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Federal Civil Procedure- Work Product Doctrine

Federal Civil Procedure—WORK PRODUCT DOCTRINE—*McDougall v. Dunn*, 468 F.2d 468 (4th Cir. 1972).

The work product doctrine[1] protects from pretrial discovery witness statements and other documents gathered by an adversary's counsel in the course of preparation for possible litigation.[2] The purpose of the work product doctrine is to preserve the privacy and independence of lawyers by denying unwarranted intrusions into their private files and mental processes.[3] Prior to the 1970 amendments to the Federal Rules of Civil Procedure, courts applied two distinct tests when considering whether to allow pretrial discovery of documents and witness statements. One test required the party seeking discovery to show good cause[4] why discovery should be allowed. The alternative test required the moving party to demonstrate either the necessity for the production of the work product materials or that denial of such discovery would unduly prejudice his case and cause hardship or injustice.[5] Not only did the courts have difficulty distinguishing between the good cause test of Rule 34 and the necessity or undue hardship test,[6] but the courts also were faced with the question of whether the work product privilege could be extended to work prepared by a non-attorney.[7]

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1. Hickman v. Taylor, 329 U.S. 495 (1947).

2. *Id.* at 505. In deciding whether to apply the work product immunity it has been held that the test is "[N]ot whether the litigation has begun but whether the documents may be said to have been prepared or obtained in anticipation of litigation." Arney v. George A. Hormel & Co., 53 F.R.D. 179, 181 (D. Minn. 1971).

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

4. FED. R. CIV. P. 34, 6 F.R.D. 238 (1947). This requirement was imposed on both work product and non-work product materials. Advisory Committee's Note, Fed. Rules Civ. Proc. rule 26, 28 U.S.C.A. (1972). Cases prior to 1970 generally interpreted good cause as mere relevancy with regard to non-evaluative investigative materials not prepared in anticipation of trial, but required a showing of necessity with regard to work product materials. *Id. See, e.g.*, Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968).

5. Hickman v. Taylor, 329 U.S. 495, 509 (1947).

6. Advisory Committee's Note, Fed. Rules Civ. Proc. rule 26, 28 U.S.C.A. (1972). The confusion involved reconciling two verbally distinct requirements; Rule 34, which applied both to work product and non-work product materials, and the *Hickman* test for discovery of trial preparation materials. Thus the showing required for production of materials varied as the type of materials sought varied. Good cause meant a showing of necessity or justification for materials protected by the *Hickman* work product privilege. For non-work product materials, however, some courts equated good cause with relevance, *e.g.*, Connecticut Mut. Life Ins. Co. v. Shields, 17 F.R.D. 273 (S.D.N.Y. 1955), while others held that the moving party must demonstrate more than relevance, but less than the *Hickman* standard, *e.g.*, Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968). Courts admitted the issue of good cause was "[U]nsettled and has been the subject of sharp controversy. . . ." *Id.* at 127.

7. The Court emphasized that *Hickman* involved witness statements taken by a lawyer and left open the issue of whether a non-lawyer could claim work product protection. There are contrary lower court holdings on this issue. *Compare* Alltmont v. United States, 177 F.2d 971,

The 1970 amendments to the Federal Rules of Civil Procedure resolved these issues by deleting the good cause requirement of Rule 34.[8] Instead, Rule 26 (b)(1) now requires a showing of relevance[9] for production of non-work product materials. To obtain pretrial discovery of work product materials the petitioner, under Rule 26 (b)(3), must now demonstrate that he has substantial need of the materials and is unable without undue hardship to obtain their substantial equivalent.[10] In addition the rules establish that the work product privilege extends to a non-attorney who prepares materials in anticipation of litigation.[11]

In *McDougall v. Dunn*[12] the Fourth Circuit Court of Appeals confronted the issue of pretrial discovery of documents ostensibly protected by the work product doctrine. In *McDougall*, shortly after an accident in which defendant's car crashed into a tree, a claims adjuster for defendant's insurance company secured from the defendant driver a statement admitting his negligence.[13] The plaintiff, a passenger in the car, moved to require the defendant to produce this statement. The district court overruled the motion on the grounds that the statements were the attorney's work product.[14]

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976 (3d Cir. 1949) (statements obtained by FBI agents accorded *Hickman* privileges since court could find no logical distinction between witness statements obtained by counsel personally and those obtained by others for counsel's use), *with* Southern Ry. v. Campbell, 309 F.2d 569, 572 (5th Cir. 1962) (statements taken by claims agent held not work product).

8. Rule 34, instead of imposing its own prerequisite of good cause, now allows discovery of documents and tangible things, subject to the restrictive provisions of Rule 26(b). FED. R. CIV. P. 34. Thus the showings required for discovery are no longer enumerated in Rule 34, but instead are found in Rule 26(b).

9. Relevance is to be broadly interpreted as anything relevant to the subject matter of the action, rather than being relevant to the precise issues framed by the pleadings. Prudential Ins. Co. v. Marine Nat'l Exch. Bank, 52 F.R.D. 367, 369 (E.D. Wis. 1971). The test of relevance is not to be construed as the narrow test used in determining admissability of evidence upon a trial. Rediker v. Warfield, 11 F.R.D. 125, 128 (S.D.N.Y. 1951). Rather, anything is relevant if it is "[R]easonably calculated to lead to the discovery of admissible evidence." FED. R. CIV. P. 26(b)(1).

10. The party seeking discovery must show that he "[H]as 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." FED. R. CIV. P. 26(b)(3). Courts have recognized that Rule 26(b)(3) replaces the *Hickman* necessity or undue hardship test for discovery of work product materials. Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972). *See* Peterson v. United States, 52 F.R.D. 317, 321 (S.D. Ill. 1971).

11. "[A] party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of (substantial need and inability without undue hardship to obtain their substantial equivalent). . . ." FED. R. CIV. P. 26(b)(3).

12. 468 F.2d 468 (4th Cir. 1972).

13. The defendant conceded that he had been drinking prior to the accident, that he was not maintaining a proper lookout, and that he was speeding. *Id.* at 471 n.2.

14. 468 F.2d at 471. The defendant resisted the motion, objecting to discovery of materials

On appeal, the circuit court held that the statements were not work product and, even if they were, they were discoverable since plaintiff did not engage counsel and had no opportunity to obtain witness statements until more than two years after the accident.[15]

The court of appeals noted the lower court's error[16] in characterizing as work product the statements taken by the claims adjuster in the regular course of his duties.[17] The court, although recognizing that a non-lawyer can claim work product privileges, held that to be work product statements must be requested by or prepared for an attorney.[18]

The court, unwilling to reverse on this point alone, cited the importance of fresh and contemporaneous witness statements,[19] and the inability of

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prepared in anticipation of litigation without a showing of good cause. The record of the circuit court is mute both as to why the district court accepted this contention, and what arguments the plaintiff advanced to support his motion to produce.

15. Plaintiff suffered a brain injury and was hospitalized for almost a year, and did not institute a lawsuit until almost two and a half years after the accident. 468 F.2d 468, 470 (4th Cir. 1972).

16. 468 F.2d at 473. It has been generally held that statements taken by a claims adjuster in the regular course of business and prior to the commencement of a suit are not accorded the protection of the work product doctrine. Southern Ry. v. Campbell, 309 F.2d 569 (5th Cir. 1962); Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972); Burns v. New York Cent. R.R., 33 F.R.D. 309 (N.D. Ohio 1963). *Contra*, Almaguer v. Chicago, Rock Island & Pac. R.R., 55 F.R.D. 147 (D. Neb. 1972).

17. An insurance company is not called into action until one of its policyholders has suffered an injury and submitted a claim. If the courts held that all reports prepared in response to such claims were prepared in anticipation of litigation, the liberal intent of the rules of discovery would be frustrated, as almost all internal documents of insurance companies relating to claimants would be discoverable only upon showing of substantial need and undue hardship. Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972). *See* Peterson v. United States, 52 F.R.D. 317, 320-21 (S.D. Ill. 1971).

18. 468 F.2d at 473, *quoting* Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367, 372 (N.D. Ill. 1972). The court's decision means that a lawyer must decide that a suit is a foreseeable contingency for the work product doctrine to operate. This holding would seem to articulate the practice of insurance companies which allow middle management (including attorneys), and not claims investigators, to review accident reports and decide whether to contest the claim. This holding, furthermore, seems to be in line with prior case law. Southern Ry. v. Campbell, 309 F.2d 569 (5th Cir. 1962); Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367 (N.D. Ill. 1972); Burns v. New York Cent. R.R., 33 F.R.D. 309 (N.D. Ohio 1963); Morrone v. Southern Pac. Co., 7 F.R.D. 214 (S.D. Cal. 1947). *Contra*, Almaguer v. Chicago, Rock Island & Pac. R.R., 55 F.R.D. 147 (D. Neb. 1972).

19. Many courts have recognized that the inability of a party to secure a witness statement until a significant time after an accident constitutes good cause under old Rule 34. Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968); Goosman v. A. Duie Pyle, Inc., 320 F.2d 45 (4th Cir. 1963); Southern Ry. v. Campbell, 309 F.2d 569 (5th Cir. 1962); Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921 (4th Cir. 1962); New York Cent. R.R. v. Carr, 251 F.2d 433 (4th Cir. 1957); De Bruce v. Pennsylvania R.R., 6 F.R.D. 403 (E.D. Pa. 1947). For a similar decision holding contemporaneous witness statements discoverable as work product under

plaintiff[20] to obtain such statements. Granting for the sake of argument the assumption that the statements were work product, the court held that the plaintiff had demonstrated the requisite substantial need and inability, without undue hardship, to obtain the substantial equivalent[21] of the statements. Accordingly, the court held that plaintiff was entitled to pretrial discovery.

The holding in *McDougall* concurs with the result reached by many courts that have decided a similar issue on the basis of the good cause test.[22] The *McDougall* decision, however, rests on Rule 26 (b)(3), and thus represents a judicial delineation of what constitutes substantial need and undue hardship.[23] This case is not an abrogation of the work product doctrine, but rather is a logical extension of the case law and trends[24] that resulted in the 1970 revision to the Federal Rules of Civil Procedure. *McDougall* establishes that witness statements taken shortly after an accident are discoverable if the party seeking discovery had no opportunity to secure statements until a significant time after the accident. By granting the assumption that the statements involved are work product,[25] the case

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amended Rule 26 see United States v. Murphy Cook & Co., 52 F.R.D. 363 (E.D. Pa. 1971).

20. *See* note 15 *supra*.

21. 468 F.2d at 473. The defendant's defense was contributory negligence. The statements sought were the only direct evidence on this issue since plaintiff, as a result of a brain injury sustained in the accident, had amnesia and was unable to reconstruct events surrounding the accident. *Id.* at 470-71.

22. *See* note 19 *supra*.

23. Other courts have recognized that the following conditions can constitute substantial need and undue hardship under Rule 26(b)(3): Arney v. George A. Hormal & Co., 53 F.R.D. 179 (D. Minn. 1971) (if information is not discoverable via other discovery methods); Fidelity & Deposit Co. v. S. Stefan Strauss, Inc., 52 F.R.D. 536 (E.D. Pa. 1971) (an adverse witness or a witness's testimony differing from his statement); United States v. Murphy Cook & Co., 52 F.R.D. 363 (E.D. Pa. 1971) (discovery of contemporaneous witness statements allowed, due to lapse of time and fading of witnesses' memories).

24. *Hickman* states that "[P]roduction might be justified where the witnesses are no longer available. . . ." Hickman v. Taylor, 329 U.S. 495, 511 (1947). This is essentially the situation in *McDougall*, since plaintiff had amnesia and was unable to reconstruct events surrounding the accident. Case law prior to 1970 generally required only a showing of relevance for non-trial preparation materials, *e.g.*, Connecticut Mut. Life Ins. Co. v. Shields, 17 F.R.D. 273 (S.D.N.Y. 1955). But, even as to the trial preparatory work of non-lawyers, courts generally required a much greater showing of need before allowing discovery of work product materials, *e.g.*, Hauger v. Chicago, Rock Island & Pac. R.R., 216 F.2d 501 (7th Cir. 1954). *See generally* Advisory Committee's Note, Fed. Rules Civ. Proc. rule 26, 28 U.S.C.A. (1972).

25. Cases cited in *McDougall* in support of this proposition (witness statements are discoverable if party seeking discovery had no chance to secure statements until a significant time after the accident) involve witness statements which are not work product. Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968) (statements were taken by a claims agent); Goosman v. A. Duie Pyle, Inc., 320 F.2d 45 (4th Cir. 1963) (statements required by law); Southern Ry.

stretches the aforementioned proposition to cover statements protected by the work product privilege.

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v. Campbell, 309 F.2d 569 (5th Cir. 1962) (claims agent); Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921 (4th Cir. 1962) (claims agent); New York Cent. R.R. v. Carr, 251 F.2d 433 (4th Cir. 1957) (claims agent); De Bruce v. Pennsylvania R.R., 6 F.R.D. 403 (E.D. Pa. 1947) (claims agent).