Attorney's Work-Product Privilege in the Federal Courts

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be given authority to determine whether the insurer should accept a compromise offer. And, in jurisdictions where pre-trial examinations are not available, some type of hearing could be conducted whereby selected and highly-qualified individuals would similarly judge the merits of the insurer's defense. In making this determination, the questions of proper investigation by the insurer and comparative financial risks should be carefully considered. Under such a system, whenever the designated party concludes that the insurer should compromise the claim rather than litigate and the injured party is willing to accept an amount within the policy limit, a refusal by the insurer to heed the recommendation should render it strictly liable for any excess amount of a subsequent judgment rendered against the insured.

If liability to the injured party has already been established after a trial on the merits, and there are no substantial questions as to the insured's liability which may provide the basis of an appeal, the insurer should not be allowed with impunity to seek reversal of the judgment on a collateral issue which does not bear directly on liability when the injured party is willing to negotiate a settlement offer within the policy limit. Where the insurer knows that the finder of fact has already decided against him on the question of the insured's liability, it should not be able to gamble the insured's money by seeking reversal on a technicality in the hope that a subsequent trial on the issue of liability will reach a different conclusion.

These proposals will limit the application of the "bad faith" rule to litigation on the undetermined question of liability for which the insurer has obtained official approval. Also limited would be the confusion inherent in the "bad faith" rule, i.e., whether the insurer reasonably considered the interests of the insured when it failed to accept a settlement offer.

ATTORNEY'S WORK-PRODUCT PRIVILEGE IN THE FEDERAL COURTS

The "sporting theory of justice," which long prevailed in our judicial system, has been rejected in the Federal Rules of Civil Procedure relating to discovery. The purpose of the rules is to assure a correct and speedy result on the merits. Discovery facilitates this end in that it tends to narrow the issues; to leave for trial only those issues actually contested; to insure that all relevant evidence will be adduced at the trial; to expose fraudulent and groundless claims; and to serve as a basis for pretrial settle-

ments. According to rule 26(b), "any matter, not privileged, which is relevant to the subject matter involved in the pending action" is subject to discovery. One privilege created by the courts is the attorney's "work-product" privilege. The work product of an attorney is protected in order to preserve our adversary system of litigation by assuring counsel that his private files will not be available to his adversary unless justification and necessity are shown. This note will analyze the scope of the "work-product" privilege as it now exists in the federal courts and the collateral questions of "good cause" and appealability.

The Work-Product Privilege

Perhaps the most important case relevant to the work-product privilege is Hickman v. Taylor. On February 7, 1943, a tugboat sank while helping to tow a car-float across a river. Five crewmen died in the accident. Three days later, the tug owners employed an attorney to defend them in any litigation that might arise out of this accident. On March 4, 1943, the United States Steamboat Inspectors held a public hearing at which the four survivors were examined. This testimony was recorded and made available to all interested parties. Shortly thereafter, the attorney for the tug owners interviewed and obtained signed statements relating to the accident from the survivors. He also interviewed other persons believed to have some information relating to the sinking and, in some cases, prepared memoranda of what they said. Nine months after the accident, petitioner, administrator of the estate of one of the deceased crewmen, brought suit against the owners of the tug and the car-float. The petitioner sought discovery of the oral and written statements secured by the counsel for the tug owners.

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2 Discovery is available not only as to specific information within the adversary's possession, but extends to the identity and location of persons having knowledge of relevant facts and to the existence and location of books, documents, and other tangible things. FED. R. CIV. P. 26(b).

3 See C. WRIGHT, FEDERAL COURTS §81, at 312 (1963).

4 Hickman v. Taylor, 329 U.S. 495 (1947). The work-product privilege should be distinguished from the attorney-client privilege, the purpose of which is to promote full disclosure of information between an attorney and his client by holding the confidential communication inviolate. The work-product privilege only requires that such material be withheld from adversaries. See Fey v. Stauffer Chem. Co., 19 F.R.D. 526 (D. Neb. 1956). Thus, where different attorneys are representing parties with a common interest, such as possible co-defendants, and they meet and discuss material that would otherwise be privileged, it seems that the work-product privilege should still be available to either attorney as to any material discussed. This should be so, even though the meeting might have constituted a waiver of the attorney-client privilege. A waiver of the attorney-client privilege should not be deemed a waiver of the work-product privilege. Contra, Wild v. Payson, 7 F.R.D. 495 (S.D.N.Y. 1946).

5 329 U.S. 495 (1947).
in preparation for possible litigation. The district court held that
the requested matters were not privileged.\textsuperscript{6} The court of appeals
held that the information sought was part of the work product of
the lawyer and, as such, absolutely privileged from discovery.\textsuperscript{7}
The Supreme Court unanimously affirmed, but on a theory different
from that adopted by the court of appeals. The Court held the at-
torney's work-product privilege to be qualified, not absolute, a
balancing of competing interests being required in each case.\textsuperscript{8}
It was noted that relevant, non-privileged information which is essen-
tial to the preparation of one's case may be discovered even though
it is in the attorney's files.\textsuperscript{9} The Court stated that the general
policy militating against invasion into the privacy of an attorney's
preparation for trial places on the party seeking to invade that
privacy the burden of establishing adequate reasons to justify dis-
covery.\textsuperscript{10} Here, the petitioner had failed to make a showing of
purported necessity or justification. It is important to note that
the question of whether there is a distinction between materials
gathered by lawyers and materials gathered by non-lawyers, in
regard to the work-product privilege, was not answered in \textit{Hickman}.

The work-product privilege would seem clearly to apply to
material gathered by a lawyer. However, mere membership in
the bar is not sufficient to render information privileged. Either
the material must have been obtained as a result of a basic pro-
fessional relationship between the lawyer and the client or the
preparation process must have required the training, skill and
knowledge of a lawyer.\textsuperscript{11} Where the attorney performs services
akin to those rendered by an investigator or claims agent, and
occupies no professional relationship to the party represented, the
immunity will not arise.\textsuperscript{12} Furthermore, the privilege will only
arise when the information sought has been acquired in prepara-
tion for trial.\textsuperscript{13}

\textsuperscript{6} F.R.D. 479 (E.D. Pa. 1945).
\textsuperscript{7} 153 F.2d 212 (3d Cir. 1945).
\textsuperscript{8} \textit{Hickman} v. \textit{Taylor}, 329 U.S. 495, 497 (1947). The two competing
interests are the precluding of unwarranted excursions into a man's work
and the need for reasonable and necessary inquiries.
\textsuperscript{9} \textit{Id.} at 511-12.
\textsuperscript{10} \textit{Id.} at 512. "Not even the most liberal of discovery theories can
justify unwarranted inquiries into the files and the mental impressions of
an attorney." \textit{Id.} at 510.
\textsuperscript{13} E.I. Du Pont De Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D.
416, 420-21 (D. Del. 1959). Where the information has been obtained in
the regular course of the defendant's business, the privilege will not attach.
\textit{E.g.}, Colden v. R.J. Schofield Motors, 14 F.R.D. 521, 522 (N.D. Ohio 1952);
addition, statements made antecedent to the commencement of the
action, not in anticipation of prospective litigation, although not obtained
in the regular course of business, are not privileged. \textit{Ridker} v. \textit{Warfield},
An interesting case in this regard is *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*,

where the plaintiff sought discovery of a memorandum prepared by one of the defendant's lawyers for the defendant's use in a previous action in which the plaintiff here was not a party. The vital information contained in the memorandum could not be obtained by the plaintiff except by discovery of the memorandum. The court held that there was no privilege which would preclude discovery of a lawyer's memorandum, prepared during a prior case, in a subsequent action between different parties. This case seemingly places the attorney for a defendant who is liable to a class of persons in an anomalous position, in that matter obtained in preparation for litigation of a suit brought by a member of a class might not be privileged in a second suit relating to the same transaction initiated by a different member of the same class, since it was not prepared in anticipation of the subsequent suit. It seems illogical for the privilege not to extend to the same defendant when he is sued a second time by a different plaintiff on a claim arising out of the same transaction or occurrence. It would have been clearer, perhaps, for the court in this case to have found that a privilege existed but was overcome because the information was vital and could have been obtained only through discovery.\(^{15}\)

In addition to the question of whether the material was prepared in anticipation of the suit in which discovery is sought, an inquiry is sometimes made into the time at which the information was obtained. Clearly, where the information sought is obtained prior to the accrual of the cause of action, the privilege should not attach, since it could not possibly have been prepared in anticipation of litigation.\(^{16}\) It has been suggested that a cut-off date corresponding to the date of commencement of the action should be applied and that all material thereafter obtained should be absolutely privileged and not subject to discovery.\(^{17}\) However, the *Hickman* rationale of qualified privilege would appear to make such a cut-off date unjustified. Indeed, the cut-off date concept has apparently been rejected.\(^{18}\)


\(^{15}\)For criticism of this rule, see Note, *Developments in the Law—Discovery*, 74 Harv. L. Rev. 940, 1044-45 (1961). For a further insight into the problem, see Insurance Co. of North America v. Union Carbide Co., 35 F.R.D. 520 (D. Colo. 1964), where it was held that adversary counsel in an active case should not be permitted to obtain the carte blanche privilege to examine the attorneys in a former closely related case, albeit between different parties.


It has been contended, and rightly so, that the proper inquiry should not focus on the date the material was obtained, but rather on whether the material is within the scope of the work-product doctrine. Whether written statements of a witness are within the work-product doctrine is not entirely clear although such statements were the matter held to be privileged in the Hickman case. Cases subsequent to Hickman have asserted that such statements, when obtained in preparation for trial, are normally privileged as the work product of an attorney. However, it has been held that since the doctrine only applies where legal talent and training are exercised, the written statement of a witness which records his mental impressions and observations, and not those of the attorney, should not be privileged. Nevertheless, a counsel's written memorandum of oral statements of a witness is normally a part of his work product, since it necessarily includes his analysis and impression of what he has heard.

Closely related to the issue of whether the written statements of a witness are within the privilege is the question of whether responses to a questionnaire sent out by an attorney are privileged. In United States v. Swift & Co., an anti-trust case, the defendant sought disclosure of all responses received in answer to the questionnaires sent out by the government. The court, recognizing that the Hickman rationale sought to protect the attorney's mental processes, strategy and legal theories evolved in preparation for trial, held that no privilege attached to the responses. Since the materials sought were statements in writing prepared and supplied by those responding to the questionnaire, the court ruled the work-product doctrine inapplicable. Because a copy of the questionnaire was available to the moving party, the only work which could be claimed by the government to be privileged was the routine clerical tasks of circulation and receipt of the ques-

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21 Smith v. Washington Gas & Light Co., 7 F.R.D. 735 (D.D.C. 1948). This would seem to apply whether the statement was prepared by the witness and later delivered to the attorney or drafted by the attorney and later adopted by the witness, so long as the attorney did not edit the statement. Lundberg v. Willis, 11 F.R.D. 136 (S.D.N.Y. 1951).
22 Id.
tionnaires. The court here noted that in order for such litigation to be manageable, full disclosure must be allowed; that this is not a situation where specific witnesses are within the personal knowledge of the movant and equally available to be interviewed; and that to compel the movant to duplicate the effort of his adversary would be time-consuming and expensive and would not provide a sound basis for analyzing the statistical results of an opponent's survey or its probative value. Where, however, legal skill is required to frame the questionnaire and the questions have not been disclosed, an argument can be made against requiring disclosure. Several recent cases have held that such responses are within the privilege. Nevertheless, it is contended that the rationale of the court in *Swift* should control. Of course, disclosure should not be allowed as to the reports and compilations of the responses, since they necessarily reflect the mental impressions and work of the attorney.

Another problematic area is that of the discovery of photographs or diagrams made shortly after the occurrence out of which the claim arose. Whether these are privileged is not entirely clear; even where they have been made under the supervision of an attorney. In some situations, legal skill may be involved in taking such pictures or preparing diagrams, and the privilege should attach. The question of whether the privilege attaches to contemporaneous pictures or diagrams, on the other hand, is rather academic. Since they cannot be duplicated, the courts will order disclosure, even though they are privileged, as "good cause" sufficient to overcome the privilege exists.

The question of whether or not to extend the work-product privilege to material obtained by those working in conjunction with a lawyer is a vexing one, particularly because the *Hickman* decision was based on the unique role of the attorney in our system of jurisprudence and because it involved only statements obtained by the defendant's attorney. The question is one of considerable practical significance to the lawyer who cannot do all the investigative work required for litigation himself. The question has caused a split among, as well as within, the circuits.

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In *Alltmont v. United States*, disclosure was sought of statements of witnesses obtained by agents of the Federal Bureau of Investigation. The government resisted discovery, contending that the material represented the work product of government lawyers. The Third Circuit Court of Appeals, after noting that *Hickman* only concerned statements obtained by a lawyer, held that "its rationale has a much broader sweep and applies to all statements of prospective witnesses which a party has obtained for his trial counsel's use." The court thought it would be illogical to distinguish between statements of a witness obtained by the attorney himself and those obtained by others for the use of counsel — in both situations, the material is obtained in preparation for trial and ultimately becomes part of the attorney's file for use at the impending trial.

While some courts have agreed with the *Alltmont* court, others have denied the privilege. Indeed, there is considerable authority that such reports are not privileged. In *United States v. McKay*, the government sought disclosure of reports relating to a testator's property from the executor. The reports had been obtained by the executor for the purpose of advising and adequately representing the estate and in anticipation of possible estate tax litigation. The Fifth Circuit Court of Appeals refused to impose a privilege under the work-product doctrine, stating that the reports in question were in no sense the work product of an attorney but were solely the work product of an expert witness employed by the lawyer.

In addition to this factor militating against extending the privilege, it can be argued that the *Alltmont* case was based on the premise that free discovery of the work of claims agents and investigators would favor the party whose attorney does his own preparation over the party whose lawyer delegates part of this task to others. The lower federal courts, however, should not, it is believed, take this premise into consideration. Even the courts which ordinarily deny the privilege to the work of laymen would grant the privilege where the investigator's work contains material in the nature of opinion, theory or recommendation as opposed to

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28 177 F.2d 971 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950).
29 Id. at 976.
32 372 F.2d 174 (5th Cir. 1967).
mere factual data, since it partakes of the nature of an attorney's work in preparation for litigation.\(^{34}\)

A strong argument can, on the other hand, be made for so extending the privilege. In *United States v. American Optical Co.*,\(^{35}\) it was stated that Federal Bureau of Investigation agents were no more than the instrumentalities through which the government attorneys acted in their professional capacity and that the memoranda and reports of such agents are as much the work-product of the government's attorneys as the memoranda or statements prepared or obtained by the attorneys themselves.\(^{36}\) The court distinguished the reports made here from routine reports of claims agents and investigators, civilian or governmental, made in the regular course of business.\(^ {37}\)

If this case is extended to apply to civilian agents, whenever they perform non-routine investigative functions which are the same as might be done by the lawyer himself and the work involves the inherent privilege of the legal profession, the privilege will probably attach. Although the threat of discovery of material obtained by an agent might less readily undermine counsel's trial preparation than would such a threat if directed at the counsel's own work, it is possible that an attorney might decide to wait and see what his adversary's agents turn up before spending his client's funds. Furthermore, this threat might make counsel bear more of the burden of trial preparation himself, including routine tasks, so as to keep the unearthed facts from discovery. This might leave him less time for work involving more legal talent and therefore impede "effective preparation."\(^ {38}\)

It is therefore believed that where the agent is acting under the direction and control of the attorney and is performing the same function that the attorney would otherwise perform, the results of his labor should be privileged under the work-product doctrine. To hold otherwise would require an attorney either to do all the work himself or disclose the material to his adversary free of charge. An amendment to the federal rules was recommended, but not adopted, which would have extended a qualified immunity to any writing obtained or prepared by "the adverse party, his attorney . . . or agent in anticipation of litigation or in preparation for trial . . ." unless the movant established special circumstances.\(^ {39}\)


\(^{35}\) 37 F.R.D. 233 (E.D. Wis. 1965).

\(^{36}\) Id. at 238.

\(^{37}\) Id. at 237-38.


Not infrequently, lawsuits are handled on a defendant’s behalf by his liability insurer. Certainly, where the insurance company retains a lawyer to represent its insured, he should enjoy the same immunity as independent counsel would enjoy.\(^{40}\) In many instances, the insured will submit a statement to his insurer relating to the accident involved. Where this statement is made for the specific use of counsel, at the request of counsel, and in anticipation of litigation, it has been held to come within the purview of the work-product privilege,\(^{41}\) but where the accident report is made by the insured to the insurer as a matter of course, it cannot be considered the work-product of his attorney.\(^{42}\) Similarly, the insurance company itself will often investigate the cause of the accident. The question of whether the privilege extends to statements obtained by investigators for the insurance company is unresolved.\(^{43}\) Where the investigation is not done in the ordinary course of business, but in anticipation of litigation or in preparation for trial, and it is done under the direction and control of the attorney for the insured, then the same considerations that govern in determining whether an agent’s reports are privileged should govern here.

Another issue in the area of work done by one not an attorney is whether a qualified privilege should extend to material obtained or prepared by a party or his agent. Where the material is obtained by the party or his agent prior to consultation with an attorney, in no sense can it be stated to be the attorney’s work product.\(^{44}\) However, where a meeting has been held between the attorney and his client in preparation for trial, the work-product doctrine bars discovery of the client’s mental impressions of the conversations, since disclosure might reveal the protected mental

\(^{40}\) Fey v. Stauffer Chem. Co., 19 F.R.D. 526 (D. Neb. 1956). In Hickman, the lawyer involved was retained by both the tug owners and their insurers.


\(^{42}\) Gottlieb v. Bresler, 24 F.R.D. 371 (D.D.C. 1959). The attorney-client privilege also will not protect such a report. Id. at 372.


\(^{44}\) The proposal that the memorandum prepared by a party after interviewing several witnesses should be privileged as the attorney’s work-product was rejected by the Court of Appeals for the District of Columbia, Groover, Christie & Merritt v. LoBianco, 336 F.2d 969 (D.C. Cir. 1964). Cf. Guilford Nat’l Bank v. Southern Ry., 24 F.R.D. 493 (M.D.N.C. 1960), rev’d on other grounds, 297 F.2d 921 (4th Cir. 1962).
impressions of the attorney. But if the work is done after retention of counsel, and the party acts upon the suggestion of counsel, it is contended that the party should be considered an agent of the attorney for investigative purposes and the considerations governing whether the privilege extends to an agent should therefore govern.

In addition to the already mentioned problems found in applying the work-product privilege, a problem also exists with regard to expert testimony, a common factor at trial. Normally, an expert will give an attorney a report concerning his findings and conclusions prior to trial. The cases go both ways on whether to extend the work-product privilege to this area. It is unfortunate that the cases denying discovery do not weigh any relevant factors, but merely label the expert an "assistant counsel." The considerations which militate for the extension of the work-product doctrine to the agent working under the direction and control of the attorney should not control here. Since the attorney cannot perform these tasks, there is no fear that he will not expend a proper effort on other parts of his case to prevent discovery of expert conclusions. If, however, permitting discovery would tend to discourage both parties from seeking expert advice, then the privilege should apply in order that the parties will not be deprived of this potential benefit. The privilege should not be extended if expert opinion was a necessity, for then the attorney would be forced to seek it even though discoverable. On the other hand, where it is desirable but not necessary, perhaps the fear of discovery would militate against the use of an expert by one party and, therefore, the privilege should apply. The possible extension of the privilege should be weighed against the possible effect allowing discovery would have on the use of highly partisan reports of experts. Professor Moore feels experts' reports should be given a qualified privilege — discovery should not be granted unless the movant can show a need for obtaining the facts or

45 Ceco Steel Prods. Corp. v. H. K. Porter Co., 31 F.R.D. 142 (N.D. Ill. 1962). See 15 STAN. L. Rev. 718, 723 (1963). But see Hickman v. Taylor, 329 U.S. 495, 504 (1947), where it was stated, in dictum, that a party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney.


information contained therein for his trial preparations and inability of obtaining the material by his own independent investigation or research. In addition, he urges that the court should have the discretion to order the movant to pay a reasonable portion of the fees of the expert as a condition to discovery.\footnote{49}

**Good Cause**

If the material in question does constitute the work-product of an attorney, it may nevertheless be subject to discovery upon a showing of good cause, i.e., a special showing of necessity or justification. This good cause requirement should be distinguished from the degree of proof of necessity required to obtain material which is not privileged, which requires a lesser burden.\footnote{50} Since most of the decisions construing what constitutes good cause represent the opinions of particular trial judges responding to the facts and circumstances of the particular case, the decisions are not readily generalized and at most furnish a rough guide.\footnote{51}

One of the most significant factors in determining whether sufficient necessity or justification has been shown is whether the movant can otherwise obtain the information sought. Where one party has superior knowledge as to the sources of relevant information, a motion under rule 26(b) can be made to obtain the names and addresses of all persons having knowledge as to the dispute and the location of documents or other tangible things. Thus, where the movant is unable to locate witnesses previously examined by the opposing party, although the movant has diligently attempted to do so, his adversary will be required to furnish the material sought.\footnote{52} Where the movant is unable to take the deposition of a witness who is unavailable, e.g., he is serving in the armed forces, his statement will be ordered produced.\footnote{53} Conversely, where the witness is available to the movant, his statement will not be ordered to be produced unless there are other factors involved.\footnote{54} It also appears that where witnesses are without the state, the added expense of taking their depositions, in and of itself, will not be a sufficient showing of good cause to

\footnote{49} J. Moore, Federal Practice § 26.24, at 1531 (2d ed. 1965). See also supra note 48.
\footnote{52} Hanson v. Gartland S.S. Co., 34 F.R.D. 493 (N.D. Ohio 1964).
\footnote{54} Allen v. Denver Chicago Trucking Co., 32 F.R.D. 616 (W.D. Mo. 1963). Here the plaintiff in a wrongful death action sought to obtain a statement of a witness given to his adversary. The special factor involved here was that, although the plaintiff had taken a deposition of this witness, the decedent was unable to investigate or testify.
overcome the privilege. Assuming that the deposition of the witness given to the movant would be substantially the same as that given to his adversary, it appears that the thrust of the work-product doctrine is that it is better to have two diligent attorneys than one. Thus, where the movant is without funds to conduct an investigation and the witnesses are without the state, it seems that the court should grant disclosure in the interests of justice and thus help to ensure a correct result. Since the party cannot afford to investigate, there is no possibility that the lawyer has merely neglected to investigate. Nevertheless, expense is not ordinarily considered to be a sufficient ground for disclosure.

With the thrust of the work-product doctrine being kept in mind, it has been held that where the movant can show hostility or lack of cooperation on the part of a witness, disclosure will be ordered. The mere fact, however, that the witness whose statement is sought is an employee of the adversary of itself is not sufficient to require disclosure. But, where the movant can show that the witness-employee refuses to respond to his requests for a statement, or is reluctant to speak freely with him or is openly hostile, disclosure will be ordered. Similarly, disclosure of a statement of a witness will not normally be granted to aid the movant in his examination of the witness. However, production of prior written statements will be ordered when the witness refuses to state in the deposition whether the prior written statement is in agreement with the facts stated in the deposition. A fortiori, production will be ordered where the witness is unable to state if there is a conflict because he fails to remember significant details about the accident.

Where the adversary has taken statements of witnesses almost contemporaneously with the occurrence, production will be ordered

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56 Berger v. Central Vt. Ry., 8 F.R.D. 419 (D. Mass. 1948). The court suggested that the movant examine the witness through the mail.
57 Note, Developments in the Law—Discovery, supra note 48, at 1034.
64 McDonald v. Prowdley, 38 F.R.D. 1, 2 (W.D. Mich. 1965).
on the grounds that such statements, in addition to being extremely valuable, are irreplaceable. In order to obtain discovery in this circumstance, the movant will also have to show inability to examine the witnesses until weeks or months later. For example, in one case where the movant obtained statements within six to nine days after the accident, disclosure was denied as to statements made the day after the accident. Similarly, photographs and diagrams made contemporaneously with the accident are subject to disclosure since they cannot be duplicated. The premise that the statement closest in time to the occurrence will be more accurate is amply supported by psychological studies and common sense. It therefore seems that excusable lapse of time in itself creates sufficient good cause to overcome the attorney's work-product privilege.

Finally, statements made by a witness to an attorney are extremely valuable to the adversary for possible impeachment purposes. Generally, disclosure is granted if the statements would be valuable for impeachment or corroboration. The movant must, however, be able to show that the statements would impeach the witness who made them, a mere surmise not being sufficient. Absent this showing, it is generally considered that the movant merely wants the statements to either assist in his examination of the witness so as to be sure that he has overlooked nothing, or to merely assist him in preparing his case, both grounds being insufficient to justify production. This appears to be illogical since the movant will be unable to show that the statements are impeaching without having seen the statements.

**Appealability of Discovery Orders**

The general rule in the federal courts is that an appeal lies only from a "final" judgment. Work-products orders are rarely appealable.  

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reviewed in the courts of appeals, and when they are, jurisdiction
is not predicated on the ground that the order was final, review
being had via a writ of mandamus.\textsuperscript{76} Denial of immediate review
is based on the ground that the issue may be raised on appeal
from the final judgment on the merits—impliedly suggesting that
such review is adequate protection or that the policies of the
finality doctrine outweight the possibilities of injury resulting from
denial of interlocutory review. As a practical matter, if an order
denyng discovery is urged as error on appeal from a final judg-
ment, a reversal will be granted only if the order is erroneous and
probably affects the merits.\textsuperscript{77} It is difficult to see how a petitioner
can prove prejudice due to a denial of discovery without seeing
the material. Where the order grants discovery, the question is
moot if there is compliance. Therefore, it seems that final review
affords little protection to one seeking or opposing discovery. It
is therefore apparent that the attorney should seek to obtain in-
terlocutory review of discovery orders. The problem then is how
this can be done within the present statutory framework.

In \textit{Cohen v. Beneficial Industrial Loan Corp.},\textsuperscript{78} a shareholder's derivative suit, the defendant moved to require the plaintiff
to furnish security for expenses and attorney's fees. The United
States Supreme Court held the denial of the motion to be appeal-
able, since the "decision appears to fall in that small class which
finally determine claims of right separable from, and collateral to,
rights asserted in the action, too important to be denied review
and too independent of the cause itself to require that appellate
consideration be deferred until the whole case is adjudicated."\textsuperscript{79}
Therefore, where the issue disposed of by the district court is
collateral to the subject matter of the litigation and denial of inter-
locutory appeal will tend to expose a person to potential irre-
parable injury,\textsuperscript{80} an immediate appeal is allowed. Based on the
collateral issue doctrine, an order denying discovery as to informa-
tion in the possession of a witness, who is not a party to the
action, will be held final and appealable if the main action for
which the evidence is sought is pending in another circuit.\textsuperscript{81} The
critical fact is that the unsuccessful movant has no other possibility

\textsuperscript{76}American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380
F.2d 277, 281, 283-84 (2d Cir. 1967).
\textsuperscript{77}Note, Developments in the Law—Discovery, 74 HARV. L. REV. 940, 993
(1961).
\textsuperscript{78}337 U.S. 541 (1949).
\textsuperscript{79}Id. at 546.
\textsuperscript{80}As to irreparable injury, the Court stated that: "[w]hen that time
[of final judgment] comes, it will be too late effectively to review the
present order, and the rights conferred by the statute, if it is applicable,
will have been lost, probably irreparably." \textit{Id.} at 546. \textit{See} Overby v.
United States Fid. \& Guar. Co., 224 F.2d 138 (5th Cir. 1955).
\textsuperscript{81}Carter Prods., Inc. v. Eversharp, Inc., 360 F.2d 868 (7th Cir. 1966).
of review. Also, where the order, if not appealed, will result in
the termination of the action, appeal should be allowed under the
Cohen rationale.\(^8\)

The denial or granting of a discovery order may cause irrepara-
ble harm and, therefore, the Cohen rationale, justifying immediate
appeal of a collateral order which neither affects nor is affected
by judgment on the merits, may be applicable. However, in light
of American Express Warehousing, Ltd. v. Transamerica Insurance
Co.,\(^8\) this possibility seems unlikely. The second circuit, in de-
nying review of an interlocutory order requiring disclosure of
certain documents, explicitly rejected the view that an erroneous
application of the Hickman principle by the district court raised
a "spectre of such dire consequences" as to necessitate immediate
appellate review. The Cohen rationale, the court noted, was meant
to apply only to a "small class of cases," and "did not change
the pre-1949 practice of denying interlocutory review of discovery
orders."\(^8\)

American Express does not mean that review may never be
had. If the district court has dismissed the action or entered a
default for non-compliance with a discovery order, the order is
clearly final and appealable.\(^8\) In United States v. Procter &
Gamble Co.,\(^8\) at the government's request, a discovery order
directed against it was amended to provide for a dismissal with
prejudice if the government failed to comply. It failed to pro-
duce the ordered material and the district court dismissed the
action with prejudice and the government appealed. The Supreme
Court held the order to be final, but allowed the government to
bring a writ of error, finding that the government had not taken a
voluntary dismissal because it had at all times opposed the produc-
tion order and was merely seeking expeditious review. The Court
indicated that had the dismissal been without prejudice, review
might not have been available.\(^8\) Where the dismissal is with
prejudice, it appears that risking a loss on the merits if the appeal
fails is a high price to pay for appellate review.\(^8\)

Where review is sought of a discovery order, non-compli-
ance may result in a judgment of contempt. If the contempt
judgment is rendered against one not a party to the action, it is

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\(^8\) See Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966). The
trial court had dismissed a class action and the representative only had a
$70 cause of action individually. If unreviewed, the district court's order
would cause the demise of the action and, therefore, review was allowed.
\(^8\) 356 U.S. 677 (1958).
\(^8\) But see United States v. Wallace & Tiernan Co., 336 U.S. 793, 794
n.1 (1949).
reviewable as a final judgment on the merits. When against
a party, where the contempt is civil in nature with the intent to
compel compliance rather than preserve the dignity of the court,
interlocutory appeal will not lie. Only where the contempt is
criminal in nature will immediate review be available. Where
the judge is sympathetic and imposes only light penalties for
criminal contempt or stays the order of sentencing pending appeal,
such can be a valuable method of obtaining immediate interlocutory
review.

Generally, attempts to secure interlocutory review of discov-
er order by mandamus or prohibition have failed. However,
in *Hartley Pen Co. v. United States District Court*, the plaintiff,
a manufacturer of pens who utilized a trade secret under a licen-
sing agreement which prohibited its disclosure, was ordered to
disclose the trade secrets and secret test procedures. The plain-
tiff sought a writ of mandamus or prohibition to reverse the order
as an abuse of discretion. The court granted the writ because
the ordinary remedies were inadequate and there were exceptional
and extraordinary circumstances present which required the issu-
ance of an extraordinary writ to prevent a grave miscarriage of
justice. The court rejected arguments that the petitioner had an
adequate remedy on appeal and that he should have been required
to obtain review by failing to comply with the order and appealing
from the resulting default judgment or contempt citation. Also
to be noted in this regard is *Atlass v. Miner*, where the petition-
er sought a writ of mandamus or prohibition to prevent enforce-
ment of a discovery order, alleging that the local admiralty rule
upon which it was based was invalid and improper. Since the
court considered the question to be critical and directed at a
fundamental procedural question, resolution of which would per-
haps serve to avoid a conflict among the district courts, and
thought that the remedy on appeal would be inadequate, it granted
the writ.

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89 See *Fenton v. Walling*, 139 F.2d 608, 610 (9th Cir. 1943), and cases
cited therein.
90 *Salvage Process Corp. v. Acme Tank Cleaning Process Corp.*, 86
F.2d 727 (2d Cir. 1936).
92 E.g., *Hickman v. Taylor*, 4 F.R.D. 479 (E.D. Pa.), rev’d, 153 F.2d
212 (3d Cir. 1945), aff’d, 329 U.S. 495 (1947).
93 *American Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380
F.2d 277, 284 (2d Cir. 1967).
94 *Salve Process Corp. v. Acme Tank Cleaning Process Corp.*, 86
F.2d 727 (2d Cir. 1936).
95 *But see Chemical & Indus. Corp. v. Druffel*, 301 F.2d 126 (6th Cir.
1962), denying the writ but suggesting that petitioner apply to the district
court for a protective order.
96 265 F.2d 312 (7th Cir. 1959), aff’d on other grounds, 363 U.S. 641
(1960).
Generally, the issues that can be raised by mandamus or prohibition are usurpation of power, clear abuse of discretion and the presence of an issue of first impression.\textsuperscript{97} The writ is unavailable when the most that can be claimed is that the district court erred in ruling on matters within its jurisdiction.\textsuperscript{98} It seems that mandamus or prohibition, being discretionary, could be utilized to allow appeals where clearly justified, these remedies not raising the objections of expense and delay which are inherent in appeals as of right.

In 1958, Congress passed the Interlocutory Appeals Act\textsuperscript{99} in order to expedite the ultimate termination of litigation and thereby save unnecessary expense and delay.\textsuperscript{100} Under this Act, immediate appeal from an interlocutory order of a district court judge may be obtained if that judge certifies that the order involves a "controlling question of law as to which there is substantial ground for difference of opinion,"\textsuperscript{101} and if such appeal would hasten the ultimate termination of the litigation.

It has been held that the correctness of an order compelling discovery is collateral to the basic issues in a case and does not present such a fundamental question of law as to be considered controlling on these issues.\textsuperscript{102} This holding appears unwarranted, for, if the propriety of such an order is likely to affect the ultimate outcome of the case, it could conceivably be termed a controlling question of law. Clearly, in many instances, there will be a substantial difference of opinion as to the issues involved.

The second requirement for an appeal under the Act is that it must hasten the end of the law suit. If discovery is denied and reversed on an appeal from the final judgment, a second trial would be required. Immediate review would eliminate the necessity of two trials—an obvious saving of time. On the other hand, where disclosure is ordered, immediate review would lengthen the litigation. It would seem that this Act should have its greatest vitality where issues of privilege are involved or where trade secrets are ordered disclosed and compliance would result in irreparable injury. Since the statute is discretionary, the courts will not be cluttered with frivolous appeals from ordinary work-product privilege cases.

\textsuperscript{97}American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 283 (2d Cir. 1967).
\textsuperscript{98}Id.
\textsuperscript{102}United States v. Woodbury, 263 F.2d 784 (9th Cir. 1959).
Conclusion

Today's discovery rules are essentially the same as those promulgated in 1938. The Advisory Committee, recognizing the urgent need for amendment to resolve confusion and disagreement present under the existing rules, has proposed several amendments to the federal discovery rules.

The first proposal relating to the “work product” dilemma is to eliminate the general requirement of “good cause” from rule 34, retaining it for trial preparation materials which would be expressly privileged under Proposed Rule 26(b)(3). The Committee's rationale is evidently to end the confusion resulting from the different requirements of good cause present under the existing rules.

Today, there is considerable debate and confusion as to whether the attorney's "work-product" privilege extends to materials obtained in preparation for litigation by non-lawyers as well as to lawyers. Proposed Rule 26(b)(3) would privilege, subject to a showing of good cause, materials obtained in preparation of litigation whether secured by the party, his attorney, surety, indemnitor, insurer or agent. In addition, Proposed Rule 26(b)(3) would permit discovery of a statement previously given by a party without a showing of good cause.

The question of whether to permit discovery of the work of an expert is unresolved today. The Advisory Committee, in its Proposed Rule 26(b)(4)(A), has decided that such information should be privileged and obtainable only if the party seeking discovery is "unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice." The court under rule 26(b)(4)(C) is also empowered under the proposed amendment to order the movant to pay the expert a reasonable fee for his time in responding to discovery and also to provide for a sharing of the expert's fee.

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103 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 1 (U.S. Gov't Printing Office 1967) [hereinafter cited as PRELIMINARY DRAFT].
104 PRELIMINARY DRAFT 11, 23.
105 See text accompanying footnote 57.
106 See 1 text accompanying footnotes 28-49.
107 PRELIMINARY DRAFT 11, 12.
108 PRELIMINARY DRAFT 27.
109 PRELIMINARY DRAFT 12.
These proposed rules would undoubtedly aid in the resolution of the confusion that exists under today's rules relating to discovery of the attorney's "work product" and perhaps end the influx of numerous discovery cases into the district courts.

**RECENT DEVELOPMENTS IN THE TAX HOME CONCEPT**

Section 63(a) of the Internal Revenue Code of 1954 defines taxable income as gross income minus certain deductions. Among these deductions are listed all ordinary and necessary traveling expenses incurred while away from home in pursuit of a trade or business.¹ Whereas "away from home" seems a simple enough concept for even the layman to comprehend, it has caused a plethora of problems for the courts and the Internal Revenue Service. Cases have developed in two separate areas of the law in order to arrive at a practical definition of "away from home." One line of cases has sought a meaning for the term "home" and thus has developed the "tax home" concept.² The second line of cases has focused on what "away" means as used in its statutory context.

In order to understand the present situation in this area and the direction in which the law is moving, it is necessary to develop each of these two areas separately. It seems plausible to begin with the term "home" and the way in which Congress, the courts and the Internal Revenue Service have construed it. Special emphasis in this area will be given to *Commissioner v. Stidger*,³ the most recent Supreme Court pronouncement concerning the "tax home" doctrine. Then, with at least a workable understanding of the "tax home" concept, the discussion will proceed to the related problem of how "away" is to be interpreted under the statute.

*Tax Home*

A deduction for travel expenses, including all expenditures for meals and lodging, was first included in Section 214(a) of the Revenue Act of 1921.⁴ Previously, Treasury Regulations promul-

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³ 386 U.S. 287 (1967).

That in computing net income there shall be allowed as deductions:

(1) . . . traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business.