); McGillivray v. First Nat. Bank, 56 N.D. 152, 217 N.W. 150 (1927); Reel v. Hansboro State Bank, 52 N.D. 182, 201 N.W. 861 (1924); King v. Merryman, 196 Va. 844, 86 S.E.2d 141 (1955).

3. See *In re* Murdock's Estate, *supra*, note 2, at 179; Kowal v. Sang, 318 Mich. 312, 28 N.W.2d 113, 117 (1947); Olander v. City of Omaha, 242 Neb. 340, 6 N.W.2d 62, 64 (1942).

4. See Appeal of Garland, 126 Me. 84, 136 Atl. 459, 464 (1927); Wright v. Knapp, 183 Mich. 656, 150 N.W. 315, 316 (1915); *In re* Gerling's Estate, 303 S.W.2d 915, 917 (Mo. 1957); *In re* Walker's Estate, 340 Pa. 13, 16 A.2d 28, 29 (1940); *In re* Lower's Estate, 48 S.D. 172, 203 N.W. 312, 315 (1925).