Work Product of the Rulesmakers

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Early in 1947, the United States Supreme Court in Hickman v. Taylor bypassed a proposed amendment to the Federal Rules of Civil Procedure, in favor of a decisional resolution of the apparent conflict between free-sweeping discovery and protection of the "work product" of adversary counsel. It coyly suggested that "until some rule or statute definitely prescribes otherwise," discovery could not be allowed as a matter of unqualified right.¹ In 1955, a second proposal was advanced to incorporate the work product doctrine in the text of the Rules, albeit in backhand fashion. It too was rejected.² The Advisory Committee on Civil Rules has now started the third swing by including a work product provision in the discovery rules, observing that there now seems to be sufficient decisional experience to warrant adoption of a formal rule.³

Under the current proposal, the present requirement that documents of any sort are subject to production only after a judicial finding of good cause is to be removed from Rule 34. In its place will be a general rule of discoverability without a

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² The 1955 proposal, as submitted to the Court, would have amended Rule 34 by retaining the requirement that good cause be shown to obtain production of documents by court order, but adding a further provision for production without court order of documents "subject to discovery without a showing of necessity or justification." This limitation was apparently intended to continue the work product doctrine. See Tolman, supra note 1, at 509-13. Professor Moore dissented vigorously from the proposed amendments, 4 Moore, Federal Practice ¶ 26.23[8-5]. Other contemporary comment also scored the proposal as sadly wanting. E.g., Groce, Amendments to the Federal Rules of Civil Procedure, 23 Ins. Couns. J. 7, 12 (1958).

showing of cause or need for a court order, supplemented by the following provision:

... a party may obtain discovery of documents and tangible things 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 good cause therefor, except that a statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without such a showing. A statement of a party is (A) a written statement signed or otherwise adopted or approved by the party, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement which was made by the party and contemporaneously recorded. 4

Adoption of the proposed Rule may have a healthy effect in the continuing restriction of the work product doctrine. Current decisions in closely related areas of discovery have come a long way toward limiting the doctrine to one or perhaps two concepts of strategic and impeachment surprise; discerning application of the proposed Rule, along with other proposed amendments, should speed this process to its ultimate conclusion. At the same time, the proposed Rule would clearly freeze into the text of the Rules a broad scope of protection for witness statements.

In undertaking an evaluation of these effects of the proposed codification of the work product doctrine, it will be necessary first to examine the explanations which have been offered for it, both at its inception and subsequently. Next these explanations will be set against the body of emerging discovery practices which are for the most part embodied in other proposed amendments to the discovery rules and which—unless abandoned—empty these explanations of any significant meaning. Finally, this background will serve as the basis for an examination of

4. Preliminary Draft, Rule 26(b)(3). This rule is expressly made subject to the provisions of Rule 26(b)(4), which provides for discovery of the “facts known or opinions held by” expert witnesses to be called at trial as a matter of course, and for similar discovery of other experts retained in anticipation of litigation only in cases of undue hardship or other exceptional circumstances. It is now generally recognized that the scope of discovery of information prepared by experts in anticipation of trial should be limited, if at all, on the basis of considerations quite different from those underlying the work product doctrine. See United States v. Meyer, 398 F.2d 66 (9th Cir. 1968), containing an exhaustive discussion of the relevant authorities and proposed Rule 26(b)(4). See also Frank, Pretrial Conferences and Discovery—Disclosure or Surprise?, 514 Ins. L.J. 661, 669-71 (1965). Accordingly, no separate treatment will be devoted here to discovery of expert investigation and testimony.
the reasons for abandoning the protection presently accorded witness statements. It will be suggested in conclusion that the proposed Rule be rejected, although it may be suitable to include a general reference to "work product" in the Rule which provides protection against undue discovery.

I. WORK PRODUCT OF HICKMAN v. TAYLOR

Proponents of special protection from discovery for materials gathered in preparation for trial could not have found a more suitable vehicle for establishing their position than the Hickman case. Four surviving crew members of a sunken tug were examined at a public hearing before the United States Steamboat Inspectors less than a month after the accident, and their recorded testimony was made available to all interested parties. Shortly thereafter statements were obtained from them by counsel for the tug's owners. During the ensuing Jones Act litigation brought by the administrator of one of the deceased crewmen, the tug owners supplied answers to interrogatories which, according to the Court, "would necessarily have included all pertinent information" obtained by counsel from crew members and other witnesses. The plaintiff, however, also requested production of any written statements taken from members of the crews of the sunken tug, another named tug, and any other vessel relating to the towing operation and sinking; it was further requested that the "exact provisions" of any oral statements be "set forth in detail." Discovery was sought to be justified on the bald claim that it would be useful for plaintiff's attorney "to help prepare himself to examine witnesses and to make sure that he has overlooked nothing."

Mr. Justice Murphy, speaking for the Court, ruled that discovery in such circumstances would contravene "the public policy underlying the orderly prosecution and defense of legal claims." Stressing the lawyer's role as an officer of the court,

6. Id. at 513. Appellate review was based on a judgment finding counsel and clients guilty of contempt for refusing to obey an order to produce written statements and to set out the contents of any oral statements. See 153 F.2d 212 (3d Cir. 1945) (reversing the order of contempt); 4 F.R.D. 479 (E.D. Pa. 1945) (ordering discovery). The order of contempt has ordinarily been accepted as a criminal contempt. See 153 F.2d at 214; 4 Moore, Federal Practice ¶ 26.23[5], at 1354. Judge Brown, however, has urged that it involved civil contempt. Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968), 12 Fed. Rules Serv. 2d 34.411, Case 3 (Brown, Ch. J., dissenting from denial of en banc rehearing).
needing privacy during his preparation of facts, legal theory, and strategy in an adversary proceeding, he explained that,

[w]ere such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.7

No more explicit reasoning or explanation of the reach of the work product doctrine was offered. Despite a certain ambiguity,8 it seems tolerably clear that the Court intended to allow discovery of all "factual" information whether obtained by counsel or otherwise, a concession to the demands of discovery which goes a long way toward depriving the doctrine of any great importance.9 Beyond this point, the opinion consists of a vague amalgam of references to "injustice" and "hardship," along with the following suggestion of the circumstances which might justify discovery of work product materials:

... written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts, or they might be useful for purposes of impeachment or corroboration. And production might be justified where the witnesses are no longer available or can be reached only with difficulty. Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules ... would be stripped of much of their meaning.10

Literal application of the suggestions implicit in this passage would make the work product protection meaningless; it would be difficult indeed to imagine material which might not "give clues as to the existence or location of relevant facts," or be "useful for purposes of impeachment or corroboration."

Notwithstanding this ambiguity, it was apparent that the Court did not contemplate a purely ephemeral protection. Its ruling that material developed for trial by an attorney is not absolutely protected from discovery by an attorney-client

7. 329 U.S. at 511.
8. Free discovery of all factual information is suggested in various passages and phrases, scattered throughout the opinion. Id. at 501, 504, 507, 508, 513. But at one point, the Court suggests that discovery should be available "where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case." Id. at 511 (emphasis added).
9. See Part III(B), infra.
10. 329 U.S. at 511-12.
privilege marked one pole; its obvious intent to restrict the ordinary requirements of discovery set out the other. It is now generally accepted that when the work product doctrine applies, a party seeking discovery must show a need arising from the particular circumstances of the individual case to overcome the general policies against discovery; often this is summarized as a showing of "extra good cause" by way of comparison with the "good cause" requirement of Rule 34.11

Mr. Justice Jackson filed a concurring opinion which included an often quoted justification for work product protection: "Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."12

Broad magisterial pronouncements of this order are well suited to the infinite variety of problems to be encountered in the operation of discovery; any attempt to prescribe a formula for each potential difficulty would be foolhardy. What is needed is a clear statement of the policies underlying the doctrine so that appropriate answers may be given to novel questions posed by actual discovery requests and objections. Unhappily, no adequate statement of these policies has been developed, although many efforts have been made to discover them both from within the corners of the Hickman opinion and from without. The present effort is aimed at re-evaluating the various policies discerned by others, with the goal of suggesting the best methods of applying—and perhaps amending—the current proposal for amendment of the Rules.

Beginning with the Court's opinion, minimal significance could be attributed to the Hickman decision by explaining it in terms of a rough political judgment as to the compromise most likely to achieve a final, general acceptance of the still new discovery machinery, and the full professional cooperation needed to implement it effectively.13 The widely disparate results

12. 329 U.S. at 514, 516 (concurring opinion).
13. Compare Professor Sunderland's comment that liberalization of chancery discovery practices faced obstacles in natural resistance to change, in the lucrative litigation resulting over application of the rules, and in the preservation of enough trial uncertainty that lawyers "might always feel confident of having a fighting chance of success no matter what side of any case" they might be employed to champion. Sunder-
of the many decisions reported prior to 1947,\textsuperscript{14} and the almost desperate struggle of the Advisory Committee to formulate a workable resolution,\textsuperscript{15} attest to a great general concern about discovery of trial preparation materials.\textsuperscript{16} A faint echo of such considerations may be found in the Court's penultimate statement that "we refuse to interpret the rules at this time" so as to achieve the absolute right of discovery claimed by the plaintiff. Nonetheless, it is obvious that more fundamental notions played a far more important role in the Court's analysis.

The simplest affirmative justification for work product protection which might be found within the terms suggested by the Court is that it is somehow unfair for one party to reap the harvest of preparatory seeds sown by his opponent. Such a notion might be based upon an aversion to allowing the lazy and slothful to profit from the diligence of others,\textsuperscript{17} or in a vested-rights idea that "a lawyer is entitled to the fruits of his labor."\textsuperscript{18} Such notions do nothing to advance the inquiry. Clearly no one would argue today that a court should be forced to determine a lawsuit on the basis of inadequate information in order to preserve for one party the advantages gained by luck, skill, or wealth. Discovery itself rests on an impatient rejection of any assertion of a proprietary privilege to prevail because of unilateral ignorance; if there is some "unfairness" in unbridled discovery, it must be sought in terms of interference with the just disposition of litigation.\textsuperscript{19}

\textsuperscript{14} The cases are collected in the notes of the Advisory Committee accompanying the 1946 proposal to amend Rule 30(b). \textit{See} 5 F.R.D. 433, 457-60 (1946); 4 Moore, \textit{Federal Practice} \S 30.01[4].

\textsuperscript{15} The difficulties encountered by the Advisory Committee are reflected in the nature of its original draft proposals, in open requests for assistance, and in the wide spectrum of views held by various members of the Committee. \textit{See} 4 Moore, \textit{Federal Practice} \S 26.23[6]; Pepper, \textit{Discovery Procedure Symposium}, 5 F.R.D. 403, 408-07, 430 (1946). William D. Mitchell, chairman of the committee, attempted to justify submission of the proposal transmitted to the Court without first offering it for preliminary consideration by the bar at large on the ground that the members of the Court "are competent to take care of themselves." 71 A.B.A. Rep. 80, 85 (1946).


\textsuperscript{17} \textit{See}, e.g., McCarthy v. Palmer, 29 F. Supp. 585, 586 (E.D.N.Y.), aff'd, 113 F.2d 751 (2d Cir. 1940), cert. denied, 311 U.S. 680 (1940).


\textsuperscript{19} It is accepted, indeed, that within vaguely defined limits one party may impose a burden on the other to uncover information not
In searching for interference with the litigation process, the Court's stern reference to "inefficiency, unfairness and sharp practices," and its clarion cry against demoralizing the legal profession, make heady reading. Unfortunately, they add nothing but an obscuring color of rhetoric to the implicit proposition that the adversary system of litigation cannot function in an atmosphere of complete candor; if no one mourns the sporting theory of justice, still there must be an area of gamesmanship in which fear of the unknown enforces an honesty which mere ethics could not achieve. The fact that litigation has remained adversarial in form and an operational reality must be thought to be responsible for generating pressure toward winning representation, which could lead to dishonest tactics if there were no limits on discovery.

Lacking any basis in controllable or even measurable experience to test such a fear about the effects of discovery, it would be difficult to quarrel with it except by advancing an intuition that no such special protection is really needed. And intuition tugs at least as strongly toward the proposition that discovery can best serve the ultimate truth-finding purposes of the adversary system if its equalizing function is subject to some such limitations. As long as the attorney is charged with the duty of presenting the most favorable case possible for his client, there will be the temptations and impetus of advocacy to strain his ultimate obligation to justice as well as to victory. Perfect knowledge of every item of proof and argument, of the complete trial "strategy" of opposing counsel, would often result—unconsciously, in most cases—in a development of position and response calculated to impede rather than advance the search for whatever truth ex post inquiry can attain.

This fundamental basis for protection will be examined further in Part III below, under the headings "hard-core work product" and "impeachment material," with the purpose of detailing its implications for the appropriate scope of protection.

immediately available at the time discovery is sought. E.g., 4 Moore, FEDERAL PRACTICE §§ 33.20, 36.04[5].

20. Similarly undifferentiated notions are apparently accepted by the Advisory Committee. The PRELIMINARY DRAFT, at 24, states that the proposal "... reflects the view ... that one side should not automatically have the benefit of the detailed preparatory work of the other side." Compare Rosenberg, Changes Ahead in Federal Pretrial Discovery, 45 F.R.D. 481, 492 (1968): "The concern is that the lawyer's morale be protected as he performs his professional functions... ."

Many other explanations of the work product doctrine have been offered, however, and should be examined first in order that their implications may be compared with those of the explanation just noted and with the current operations of federal discovery.

II. WORK PRODUCT OF THE COMMENTATORS

A. "Sharp Practices"

Although a great deal has been written about the work product doctrine over the last 20 years, only a few commentators have discussed the Court's vague allusion to the "sharp practices" which might result from unlimited discovery. It has been suggested that lawyers would simply lie about information uncovered by their own investigations, insert false statements or misleading memoranda in their files, or that their ingenuity might in some other way "prove equal to the situation." The paucity of comment in this area reflects the lack of importance of the anticipated danger of evasion, which of itself furnishes no more reason for limiting discovery of trial preparation materials than any other kind of information. If there is greater reason to fear cheating in the work product area than any other area of discovery, it must be because attorneys believe that the intrusion of discovery into its sacred groves is more unwarranted. If discovery is in fact unwarranted, protection should be given. But to whatever extent discovery is otherwise found to be proper, it should be made available with suitable sanctions for evasion.

B. Oral Statements

Other nonjudicial comment has been directed at considerations passed over in the preceding discussion of the Hickman opinion itself. Both the Court, and Justice Jackson in his concurring opinion, dealt at some length with the undesirable consequences which could result from discovery of unwritten information which had remained in an attorney's memory. It was feared that since inconsistencies would inevitably appear between an attorney's recollection of an oral statement given


by a witness, and the witness’ subsequent testimony at trial, the attorney’s version would be offered to impeach the witness, with the added insinuation that if the witness were not lying, then the attorney must be. Even apart from the dangers of attaching undue significance to possibly meaningless inconsistencies, it was quite properly thought improvident to force an attorney to switch from his role as advocate to the role of witness. This fancied danger does not require extended discussion, however, for the remedy is as obvious as the danger itself—discovery could be allowed, subject to an absolute bar against using the material discovered at trial for any purpose.

Prohibiting trial use of oral statements obtained by discovery does not fully answer the further objection that forcing the attorney to reveal detrimental information is apt to undermine his client’s confidence in him. The only apparent distinction in this respect between discovery of unprivileged oral statements and of other factual information uncovered by the attorney, however, is that the client is more apt to feel betrayed because it is safer to lie with respect to oral statements. This marginal distinction can hardly be reason enough to prevent discovery.

C. DETERRENCE OF WRITTEN PREPARATION

An immediate response to the rule against trial use of oral statements discovered from an attorney is that it would reinforce another risk of discovery, so that “much of what is now written would remain unwritten.” Although little has been written about this risk, Professor James has observed that the fear of discovery should not significantly deter preparation of statements by investigating agents since “a party needs written statements signed by the witnesses to tie them down to their early, presumably unrehearsed, versions of the occurrence,” and since even the simple act of omitting unfavorable parts of the statement will destroy any effectiveness the writing might have for impeachment purposes. While Professor James was referring to statements obtained by investigating agents rather than counsel, the importance of securing complete witness statements is the same whether attorney or agent is involved.

24. The importance of work product protection in maintaining client confidence is stressed in Gardner, supra note 22, at 272-73.
27. Expert trial lawyers regularly emphasize the great importance
Thus, this observation may be counted as an expression of doubt that discovery would significantly deter preparation of written statements.\textsuperscript{28}

A more elaborate argument may also be urged for the proposition that discovery would not deter written preparation, although it may be too elaborate to accord with the probable reasoning of an attorney actually engaged in the course of day-to-day trial preparation and discovery. Whether or not present rules are appropriate, it is well established that written witness statements are discoverable upon a showing of sufficient cause.\textsuperscript{29} If the circumstances are such that discovery would be allowed of a written statement—as for example if a deponent cannot remember significant details of the events in question—there is no apparent reason why discovery should not also be allowed of an oral statement, particularly if neither the results of discovery nor the attorney’s own testimony could be used at trial. Confronted with such rules, an attorney would rarely find it beneficial to avoid reducing a statement to writing. Any gain which could result from this practice would have to rest on the dual anticipation that, first, the witness’ testimony would change in the future so as to become more favorable to the attorney’s cause because unfavorable aspects had been altered or forgotten, and that, second, the attorney himself would have honestly forgotten the previous less favorable version by the time for discovery. This gain would have to be weighed against the at least equally high probability that the story of the witness, shaped as far as possible by the private suggestive questioning of the attorney preparing to take the statement initially, would change unfavorably under the influence of questioning by his adversary. Thus the gains from committing the witness to a written version should prevail so clearly over the unlikely possibility of reaping benefits from allowing the statement to remain in oral form that written statements will be prepared as a matter of course regardless of the rules on discovery. If discovery of witness statements should be denied, it must be on grounds other than the fear of deterring their preparation.

\textsuperscript{28} See Southern Ry. v. Lanham, 403 F.2d 119, 129 (5th Cir. 1968).
\textsuperscript{29} See Part III(C), infra.

of securing written witness statements as promptly as possible. E.g., 2 F. BUSCH, LAW AND TACTICS IN JURY TRIALS § 201 (1959); E. CULLI-
NAN & H. CLARK, PREPARATION FOR TRIAL OF CIVIL ACTIONS 21 (3d ed.
1956). Likewise, it is advised that an attorney warn his client not to
give written or even oral statements regarding the events involved in
the suit. 1 A. AVERBACH, HANDLING ACCIDENT CASES 78 (1958).
So far as all other writings prepared in anticipation of litigation are concerned, the possibility of deterring written preparation seems even more ephemeral. Most written trial preparation materials other than witness statements should fall within the "hard-core" area of work product protection discussed below and are thus protected in any event. Conversely, writings which themselves constitute evidence should be freely discoverable. Summaries of purely factual data might seem to pose some difficulty since facts themselves are not within the scope of work product protection. Probably the best procedure would be to deny discovery of factual summaries as such, since all factual information possessed by a party is subject to discovery by other methods which avoid any need for separating fact from protectible tactic in writings which intermingle both. The fear of deterring written preparation adds little to the balance in deciding these issues, and probably should not be considered as a separate factor in approaching other specific problems, notwithstanding its inclusion in the Hickman opinion.

D. Deterrence of Adequate Investigation

Beyond the comments suggested more or less directly by the Court's opinion, efforts have been undertaken to explain the work product doctrine in terms which run parallel to the opinion without really drawing from it.30 This analysis seeks to draw a somewhat different line of tension between the functioning of the adversary system and the intrusion of discovery than that suggested above. The danger most to be feared from complete discovery, in this view, is twofold: first, each party would be tempted to forego investigative efforts in hopes that the other party would develop a case to be seized ready-made through discovery;31 second, a party who did investigate would be fearful of developing potentially adverse information only to have to hand it to his opponent.32 Operation of such influences could indeed destroy the efficacy of the adversary system which discovery was designed to improve. The trial itself cannot function

31. This argument has been approved, with some modifications, in Gardner, supra note 22, at 268-82. See also Taine, Discovery of Trial Preparations in Federal Courts, 50 Colum. L. Rev. 1026, 1047 (1950).
32. C. McCormick, Evidence §§ 100 at 202-03 (1954); Frost, The Ascertainment of Truth by Discovery, 28 F.R.D. 89, 95 (1960): "If the physical evidence at the scene is damaging—don't take the picture. If the witness is obviously hostile—don't take his statement."
well if neither party undertakes adequate pretrial investigation. Even if each party intentionally omits only those lines of investigation which he fears will prove helpful to the other side, much information will remain hidden. Acceptance of this analysis would justify a wide area of work product protection designed to prevent discovery from destroying the incentive of interest which underlies the workings of the adversary system.33

There is good reason to doubt whether in fact many lawyers would dare to curtail trial preparation activities for the reasons thus suggested even if work product protection were given the far-reaching scope implicit in this explanation.34 Professor James has answered this explanation with the three-barreled response that: "no party can afford to forego the kind of preparation he believes is needed"; each party "must know the facts as they are likely to appear at trial," and be able to evaluate the case realistically for settlement purposes; and no party "will be willing to let his adversary get to the witnesses first if this can be helped."35 Although these comments were made with regard to investigating agents, they apply with even greater force to the attorney, since although the attorney is apt to be more familiar with the dangers of discovery, he should also have a far greater appreciation of the importance and methods of thorough preparation. The pressures of adversary litigation should ensure thorough preparation despite the existence of fact discovery; it has, indeed, been argued that better trial preparation will result from open discovery because an attorney would no longer be able to rely on his opponent's

33. The Advisory Committee's note to the proposed work product provision of Rule 26(b)(3) notes that it reflects "the view . . . that each side should be encouraged to prepare independently." PRELIMINARY DRAFT 24. Legislative acceptance of this proposition is reflected in California's Code of Civil Procedure, § 2016(g), declaring State policy to be:

   to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases.

34. In American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277, 282 (2d Cir. 1967), Judge Feinberg noted the possibility that disclosure of work product may encourage lazy preparation, but found that possibility "most improbable in this hotly contested litigation." One early study of the operation of discovery found only "hints" of such results. Speck, The Use of Discovery in United States District Courts, 60 YALE L.J. 1132, 1154-55 (1951); see W. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 197 (1968).

35. F. JAMES, CIVIL PROCEDURE 206 (1965).
ignorance of the gaps in his own preparation.\textsuperscript{36} Certainly there is no risk of discouraging effective preparation in the vast majority of cases.

On the other hand, the wide divergence in the qualities and abilities of members of the bar cautions against over-ready acceptance of a rebuttal based on the work habits of the best. It is readily conceivable that some of the more ineffective members of the profession would be subject to the fears and temptations urged above, or even the simple desire to minimize expense and effort, and would be little loath to rely on their adversaries to prepare their cases for them no matter how dangerous that course really is. And it is in precisely this area that there is most to fear, since the day is not yet visible when the outcome of lawsuits will be unaffected by the comparative forensic abilities of adversary counsel. Likewise, it is possible that in some cases, particularly private litigation in such areas as antitrust and securities law, defense counsel will yield to a temptation to postpone complete preparation until it is known how well the plaintiff is able to prepare through intelligent discovery or otherwise.

To whatever extent the rationale that discovery deters effective preparation for trial is accepted, finally, it entails the conclusion that protection should be extended to trial preparation by a litigant or agents of either the litigant or his lawyer. With regard to work not done at the direction of counsel, to be sure, it could be argued that protection is unnecessary since any danger of deterrence disappears in the face of a layman's ignorance of the scope of pretrial discovery. However much this argument might consort with the tendency to equate work product protection with the role of the attorney as advocate, the resulting discrimination would only compound the disadvantages encountered by those seeking to help themselves through the litigative encounter. If this explanation of work product protection is accepted, the proposed extension of protection to materials gathered by a party or by agents\textsuperscript{37} is fully justified; but as will be noted below, rejection of this theory still leaves the way open for extending a different scope of protection on other


\textsuperscript{37} The protection is to extend to discovery of documents and tangible things 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) . . . ." \textit{Preliminary Draft Rule} 26(b)(3).
theories.38

Whatever attraction may be felt toward this theory of work product protection, it must vanish before the overriding consideration that the price of protecting lawyers against the folly of reliance on the other side, or suspending investigation of apparently unfavorable information, is a rule which denies discovery of factual information obtained in preparation for litigation.39 The Court did not seem willing to countenance such a severe limitation on discovery in Hickman, and as noted below, the lower courts have certainly not been implementing such a limitation. Free fact discovery has been allowed because the extent of the losses resulting from unlimited discovery must inevitably remain a matter of conjecture, while the discovery system itself represents a considered judgment, based on long experience, that closing off such inquiry results in unilateral ignorance—often mutual unilateral ignorance of different areas of fact—and inadequate trial preparation.

The explanations of the need for work product protection just canvassed have tended to isolate it from the rich tapestry of evolving discovery practice, although this uncertain doctrine is closely related to many surrounding questions which are being resolved in favor of discovery. The lessons suggested by judicial reaction to these problems are by far the most useful source of instruction as to what the work product doctrine has become, and what it should be. By way of summary anticipation of the ensuing discussion, the main lesson seems to be that the doctrine is much less mysterious, and less significant, than might be guessed by examining the tortured struggles it has caused.

38. It is not entirely clear whether this theory is responsible for inclusion of this provision in the proposed Rule. The comments of the Advisory Committee seem to indicate that it accepts the theory of work product protection that "each side should be encouraged to prepare independently," Preliminary Draft 24. The further comment that the strength of the showing needed to overcome the proposed protection may vary with the extent of the attorney's involvement in developing the materials, id. 24, 26, may only be intended to suggest that an ad hoc judgment be made whether discovery is likely to deter the particular pattern of trial preparation involved.

39. This consequence is cheerfully accepted in the Developments note discussed above. The clearest statement is that "discovery of specific factual material collected by the lawyer's industry should in most cases be denied . . ." Note, supra note 30, at 1040. But see id. at 1034–35, where a more ambiguous position is suggested.
III. WORK PRODUCT OF THE JUDGES

A. Hard-Core Work Product

Some of the areas in which the work product doctrine forecloses discovery are easily comprehended under other principles as well. One obvious example is the need for protection against forced revelation of a party’s evaluation of his case; as long as voluntary settlement is encouraged, it would be an intolerable intrusion on the bargaining process to allow one party to take advantage of the other’s assessment of his prospects for victory and an acceptable settlement figure. Discovery, moreover, would soon become self-defeating as lawyers would quickly become accustomed to formulation of only the most glowing prospects for success. Such distortion would in turn inhibit actual settlement, as even the habitual fictionalization of unduly optimistic forecasts would erect barriers to agreement in the form of expectations heightened by those forecasts, notwithstanding the conscious purpose of creating a bargaining facade.

Much more difficulty is encountered in attempting to deal with discovery of what may loosely be termed matters of trial strategy. On first reaction, it might be tempting to dismiss such discovery as a request for information which is simply irrelevant to preparing the discoverer’s case for trial. For example, the identity of witnesses the opposing party intends to call at trial might seem irrelevant since he can be compelled to name all persons known to him to have knowledge of the matters involved in the suit. Similarly, discovery of legal theories might seem irrelevant in view of the discoverability of the factual information on which such theories are built.

Little reflection is needed to show the failure of this easy attempt to resolve the problem. Discovery, as the Court noted in its Hickman opinion, has been developed as an important supplement to “notice” pleadings, not only in the function of fact disclosure but in the function of issue formulation as well. Improved knowledge of the facts generated by discovery improves the basis for predicting the range of potential issues.

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41. See 4 MOORE, FEDERAL PRACTICE ¶ 34.08, at 2482: “Quite clearly all such materials are relevant.”
42. 329 U.S. at 501.
but it does little to reveal which issues will actually be in controversy, and the insurance it provides against emergence of “surprise” issues would operate perfectly only if all lawyers had perfect legal knowledge or infallible means of attaining that nonexistent paradigm.

(1) Discovery of Legal Theories and Contentions

Rules against discovering the opposing party's legal theories, moreover, take their toll in the arena of factual knowledge as well as the arena of issue formulation. At the present time courts will not allow a request, in a single interrogatory, for all of the information available to the other side which bears on the case.\(^4\) Instead, the very most that is allowed is a request for all the facts bearing on individually specified issues. Such discovery is of course limited by the ability of inquiring counsel to conjure up the issues—if he fails to consider an issue while thinking about the case in the abstract, he may never acquire the factual information which would suggest it.

Perhaps in response to such considerations the very steady trend of current opinion departs from earlier reluctance to allow discovery of the theories and contentions of counsel and allows it quite specifically.

The most basic justification ordinarily advanced is that issue formulation is one of the two fundamental purposes of discovery.\(^4\) This justification is in turn expanded by noting that discovery is a better means of uncovering an opponent's position than is a motion for a more definite statement of his pleadings,\(^4\) or by observing that the ambiguous generality of many pleadings, while acceptable under current practice, creates a great need for further specification if meaningful trial preparation is to be possible.\(^4\)

Several courts have allowed discovery of opinions, contentions or theories on the more general ground that it serves a

\(^4\) An attempt to achieve such discovery was roundly denounced in Uinta Oil Ref. Co. v. Continental Oil Co., 225 F. Supp. 495, 500-01, 504 (D. Utah 1964).
substantial purpose in enabling the inquiring party to prepare for trial. Some of the purposes which might be served are suggested by the following statement of one court:

... there is a noticeable trend toward permitting such interrogatories if the court is convinced that by requiring responses thereto the lawsuits could be expedited, the information obtained could lead to relevant evidence, the issues could be narrowed, unnecessary testimony and wasteful preparation could be avoided, or any other substantial purpose sanctioned by the discovery provisions ... could be served.

These positive purposes are further reinforced by the observation that in any event it is often difficult and unrewarding to attempt to distinguish between fact and opinion.

The vehicle for discovering specific contentions has occasionally been deposition of a party. One extreme decision required the president of a corporate plaintiff to answer complicated antitrust questions as to the plaintiff's contentions regarding the fairness of prices charged; the existence of competition between various firms, and the factors relied upon to determine whether such competition existed; and the reasonableness of certain competitive practices. Ordinarily, however, it is recognized that a party is usually not able to define his legal position—that "that is what lawyers are for," so that such information should be sought by interrogatory rather than on oral deposition.

Recognition that the attorney is responsible for contentions


and theories, and that interrogatories—and requests for admissions—are the proper mode of discovery in this area, returns the question squarely to the work product arena. Surprisingly few opinions attempt to reconcile discovery of this nature with the work product doctrine, possibly because it is so clear that the doctrine is indeed inapplicable. The most common example of discovery of contentions involves a request for a statement of the specific acts of negligence which will be relied upon to support a conclusional allegation of negligence. In upholding such a request, one court has rejected a work product objection on the grounds that “it is everyday experience” that the operation of a lawyer’s mind is needed to frame pleadings—including the allegation of negligence—and answers to interrogatories, and that allowing a work product objection to prevail “would be to adopt an unrealistic view of litigation and to ignore the role of the lawyer in carrying it forward.”

This conclusion that the work product doctrine is inapposite to discovery of contentions mingling fact and law applies with equal force to discovery of legal theories as such. A request for a statement of the legal theories upon which a plaintiff intends to rely involves an even smaller intrusion into areas deserving work product protection than, for instance, a request for a statement of all of the ways in which the plaintiff claims the defendant was negligent. Identification of legal theories, after all, was a thoroughly accepted part of traditional practice, and there has never been room for an argument that one party ought to be able to preserve “surprise” legal issues for trial. Notwithstanding this fact, virtually all cases allowing discovery of contentions involve a quest for the factual contentions sup-

53. Unfortunately, a substantial number of decisions have ruled that requests for admissions under Rule 36 may not be addressed to facts in dispute between the parties, particularly in the context of such ultimate facts as negligence. E.g., Kasar v. Miller Printing Mach. Co., 36 F.R.D. 200, 203 (W.D. Pa. 1964); Wedding v. Tallant Transfer Co., 37 F.R.D. 8, 11 (N.D. Ohio 1963); Lehmann v. Harner, 31 F.R.D. 303 (D. Md. 1962). A better view is shown in Tillman v. Fickencher, 27 F.R.D. 512, 513 (E.D. Pa. 1960). The proposed amendments to Rule 36 make it clear that such requests are proper. A similar uncertainty as to the suitability of Rule 36 as a device for ferreting out opinions or contentions is discussed in 4 Moore, FEDERAL PRACTICE ¶ 36.04[4].


porting identified legal theories. And even recent cases have rejected such attempts to develop discovery into a compulsory system of pretrial memoranda as a request that a defendant state the grounds underlying a defense that the complaint fails to state a claim upon which relief can be granted.

Further examination of the discovery of purely legal positions may best be set against the background of concern expressed by eminent scholars that even cases allowing discovery of mixed factual-legal contentions have gone too far. Professor James has argued that such discovery represents a relapse into the fatally seductive toils of special pleading in which the benefits of clearer definition of the contested issues are achieved only at the prohibitive expense of freezing the issues to those thus defined, and ultimately defeating justice.

Two answers readily present themselves to this concern. The first is obvious—the danger of issue stagnation is created only if courts insist on adherence to the issues formulated in discovery, and can be avoided by denying any binding effect to the issues thus developed except in cases of obvious bad faith. This is what the courts now appear to be doing.

Cases dealing with discrepancies between a party’s clearly factual answers to interrogatories or depositions and his later trial testimony have established that the party is not bound by prior answers; instead, “the finder of fact must weigh all of the answers and resolve the conflict.” This result obtains even when there is no apparent justification for the change of po-

56. But compare Bynum v. United States, 36 F.R.D. 14 (E.D. La. 1964) (requiring plaintiff to respond to an interrogatory by stating whether reliance would be placed exclusively on a theory of res ipsa loquitur, or whether specific acts of negligence would also be alleged) with Cleminshaw v. Beech Aircraft Co., 21 F.R.D. 300, 302 (D. Del. 1957) (inquiry whether plaintiff will rely on res ipsa loquitur would invade work product of counsel).


58. F. James, Civil Procedure 215-17 (1965); James, supra note 43, at 1473. Favorable comment on this view may be found in 2A Barron & Holzoff, Federal Practice § 768. Professor James adds the argument that it is inappropriate to require a party to answer under oath interrogatories as to contentions which will be developed by counsel. 71 Harv. L. Rev. 1478; see United States v. Selby, 25 F.R.D. 12, 14 (N.D. Ohio 1960). A fair response is made in Microtron Corp. v. Minnesota Min. & Mfg. Co., 269 F. Supp. 22, 25 (D.N.J. 1967), that “we all know that today, [no client] would undertake to supply answers to technical interrogatories without the assistance of counsel.”

sition because of the acquisition of additional information. And if it can be shown that the original answer was given in good faith reliance on information later discovered to be incorrect, permission may even be given to amend the answer.

Fewer cases deal with the possible preclusive effect of answers to interrogatories eliciting opinions, contentions, or legal theories. One court has concluded that although such interrogatories and their answers do serve as adjuncts to the pleadings, "it is not their function to limit a party's proof in the way that pleadings do," because additional information may be acquired after the answers are given and "the discovery rules are not to be employed as a stratagem to maneuver an adverse party into an unfavorable position." Other courts have ruled that answers based on a plaintiff's present knowledge cannot be used to force him to an election between inconsistent theories of recovery, although one judge has indicated that he would expect the plaintiff answering a request for his construction of the patent in suit to amend his answer "were a change in his understanding or his contentions to warrant it, . . . in accordance with his continuing obligation to keep the answers to all interrogatories as up to date as possible."

These decisional developments are reflected in the proposed amendments to the discovery rules. Rule 33(b) is to provide that interrogatories are not objectionable merely because answers

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60. E.g., Merchants Motor Freight v. Downing, 227 F.2d 247, 251 (8th Cir. 1955); Anderson v. Phoenix Prods. Co., 137 F. Supp. 732, 737 (E.D. Wis. 1955), aff'd on other grounds, 226 F.2d 191 (7th Cir. 1955) (witness persuaded court that discrepancies were due to confusion and inadequate study of available records).
61. E.g., Ray v. J.C. Penney Co., 274 F.2d 519, 521 (10th Cir. 1959).
62. General discussion may be found in 2A BARRON & HOLTZOFF, FEDERAL PRACTICE § 778; 4 MOORE, FEDERAL PRACTICE ¶ 33.29[2].
would involve "an opinion, contention, or legal conclusion," although there is express provision for judicial control over the time of answering. The notes state that answers to such interrogatories will not limit trial issues undesirably, since "the interrogating party will ordinarily not be entitled to rely on the unchanging character of the answers he receives and cannot base prejudice on such reliance."

The proposed amendments to Rule 36 treat this problem in what may at first seem a curiously inconsistent manner. Rule 36(a) is to allow requests for admission "of the truth of any matters within the scope of Rule 26(b)," which refers in general terms to discovery of "any matter, not privileged, which is relevant to the subject matter involved . . . ." The note to Rule 36 makes it clear that this embraces matters of opinion and legal conclusion, and stresses the purpose of "enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference," by giving an admission "a conclusively binding effect. . . . comparable to an admission in pleadings or a stipulation . . . ." A binding effect of some sort eases the burden of preparation, but this seems at odds with the recognition that answers to interrogatories should not be given any such effect because the advantages are obtained at the expense of just adjudication. Apparently it is not actually intended that answers to requests for admission will be given substantially different effect. Proposed Rule 36(b) includes the power to "permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby," and prejudice cannot be shown by the party requesting the admission. The note also states that Rule 36 makes it clear that "admissions function very much as pleadings do." These provisions and comments, taken jointly, appear to provide for a second round of pleading after pretrial preparations have progressed substantially. Standards for amendment are then sim-

66. Preliminary Draft 61, 64-66.
67. Id. at 79, 83. McSparran v. Hanigan, 225 F. Supp. 628 (E.D. Pa. 1963), cited in the notes, explains a determination to enter judgment notwithstanding the verdict on the basis of the plaintiff's answers to requests to admit by relying directly on the analogy between such requests and "the older style pleading in which so-called ultimate facts were alleged under oath . . . and were conclusively taken to be true unless specifically denied." Id. at 637. A highly similar approach was actually taken in United States v. Lemons, 125 F. Supp. 686, 688-90 (W.D. Ark. 1954), cited in the notes as an example of cases treating responses to requests for admissions as the equivalent of sworn testimony.
68. Preliminary Draft 81.
ilar to those in present Rule 15, after allowance for a presumption that there is less excuse for sloppy pleading after the case has passed through the preliminary rounds.

This second round of pleading might prove a marginally useful addition to the arsenal of issue-formulating procedures provided by initial and amended pleadings formally denominated as such, other discovery devices, and pretrial conferences, particularly in very complex cases. In more ordinary litigation, this device might also serve as a substitute for formal pretrial conferences. The fact that an admission is to be made "for purposes of the pending action only" may add an additional margin of utility because there is no danger of unforeseen future effects. It seems more likely, however, that the main justification for the proposed procedure lies in the often hopeless and usually fruitless task of drawing boundary lines around separate provinces of "fact," "opinion," and "legal conclusions." If so, there appears to be no reason to apply stricter standards of deviation (variance?) to answers to requests for admission than to answers to interrogatories, except that the purpose of fostering reliance on the answers in trial preparation justifies a higher degree of rigor in insisting on a request for leave to amend when changes appear desirable. And it certainly would be a long step backward to use in this context the provisions of Rule 37(c), which—in the language of the proposed amendment—require a court to impose on the party failing to admit a requested "matter" payment of "the reasonable expenses . . . including reasonable attorney's fees" incurred in proving it at trial, unless it is found that there was "good reason for the failure to admit or . . . the admission sought was of no substantial importance." The note to this provision should be supplemented by an express statement that only in the rarest circumstances can it be found that there was no good reason for failure to admit matters of opinion or legal conclusion.

Finally, concern has been expressed that an attorney may feel psychologically precluded from adopting theories and contentions not earlier revealed during discovery for fear of appear-

69. See, e.g., Peck v. Clesi, 37 F.R.D. 11, 12 (N.D. Ohio 1963), sustaining objections to requests for admission going to:

the major areas of dispute between the parties. A request for admissions as to disputed facts appears to be nothing more than an attempt by one party, in anticipation of a favorable verdict at trial, to lay a foundation for transferring to the other party a large part of the costs of the lawsuit, pursuant to Rule 37(c) . . . . Such an attempt will not be permitted.
ing irresponsible or dishonest to judges and fellow attorneys,\(^7\) even though no formal rules bar such a course. Although categorical demonstration is impossible, this fear seems chimerical in light of the twin facts that imbalances of advocacy rarely err in the direction of reticence, and that the changes of position forced on conscientious advocacy by changing facts are well recognized on all sides.

The second answer to the fears expressed by Professor James is that refusal to attribute binding effect to issues developed in discovery does not result in denial of any beneficial results. Such discovery is not intended to promote trial "efficiency" by eliminating possible issues at the expense of doing justice on the actual facts.\(^7\) Instead, it is designed to ensure that one side does not come to trial unprepared to meet issues which could have been met if they had been anticipated; efficiency will be promoted only by averting the need to prepare to meet issues so flimsy that they can be eliminated even during discovery stages. These advantages are, to be sure, somewhat speculative. Potentially available issues are not likely to be conceded in discovery, particularly during the early phases of a suit, and the ordinary suit may not involve such factual uncertainties or legal complexities as to raise much danger that real issues will be overlooked.\(^7\) Recognition of the resulting danger that the burdens of discovery may outweigh the possible benefits is undoubtedly responsible for the provisions in the current amendment proposals that theories and contentions may be sought by discovery, but that the court may order postponement of the answers until later stages of discovery, including pretrial proceedings.\(^7\)

\(^{70}\) Gardner, supra note 22, at 275.

\(^{71}\) Compare James, supra note 43, at 1485:

the right of amendment would . . . take away whatever value particulars might have in promoting efficiency or fairness. If on the other hand conditions are to be put on amendment, then the additional protection for the adversary will frequently have to be bought at the cost either of injustice or of inefficiency.

\(^{72}\) The Columbia University Project for Effective Justice, Field Survey of Federal Pretrial Discovery: Report to the Advisory Committee on Rules of Civil Procedure (1965) [hereinafter cited as Columbia Report] reports that discovery does not appear to lead to greater agreement between the parties, and that on the whole it appears to result in a greater addition of new issues than deletion of issues. Id. at X. 14-15. But to the extent that relevant issues are added, there is little reason to suppose that—unless the law making them relevant is unjust—the effect is undesirable.

\(^{73}\) Preliminary Draft Rules 33(b), 36(a). Some courts have already asserted the power to postpone the time for answers. E.g., Diversified Prods. Corp. v. Sports Center Co., 42 F.R.D. 3, 4-5 (D. Md. 1967) (Thomsen, C.J.). Others have simply refused to order responses to
These provisions for postponement of answers lead back to the question whether any benefit would result from allowing discovery of the legal theories which a party intends to assert, as well as the specific factual contentions which will be used to support them. It is not clear whether the proposed amendments are intended to allow discovery to be used for this purpose. Proposed Rule 33 allows discovery of an “opinion, contention, or legal conclusion,” language which could refer either to pure legal assertions or factual conclusions which support identified legal theories. The notes of the Advisory Committee refer to cases involving “factual conclusions” and contentions or other inquiries which “in some measure call for legal conclusions,” and distinguish these proper questions from those relating to “issues of ‘pure law,’ i.e., legal issues unrelated to the facts of the case.”

Legal theories to be asserted would appear to be related to the case, but it may be intended that discovery is to be available only along the lines of present practice, involving a statement of the relationship between identified legal theories and facts to be asserted.

On the other side of the benefit equation lie the costs of requiring discovery. Although it is difficult to object to a requirement which encourages clear development of legal theories, an obvious problem is presented when a party is unable to determine, early in the suit, what legal theories will eventually be relied upon. Such problems are most likely to occur in complex litigation in which most of the evidence is in the hands of the defendant and must be obtained by discovery, but they could also occur in more ordinary litigation. Even in a “simple” accident case, it would be possible to proceed on a theory of negligence, or of some aggravated form of unintentional misconduct, or even of intentional battery. Probably such cases can be best handled by accepting a discovery response that the party does not yet know what theories will be relied upon.

A closely related problem is presented by changes in theories, which result from the availability of new factual information, from new developments in the law while the suit is pending, or simply from fresh inspiration. As an illustrative example, a person injured by the collapse of a chair might intend to bring suit simply on a theory of strict liability or breach of warranty. If asked for his theories early in the development of the case, queries designed to freeze an opponent’s contentions at an unreasonably early stage of the proceedings. E.g., United States v. Carter Prods., Inc., 28 F.R.D. 373, 377 (S.D.N.Y. 1961).

74. Preliminary Draft 65.
he would so state. Discovery of his theories early in the suit would enable the defendant to prepare to meet the issues thus raised, and to avoid the need to prepare to establish that the chair was designed and constructed with an appropriate degree of care. Following extensive preparation of his case, however, the plaintiff might wish to add a claim for negligent design. Surely he would be allowed to do so, thereby forcing the defendant to trace through the steps which had been omitted earlier, perhaps at some disadvantage because of the lapse of time. Even if the issues first appeared at trial, there would be strong pressure to allow them to be raised if it were possible to provide the defendant with an opportunity to meet them by continuance or mistrial. The fact that such problems are not likely to occur very often, because litigants would habitually respond to discovery with all remotely reasonable theories, simply underscores the question whether any benefits are apt to be obtained.

It is submitted that the fact that discovery of legal theories may often accomplish nothing does not justify its prohibition. The possibly small measure of accomplishment must be weighed against the ordinarily slight burden imposed. Although in many situations a party will be unable to specify any theories early in the suit, and new theories will often emerge as the suit progresses, there will also be many situations in which it is possible to specify theories at the outset and to stick by them. The issue of negligent design, for instance, may often remain out of collapsing chair cases. As long as a great deal of flexibility is allowed in deviating from the issues developed in discovery—and probably the only appropriate limitation is one of willful bad faith—the benefits of obtaining a preliminary, even though tentative, specification of issues weigh in favor of allowing discovery. The discretionary power to dispense with such discovery entirely—or to postpone it to become an effective substitute for more formal pretrial procedures—should be sufficient protection against significant waste motion.

Adoption of this procedure does not seem likely to result in undue burdens on the courts—uncomplicated suits will probably be handled by use of stock questions and answers, while attorneys involved in more complicated suits are apt to be guided both by formal pretrial conference procedures and by the realization that premature attempts to define the issues narrowly would yield only general answers and prompt retaliation.\footnote{75. The fear is still expressed that the discovery provisions of the
This development of discovery in the area of legal theories and contentions represents an inroad on areas that may once have been thought protected, but it is not the harbinger of complete revelation of all phases of trial strategy. The objections to completely open discovery extend beyond the danger of premature efforts to define positions before discovery and pretrial have made some degree of commitment desirable. The more obvious of these objections is that the dangers of overblown discovery assume a different relation to the possible benefits once the category of "issues and contentions" is put behind. A particularly diligent or nervous lawyer might request, for instance, that opposing counsel furnish a running account of all statutes, cases, and authorities consulted, theories developed, questions to be put to trial witnesses, and so on. Such blatant abuse would rarely occur, but it is predictable that greater freedom would create a need for greater restraints.

Beyond the dangers of bloating discovery out of any proportion to its worth lie more fundamental objections to complete revelation of trial strategy. Forcing each side to make its own analysis of a case, at least initially, may often result in a more penetrating development of fact and law than would occur if each side had free access to the other's strategy. There may be some value in even the simple requirement that requests for factual information be related to specific issues instead of a broadside demand for all available information. How far these possible benefits are actually realized, however, is open to question. Since, in theory, law is equally available to both parties, while factual information patently is not, there is considerable room for the argument that such benefits are largely illusional.

More important consequences follow from the fact that an adversary trial is not a precise, nor even a perfectly rational, way of establishing historical fact. Surely no factfinding procedure

Federal Rules have been drafted with an eye to the most complex litigation likely to come before the federal courts, and are simply overpowering for the run-of-the-mill cases constituting the vast bulk of the courts' workload. E.g., Brueckner, An Assessment of the Worth of Pretrial Procedures, 1965 PROCEEDINGS, ABA SECTION OF INS., NEAL & COMP. L. 386; Knepper, Some Suggestions for Limiting Discovery, 34 INS. Couns. J. 398, 400 (1967). The information uncovered by the Columbia Report suggests that in a large majority of cases, discovery is kept within bounds reasonably related to the size and complexity of the litigation involved. COLUMBIA REPORT 1.4.
of purely human contrivance can be entirely accurate in determining past events which did not transpire under laboratory conditions. Living testimony is based on imperfect recollection of often inattentive observations, and is often subject to the strain, conscious or otherwise, of attempting to separate observed facts from facts which it would now be convenient to have observed. "Trial strategy" is often responsible for exacerbating these difficulties. Juries and judges are in varying degrees susceptible to the effects of skilled argument and emphasis, or selective presentation of evidence. Yet these same tools have become an integral part of the adversary system on the supposition that they accomplish more good than harm in the quest after vanished fact. To some extent, the normal devices of trial strategy are predictable and are anticipated by each side. But as the pet anecdotes of any trial lawyer would suggest, much of their value is thought to lie in surprise; in the fact that they cannot be fully anticipated and countered by maneuvers designed to dissipate their effects and to reestablish a comforting darkness. 76 Perhaps protection against discovery of such trial tactics could be afforded on the ground that information as to them does not constitute evidence and is not calculated to provide a lead to evidence, but it would be difficult to refute the proposition that the only way of knowing whether such information might lead to new evidence would be by revealing it to the other party. Protection against pretrial discovery of such trial plans thus forms the hard core of the work product doctrine. 77

The implications of this central doctrine are easier to recognize in specific situations than they are to define in the abstract. Comparatively few cases deal with efforts to penetrate this hard core of work product by discovery, indicating the soundness of the intuitive judgment that few lawyers are likely to seek information which is properly protectible on this theory. Most courts will allow discovery of specific factual and legal contentions in an area which roughly corresponds to the area in which it would be proper to propose findings of fact and ulti-

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76. As one thoughtful observer has noted, "Work [product] protection is the major single area in which surprise is allowed. . . . To the extent that someone may be surprised . . . , he should accept it." Frank, Pretrial Conferences and Discovery—Disclosure or Surprise?, 514 Ins. L.J. 661, 672 (1965).

77. The Advisory Committee has limited its explanation of the work product doctrine in these terms to the statement that the proposed rule provision "reflects the view that the lawyer's mental impressions should be protected." Preliminary Draft 24.
mate conclusions of law to a judge. On the other hand, it would be surprising in the extreme if a party were ordered to prepare a verbatim statement of the questions to be put to each witness and the anticipated replies, or to divulge cross-examination plans. Likewise, it would be clearly improper to order disclosure of the arguments to be used to persuade the factfinder to draw particular conclusions of fact from the evidence at trial.

Cases dealing with efforts to discover trial evidence lie close to this area of obvious impropriety. While it is generally accepted that a party may not seek a statement of the evidence which will be offered at trial to prove each of his opponent's points,\(^7\) it is also agreed that interrogatories addressed to factual information are proper even though they seek "evidentiary detail."\(^8\) In some "big" cases, for example, it has been ruled that a party may not be required to produce the evidence which will be introduced at trial because of the resulting burden, confusion, and possible unfairness if the response is made the basis for imposing a continuing duty of supplementation or exclusion of other evidence at trial. In the same cases, however, the courts have required identification of the facts and transactions to be relied upon, of the documents to be offered in evidence, and the persons known to have information about the facts so specified.\(^9\) The distinction may blur at times, but the basic premise appears to be that all factual information available to one party ought to be available to the other;\(^10\) given discovery of such scope, and given the rules allowing discovery of contentions, theories, and opinions, nothing further would be accomplished by discovery of actual plans for shaping trial evidence\(^11\) and it might result in some harm. Here, as in other areas close to the line, any need that may arise in complex litigation for advance

\(^{78}\) E.g., United States v. Grinnell Corp., 30 F.R.D. 358, 362 (D.R.I. 1962) ("there is nothing in the Federal Rules ... that compels either party to present its case in advance of trial"); Aktiebolaget Vargos v. Clark, 8 F.R.D. 635 (D.D.C. 1949); 4 MOORE, FEDERAL PRACTICE ¶ 33.12.


\(^{81}\) See Part III (B), infra.

disclosure of trial evidence may be handled more efficiently, and with less danger of abuse, through formal pretrial conference procedures.83

Various problems closely related to the quest for trial evidence have also been reflected in reported cases. Occasionally a request is made for identification of the witnesses who will be used to prove specific matters,84 or for revelation of the steps of trial preparation by asking what efforts have been made to find witnesses85 or by asking deponents what they have done in preparation for deposition.86 On the law side of trial preparation, a few cases have found it necessary to deal with blanket requests for all of the files relating to a case,87 or for memoranda prepared in developing a party's theoretical position.88 Denial of discovery in such circumstances is easily understandable.

A common problem which seems to fall close to the borderline involves the request that a party identify the witnesses who will be offered at trial. Despite an aberrational opinion or two,89 it is clear that work product protection does not guard

against revelation of the identity of persons known to have knowledge of the facts involved in a lawsuit, whether or not they were discovered by counsel during preparation for trial. Most of the reported cases, on the other hand, have ruled that during discovery a party need not identify the witnesses to be called at trial. Many of these cases simply rule without explanation that such discovery is improper, while a few simply rule to the contrary that discovery is proper. Discovery is normally denied on the ground that a party ought not to be limited at trial to witnesses chosen during the early stages of preparation and discovery. This reasoning is occasionally supplemented by the suggestion that compulsory revelation of trial witnesses would unduly interfere with strategic planning, or that a witness may not be prepared, at the time of trial, to testify as he had previously indicated he would. Courts allowing discovery, on the other hand, occasionally respond to such objections by noting that the answering party should remain free to change its list as trial preparation advances.

Although the response of allowing discovery with a continuing right to supplement or amend the list of witnesses might seem to meet the objections adequately, it also raises a very real problem for parties. The list of witnesses from whom statements have been taken, but not the identity of other persons known to have knowledge of the relevant facts),


question whether any advantage results. A number of courts have denied discovery on the ground that pretrial conference procedures are better adapted to disclosure of trial witnesses. Given the advantage of timing disclosure immediately before trial, and given the great likelihood that pretrial procedures will be used in suits of such potential complication that advance notice of trial witnesses is likely to be useful, there is no real reason why discovery should be available as a duplicate procedure. In the final analysis, identification of trial witnesses on discovery does not seem to involve any of the considerations underlying the work product doctrine. The problem seems to be largely one of the relative convenience of discovery and pretrial procedures; probably the best resolution would be to allow discovery shortly before trial in any case in which formal pretrial procedures are not employed.

Undoubtedly there are further examples of discovery efforts which, if successful, would invade areas which should remain sacred. The examples just explored, however, should suffice.


98. Professor Moore argues that discovery of the identity of trial witnesses should be allowed to eliminate “surprise witnesses.” Possible adverse effects can be avoided, in his view, by the conditions that parties would not be bound to call all of the witnesses listed, should be permitted upon proper notice to call other witnesses, and should not be required to identify trial witnesses at an early stage of the litigation. 4 Moore, FEDERAL PRACTICE ¶ 26.19[4]. These qualifications appear to remove any advantages inherent in discovery as compared to exchange of witness lists at an attorneys’ conference held prior to a pretrial conference.

99. Impeachment witnesses may deserve special treatment, but any determination of this question must be made on the basis of considerations going beyond the work product doctrine as such.

100. Cutting across all areas of work product protection are the conceptually related questions of its applicability when discovery is sought in a case other than the case for which the material was prepared, and of waiver by revelation to outsiders.

Several cases suggest that the protection applies only if the materials were prepared in anticipation of the very suit before the court, Gulf Constr. Co. v. St. Joe Paper Co., 24 F.R.D. 411, 415 (S.D. Tex. 1959), and vanishes when that litigation is terminated. See Hanover Shoe, Inc. v. United Shoe Mach. Corp., 207 F. Supp. 407, 410 (M.D. Pa. 1962); Tobacco & Allied Stocks v. Transamerica Corp., 16 F.R.D. 534, 537 (D. Del. 1954). It should be clear that this conclusion is tenable only when there is no danger of disclosure to others pursuing claims related to the claims involved in the litigation giving rise to the one-time work product materials. See, e.g., Republic Gear Co. v. Borg-Warner
to give the flavor of the area which deserves work product protection. The key concept is that of adversarial strategy, nothing more. This concept does not extend of its own force to surprise impeachment materials or the desirability of covering up an absence of such materials; the proper role of discovery in that area must be determined on the basis of closely related but distinct considerations to be explored below.

Justifying limitations on discovery by the need for privacy in shaping trial tactics entails three further conclusions which should be noted briefly. First, it is clear that the fact that a person is engaged as an attorney in pending litigation does not preclude discovery of his factual knowledge about a case; one rather loose way of phrasing this conclusion is that protection is available only for materials developed while the attorney is acting in a capacity which involves his "professional skill and experience." Second, to whatever extent a party or any other person participates in shaping trial tactics or theories, work product protection should be available notwithstanding the absence of professional standing.


See Southern Ry. v. Lanham, 403 F.2d 119, 131-32 (5th Cir. 1968) (evaluation of case by claims agent entitled to work product protection); Cleary, HICKMAN v. JENCKS, JURISPRUDENCE OF THE ADVERSARY SYSTEM, 14 VAND. L. REV. 865, 867 (1961) (protection of a litigant hand-
Finally, there is only marginal room for adding an exception allowing discovery upon a showing of "good cause" to the protection of the hard core of work product. By its very definition, this concept includes an evaluation of the gains and losses resulting from discovery in most cases, and a conclusion that it should not ordinarily be allowed.\textsuperscript{104} The nature of the matters likely to fall within the protected area, as examined above, suggests that revelation would be appropriate only in cases of pathological complexity or obscurity, and that it can best be accomplished in such cases through more or less directly supervised pretrial procedures rather than completely unsupervised discovery.

Curiously enough, no attempt has been made to embody this core of the work product doctrine as such in the proposed Rules amendments. The proposal expressly limits discovery only of "documents and tangible things," although the protection is of course equally necessary for intangible impressions and intentions. Presumably the traditional protection will continue; otherwise the proposed rule would be too narrow in scope. Whether the rule is too broad, in extending protection to documents and tangible things which do not reflect the core of trial preparation, depends primarily on a determination of the proper scope of discovery of factual information and of witness statements, the questions discussed next below.

B. FACTUAL INFORMATION

It has been clear from the inception of the work product doctrine that it does not prevent discovery of factual information uncovered by an attorney preparing for trial. The Court put the matter succinctly in \textit{Hickman v. Taylor}, stating that a party "clearly cannot refuse to answer interrogatories on the ground that information of his own case "would seem to be no less essential to effective preparation than would be so if a lawyer were employed"); \textit{cf. California v. United States}, 27 F.R.D. 261, 262 (N.D. Cal. 1961).

\textsuperscript{104} \textit{See, e.g., United States v. Swift & Co.}, 24 F.R.D. 280, 284 (N.D. Ill. 1959) (ordering production of responses obtained by the Government to a questionnaire sent to over 1500 companies; finding small incursion on any arguably protectible area of trial preparation and great benefit to trial of a protracted case):

The privilege of the lawyer's work product and the showing of good cause sufficient to overcome it are interdependent, and when, as here, the factors supporting the claim of privilege are weak, the requisite showing of good cause is correspondingly lessened.
Discovery of such factual information is, as already noted, inconsistent with attempts to explain the work product doctrine in terms of a need to discourage reliance upon the trial preparation efforts of the other side. Occasionally this inconsistency has led a court to conclude that factual information should not be subject to discovery, but the overwhelming majority of decisions have held that facts are freely discoverable.

(1) Survey Data Prepared for Litigation

The rule that factual information is not within the sweep of work product protection has been tested by cases dealing with discovery of survey data prepared for litigation. Recent cases have ruled that work product protection extends to the contents of, and responses to, questionnaires addressed by the Government to members of an industry affected by an antitrust suit. Little explanation is offered for this result beyond a general declaration that such matters clearly represent trial preparation materials prepared under the direction of an attorney, although it has been suggested that at least the questionnaires deserve protection because the questions themselves might tend to reveal the lawyer's legal theories. This theory is impliedly supported by decisions ruling that answers to questions already

105. 329 U.S. 495, 504 (1947).

no change is made in the existing doctrine ... that one party may discover relevant facts known or available to the other party, even though such facts are contained in a document which is itself not discoverable.

PRELIMINARY DRAFT 26. The Columbia Report indicates that discovery of an opponent's factual contentions is the second most frequently sought goal of discovery. Columbia Report III. 36. See also id. at II. 3; III. 26, 40; IV. 15.

109. See Note, supra note 100, at 564-65.
made available to the discovering party should be discoverable
because they do not involve any peculiarly legal contribution by
the attorney who prepared the questions.\textsuperscript{110} A more realistic
line was drawn in another case, however, where the plaintiff in
a trademark infringement action was ordered to provide full
information concerning a consumer confusion survey, including
the methods of selecting the persons interviewed and the ques-
tions asked and statements made to them, but excluding the
instructions given by counsel to the interrogators which did not
relate to the actual conduct of the survey.\textsuperscript{111} Since the legal
theories and specific contentions of a party are freely dis-
coverable in any event, there does not appear to be any sound
reason why such factual information should be protected. The
difficulty of on-the-spot evaluation and refutation of survey
methods during trial, indeed, suggests that the case for discovery
is stronger than with many simpler types of factual infor-
mation.\textsuperscript{112}

(2) **Supplemental Answers**

The extent of the obligation to reveal factual information
secured during the course of trial preparation is underscored by
the proposed provisions defining the duty to supplement answers
to prior discovery efforts with information acquired after the
original answers have been framed. Proposed Rule 26(e) pro-
vides that later-acquired information must be provided whenever
it relates to the identity of persons having knowledge of
the facts in suit or the identity of expert witnesses, or whenever
it is learned that answers previously given are incorrect. Other-

\textsuperscript{110} Ledge Hills Farms, Inc. v. W.R. Grace & Co., 7 FED. RULES
SERV. 2d 34.411, Case 1 (S.D.N.Y. 1963); United States v. Swift & Co.,
24 F.R.D. 280, 282-84 (N.D. III. 1959). A contrary result was reached
in United States v. Deere & Co., 9 F.R.D. 523 (D. Minn. 1949), partly on
the ground that the persons answering the questionnaire should be
protected by an informer's privilege, and partly on the ground that the
answers are as much a part of work product as if they had been indi-

The court's unfavorable reaction to the survey as trial evidence is re-

\textsuperscript{112} There is no sound reason to find that responses to surveys
should be protected in the same way that ordinary witness statements
are. Quite aside from the argument advanced below that witness
statements themselves should be freely discoverable, it is well settled
that the factual information contained in witness statements is discov-
erable, even though the statements are not subject to production.
wise, the duty to supplement answers arises only when ordered by the court, when created by agreement, or when the inquiring party specifically requests supplementation.

This proposal seems a satisfactory response to a problem which has been treated in various ways by different courts, if only to achieve an answer to a question which demands a clear rule. It requires the interrogating party to identify the areas of inquiry in which he feels there is need for updated information, but provides insurance against ignorance of serious proportions by requiring the interrogated party to provide information in categories which are easily identifiable and obviously important. An unqualified obligation to provide all new information as acquired might accomplish more completely mutual knowledge of all the facts, but the resulting burden of constantly reviewing and supplementing previous answers would far exceed the marginal benefit obtained.

The interaction between fact discovery and protection of trial preparation efforts is found in two further areas which are not touched by the proposed amendments. The first involves efforts to shortcut the discovery process by simply asking for all the facts in the opponent's possession relating to the case; the second involves the nature of...
the duty to answer factual inquiries when conflicting information is available.

(3) General Inquiries

The broadest form of factual inquiry to receive judicial approval is a request for "all the facts relating to the alleged accident." This interrogatory was a form worked out in conference between the court and several active trial lawyers "in an effort to eliminate the necessity for the mass of minutely detailed interrogatories which had become customary." Two subsequent decisions in the same court, however, have found an interrogatory seeking all information relating to an accident to be too broad, although the more recent opinion indicates that a request for information regarding the facts of the accident, instead of all information relevant to the accident, would be approved. Another court has recently disapproved earlier opinions finding requests for "all the facts" objectionable because of the impossibility of judicial supervision of the completeness of the answers; it allowed a series of requests for a statement of all the facts known to the interrogated party which supported individually specified contentions advanced by him.

At first blush it might seem that such interrogatories represent the ultimate form of invasion into an opponent's trial preparations, requiring him to marshal all available information and categorize it according to his view of the issues, thereby revealing in advance the complete details of his trial strategy. Beyond this objection, there is also a danger that available arguments might be overlooked in categorizing the facts during discovery, and might accordingly be shut off at trial for want of advance disclosure.

Closer examination, however, reveals that these cases simply involve a particular form of the general request, examined above, for a statement of the facts which will be relied upon to support particular contentions. Any such request seeks a statement of

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all the facts currently available, and could not honestly be an-
swered by a statement of only some of the facts. The dividing
line between the proper and improper therefore appears to be
the line already suggested: a single unfocused inquiry for "all
the facts" is improper, as is a request for a formal statement of
evidence which will be offered at trial;\textsuperscript{119} specific requests for a
statement of the facts which will be relied upon to support
identified contentions are proper.

(4) Conflicting Information

Somewhat different ties bind contention discovery to a sep-
ardate problem of fact discovery not treated by the proposed
amendments. A party requested to respond to simple fact dis-
covery, or to state the facts which will be relied upon to support
identified contentions, may be aware of conflicting versions
of the facts, or may not wish to credit the single version available
to him. A common response in such a situation is that dis-
covery questions cannot be answered for want of knowledge of
the true facts. A few cases, however, present the opposite spec-
tacle of a party who simply answers on the basis of the favor-
able information without indicating that conflicting information
is available. It seems likely that this latter reaction is not an
uncommon litigational reflex, but is seldom reflected in reported
decisions because it is difficult to uncover the nature of the re-
sponse, particularly in time to get any meaningful relief.

One possible approach to this problem of credibility would
be to allow the party to answer that the facts are uncertain and
must await resolution at trial.\textsuperscript{120} This approach might be sup-
ported by the argument that it would be a gross invasion of
work product to require counsel to reveal his evaluation of wit-
ess credibility, and that neither counsel nor parties should be
required to perform the ultimate fact-finding function of deter-

\textsuperscript{119} See Bowen v. The News, 1969 CCH Trade Cases ¶ 72,768 (S.D.

\textsuperscript{120} See Note, Developments in the Law—Discovery, 74 Harv. L.
Rev. 940, 1034-35 (1961):

"If the issue is legitimately disputed, an answer to a critical
question need rarely be so specific as to prejudice the answering
party's case... [I]f would not be reasonable to require the
answering party to resolve conflicts in testimony, weigh the
credibility of witnesses, or in any way assess conflicting or in-
complete evidence.

Cf. Note, The Scope of Discovery Under Rule 33, 15 S.C.L. Rev. 677, 690
(1963). Another solution is simply to rule that there need be no
answer at all. E.g., Reynolds v. Southern Ry., 4 F.R.D. 526, 528 (N.D.
Ga. 1968).
mining which witness to believe. Acceptance of this approach, on the other hand, would close discovery off from much of the area opened up by allowing discovery of facts uncovered in preparation for trial. More important, the supposed difficulties are illusional: There is no need for counsel to evaluate credibility, nor choose between conflicting sources of information, since he can simply state the nature of conflicting information. Unilateral ignorance of important material is so much at odds with the basic purposes of discovery that most courts\textsuperscript{121} have accordingly chosen this alternative.

An early opinion requiring that conflicting information be set out found this practice would achieve the advantage of enabling the inquiring party to determine what areas need further investigation and proof.\textsuperscript{122} Several other opinions imposing a duty to set out conflicting information have made it clear that the answering party may set out the sources or the nature of its information (e.g., hearsay) in order to avoid being bound by its response as an admission of fact.\textsuperscript{123} Further protection against the dread dangers of preclusion has been provided by allowing an answering party to state expressly that further information may become available; or to answer in terms of belief rather than knowledge;\textsuperscript{124} or even to answer by reference to testimony of interested witnesses which the answering party accepts as establishing circumstances from which wrongful intent can be inferred, but rejects as incredible in claiming proper intent.\textsuperscript{125}

\textsuperscript{121} But see Bechak v. Conemaugh & B.L.R.R., 18 F.R.D. 147 (E.D. Pa. 1955) (defendant need not state activities of the plaintiff's fellow workers at the time of the accident because an answer would oblige the defendant to accept as true facts unsworn statements of others, or even to elect which of differing statements to believe); Muth v. Fleming, 7 F.R.D. 537, 538 (W.D. Mo. 1948) ("plaintiffs were warranted in declining to answer the interrogatories with respect to matters concerning which they had only hearsay information"). Since more recent decisions would require the interrogated party to state his contentions with respect to such matters if asked to do so, any residual effect these decisions might have is at best small.


\textsuperscript{125} Sahley v. Tipton Co., 49 F.R.D. 495, 496 (D. Del. 1966) (suit to set aside fraudulent transfers of money and property).
Similarly, in response to an objection that a request for a party's version of the accident in suit is too broad, it has been ruled that if several versions are available it is the answering party's duty "to tell each and every version." If only one version is available, on the other hand, the answer may be qualified by a caveat that it is based on something other than direct knowledge in order to avoid a binding admission. Likewise, where a party has responded that its contentions are based on information and belief, it has been ordered that the information relied upon be furnished. But if no information whatever is available to support a specific contention as to the facts, the answering party cannot be forced to state a specific contention, provided that it could not reasonably acquire information upon which to frame an answer.

Turning to the problem presented by a party who bases an answer on favorable information despite knowledge of conflicting information, it has been ruled that conflicting information must be provided even though there is no specific request for it. This approach seems sound in theory, since it reflects the basic purpose of discovery to obtain available factual information in addition to disputatious contentions, and since the existence of conflicting information can be indicated accurately without trenching at all on the rule that the substance of identified witness statements is subject to the same protection as the statements themselves. The fact that the duty to identify all persons known to have knowledge of any discoverable matter should enable the inquiring party to uncover the conflicting versions on his own—assuming that such persons are still available, willing to talk, and able to remember—does not provide a completely satisfactory alternative because an incomplete in-

129. United States v. Watchmakers of Switzerland Information Center, 2 F.R. Serv. 2d 333, Case 3, at 546-47 (S.D.N.Y. 1959). In some circumstances, at least, a court may require a plaintiff to state what efforts have been made to obtain information, see Breeland v. Bethlehem Steel Co., 179 F. Supp. 464, 467 (S.D.N.Y. 1959), or may impose a duty to acquire information from closely related sources, see Firemen's Mut. Ins. Co. v. Erie-Lackawanna R.R., 35 F.R.D. 297, 299 (N.D. Ohio 1964) (insurer must get information known to its insured in suit brought as subrogee to insured's claim against defendant); cf. F.R. Civ. P. 33.
vestigation may result from lack of resources or diligence, absent notice that it may be fruitful. And the basically proper attitude of most litigators that nothing should be volunteered beyond the minimum necessary for strict compliance with the discovery requested, does not justify the undoubtedly common attitude that the existence of conflicting information is a proprietary secret which may be concealed unless objections to direct requests for it are unsuccessful.

Difficulties in framing appropriate sanctions, however, may mean that a duty of disclosure can be effective only to the extent that good adversarial conscience becomes imbued with the full spirit of good discovery. In the case cited above, for example, the court refused to enter judgment for the plaintiff on the ground of failure to provide the conflicting information. Another court has ruled that answers to interrogatories inconsistent with the deposition testimony of a party's own agent do not even establish good cause for production of materials used in preparing the answers to uncover the possible existence of varying versions of the facts. The possibility of precluding the answering party from maintaining his asserted position by applying the sanctions of Rule 37(d) for failure to respond to discovery seems somewhat extreme, except in cases of obvious bad faith. Nonetheless, recognition of the duty to indicate the existence of conflicting information may in the long run be substantially self-enforcing.

(5) Summary

Any attempt to gather together these tangled threads of decisional developments surrounding the relationship between fact discovery and work product protection is attended by the dangers usually encountered in relying on reported trial court decisions as evidence of the tremendous body of evolving and often divergent practice. It is clear beyond peradventure that the qualification of strictly adversary litigation inherent in modern discovery has been found to require disclosure of all factual information, whether or not it was obtained solely by an attorney preparing for trial. The duty to provide a statement of the facts which will be relied upon to support identified contentions is probably supported by a duty to indicate the existence of conflicting information, and, where contentions are requested or where the answering party chooses not to believe available

but non-conflicting information, by a duty to indicate the version contended for. As a result, work product protection is limited to the hard-core area of trial strategy examined above, and, perhaps, to the area of impeachment materials which still remains to be examined.

C. IMPEACHMENT MATERIAL AND WITNESS STATEMENTS

Discovery of documents sought for purposes of impeachment was denied in one case with the observation that although the issue of credibility may control the disposition of a lawsuit, it "is not necessarily relevant to the subject matter." The concession of the importance of credibility carries with it the refutation of this approach to the problems posed by discovery of impeachment materials. These problems are approached in an overwhelming majority of cases from the premise that impeachment matters are within the general scope of discovery, unless special reasons for protection appear.

The most frequently urged reason for protecting impeachment materials from discovery is the fear of perjury, a fear which in the past gave rise to much of the opposition to creation of the modern methods of discovery, and which is still prominently expressed in discussions about extending civil discovery devices to generalized use in criminal proceedings. The argu-


133. In addition to the cases discussed below, see Lecklikner v. Transandina Compania Naviera, 41 F.R.D. 546 (E.D. Pa. 1966), ruling that it is proper for a third-party defendant to depose a plaintiff, who had already been deposed by the defendant, simply for the purpose of obtaining contradictory statements from the plaintiff.

134. Cf. G. RAGLAND, DISCOVERY BEFORE TRIAL 124-26 (1932), recounting the results of "field investigations" in several jurisdictions enjoying broad pretrial discovery. The judges and lawyers interviewed were asked whether advance knowledge of testimony led to perjured testimony. "The uniform answer was that . . . on the contrary a chief use of the procedure was to curb perjured testimony and to eliminate false claims."


That old hobgoblin perjury, invariably raised with every suggested change in procedure . . . is again disinterred from the
ment runs basically as follows: if the unscrupulous litigant does not know how much the scrupulous litigant ("our side" to all the writers) knows, he will be compelled to stick close to the truth for fear of being shown up as a liar. As soon as he learns the extent of his opponent's information, however, he can lie without inhibition if his opponent knows little or nothing, and he can devise ways to lie around whatever his opponent does know.138

Concern about fabricated testimony provides a strong foundation for limiting discovery to protect values closely akin to—but distinct from—the values protected by the hard-core work product doctrine. Whether or not there is substance in the cynical view that a willful perjurer is the most effective witness, it does not seem likely that a substantial proportion of witnesses consciously fabricate and deliver testimony which they know to be untrue.137 Genuine problems are frequently encountered, however, with the natural human tendency to remember facts which are helpful to oneself or one's employer, friends, or other sympathetic persons. Self-reinforced conviction undoubtedly is responsible for a considerable amount of sincere testimony, honestly believed, which lacks any foundation whatever in even mistaken observation.138 The operation of this capacity is probably less directly influenced by knowledge of the extent of an opponent's information than is the development of conscious perjury, but it seems certain that benefits would result from affording protection to information which

grave where I had thought it was forever buried under the overwhelming weight of the complete rebuttal supplied by our experience in civil causes. . . .


We hear some . . . complaining that the new Federal Rules . . . with their hospitality to pretrial discovery, have engendered fraud and perjury. The answer is that no one knows. Unfortunately, there were perjury and coaching of witnesses in the old days; no data is available to show whether those evils have waxed or waned in these newer days.

Compare 6 J. WIGMORE, EVIDENCE § 1845 (3d ed. 1940).

Evaluations of the benefits resulting from enforced ignorance of the extent of an opponent's impeaching information vary greatly. Federal trial judges have voiced the view that the gains in reducing "conforming" testimony or deliberate fabrications are generally outweighed by the dangers of surprise trial use.139 Writers in insurance law journals, on the other hand, frequently and vigorously champion the contrary view that discovery of impeachment material will "destroy the very strength" of the adversary system, and will "simply aid the fraudulent and frustrate justice."140 The challenge thus posed is really a manifold one, involving different types of impeachment material, and bears examination in relation to each type unless supervening arguments based on the work product doctrine require a conclusion of nondiscoverability in any event.

Such supervening arguments might be thought to lie in the basic case for protecting hard core work product. Impeachment material represents the most easily rationalized instance of the successful use of surprise as a tool of adversary fact presentation, so the values of secrecy may be thought to be merely a particular extension of a generalized policy. Moreover, such material as is available has almost certainly been gathered by investigations undertaken in preparation for trial, and its discovery can add only knowledge of projected trial tactics, since underlying factual contentions and information are subject to discovery in any event. Protection of such material, including protection against disclosure of the fact there is no such material, might thus seem to follow as a matter of course. When the question is broken down into the various categories of impeachment material, however, little if any basis appears for protection independent of the peculiar values of secrecy arising from the nature of impeachment itself.141

141. The relationship between the work product doctrine and limitations on discovery of impeachment material is not elucidated by the comments of the Advisory Committee to the proposed rule amendments. Its main comment is that, "courts have in appropriate circumstances
Federal decisions in this area may be divided into three major categories, involving impeachment by use of various types of factual information; by use of facts which if true must be known to the inquiring party; and by prior inconsistent statements. Quite different considerations apply to discovery in each of these three categories.

(1) **Factual Information Unknown to Inquiring Party**

Factual information useful for impeachment but not of such a character that the facts sought must, if true, be known to the inquiring party, has uniformly been found discoverable. The most frequently occurring example is a request for information about criminal convictions of a plaintiff, useful for impeaching his credibility as a witness. Questions designed to uncover the financial stake other witnesses may have in the litigation have also been allowed, such as a request for the names of persons sharing the costs of suit, a request for information whether an expert medical witness first examined a personal injuries plaintiff in litigation-oriented circumstances, or an inquiry whether one party contends that an agent of the other has offered to pay witnesses for their testimony. Perhaps the most unusual ruling required a party-deponent to answer questions as to his reasons for invoking the fifth amendment before the House Committee on Un-American Activities several years earlier, partly on the grounds that if criminal activities were uncovered they could be useful for impeachment purposes, and that if the privilege had been asserted without justification that fact too could have an impact on present credibility.
None of the possible reasons for limiting discovery of impeachment material apply in such cases. There is no problem of interference with trial preparation efforts, no danger of destroying the truth-revealing impact of strategic surprise, and good reason to believe that in most cases the information sought cannot be uncovered in other ways.

(2) Information Which Must Be Known to the Inquiring Party

Greater difficulties are presented by a demand for information which—provided it is true—necessarily must be known to the inquiring party. This problem ordinarily arises when a plaintiff in a personal injuries suit seeks to learn what information the defendant has about the plaintiff's physical condition prior to the events in suit; a typical pair of interrogatories might read:

Did plaintiff ever suffer any injuries, sickness, disease or abnormality of any kind prior to the accident alleged in this action involving any part or function of the body claimed in this suit to have been injured; If so, when? What was the said injury, sickness, disease or abnormality?\(^1\)

However appropriate it might seem for a defendant to put such an inquiry to the plaintiff, there is an immediate suspicious reaction when the plaintiff puts it to the defendant. The competing considerations bearing on discoverability are readily apparent. On the one hand, concealment of the defendant's knowledge may have a powerful effect on the veracity of the plaintiff's testimony, discovery will probably add nothing to identification of the issues to be tried, and any available information must certainly have been gathered in anticipation of litigation. On the other hand, it would be difficult to establish that impeachment material is intrinsically more trustworthy than any other kind of evidence,\(^2\) and advance knowledge may be

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148. Compare the observation of Vice Chief Justice Struckmeyer, dissenting from the allowance of discovery of surveillance information, in Zimmerman v. Superior Court, 98 Ariz. 85, 96 n.2, 402 P.2d 212, 219 n.2 (1965):

The argument is made that not to disclose leaves the plaintiff open to manufactured or perjured testimony from the defendant's witnesses. I think this is highly unrealistic and implausible. I, personally, know of no instance in thirty years as an
the only effective way of enabling explanation or refutation. Beyond this consideration, a great deal of evidence has value both for substantive and impeachment purposes—revelation that the plaintiff had long suffered from the condition now attributed to the defendant's fault, for instance, serves not only to discredit the plaintiff's contrary testimony but also to bolster the defense that the defendant did not cause the condition.

Federal courts have responded to this dilemma in several reported decisions by denying discovery. In sustaining objections to the interrogatories set out above, for instance, the court observed that the plaintiff would be given full opportunity to explain at trial any innocent lapses of memory as to his own prior condition, and found the object of the interrogatories was not to discover facts, "but instead to frustrate an effective cross-examination and to avoid the possibility of impeachment." Other decisions similarly deny discovery of the information available to the defendant, but require the defendant to state whether it will be contended that the plaintiff's claimed injuries are due in whole or in part to other events.

The intimately related question whether a plaintiff may discover the existence, and perhaps the contents, of "surveillance" movies designed to show the exaggeration of claimed disabilities has been answered in the negative by one court. Other federal judges, however, require a pretrial showing of such movies in order to enable the opposing party to prepare to meet anything which is open to further explanation. It seems clear, attorney in which it has been asserted that a defendant manufactured surveillance evidence. Wigmore, on the other hand, observed that in determining whether particular information should be subject to pretrial disclosure, [i]t is not easy, by any analysis or classification, by experience or by deduction, to enumerate, and to say that this or that class of evidence is in general attended by the feasibility of falsification, while another is not.

6 J. WIGMORE, EVIDENCE § 1845, at 373 (3d ed. 1940).

therefore, that federal trial judges are no more unanimous on this aspect of discovery than on any other.\textsuperscript{153}

In some ways, the most satisfactory response to the choice between the potential advantages and disadvantages of surprise in this area might be to leave the matter to the discretion of the trial judge. The tacit assumption underlying this decision would be that judges are capable of making sufficiently accurate assessments of the probability of misuse, primarily on the basis of the past experience or reputation of particular counsel, to allow discovery in most cases in which it would contribute to the overall search for truth.\textsuperscript{154} Unfortunately, several considerations make such an approach unsatisfactory. In large districts, the supposed basis for individualistic judgments would often be completely lacking. Past experience with particular cases, moreover, might reflect the client's honesty rather than the attorney's—surely there would be little point in allowing discovery on condition that the material be kept secret from the client. As the practice developed, judges might become reluctant to deny discovery for fear of branding counsel as untrustworthy. Present litigants, finally, may not fairly be asked to pay in unpreparedness for the past transgressions of counsel, even if they could be known. Nor is there any workable basis for making rational discretionary judgments other than past experience with a particular lawyer. A discretionary approach, accordingly, seems likely to be an arbitrary, hit-or-miss avoidance of the problem rather than its solution.

An alternate approach that has attracted some courts and commentators has been the suggestion that a party possessing information relevant for both substantive and impeachment purposes should be allowed to elect whether to use it solely for impeachment purposes. The case most frequently cited for this position is actually quite obscure.\textsuperscript{155} The plaintiff had inquired

\textsuperscript{153} One of the leading state cases allowing discovery of impeachment material which, if true, must be known to the inquiring party is \textit{Boldt v. Sanders}, 261 Minn. 160, 111 N.W.2d 225 (1961).

\textsuperscript{154} In \textit{Margeson v. Boston & Me. R.R.}, 16 F.R.D. 200, 200-01 (D. Mass. 1954), Judge Aldrich observed:

\begin{quote}
Experience indicates . . . that there are facile witnesses whose interest in “knowing the truth before trial” is prompted primarily by a desire to find the most plausible way to defeat the truth . . . . I shall be more liberal [in allowing discovery] when the situation indicates, and I am not referring to the personalities involved, that the information obtained will not be abused, either by counsel taking advantage of his opponent’s industry to save his own, or by opportunistic witnesses.
\end{quote}

whether the defendant had observed "any action or activity by or on the part of plaintiff." In sustaining objection to this interrogatory, the court noted that it was not yet clear whether the plaintiff intended to claim his ability to do physical work was impaired by his injuries, or whether the defendant would seek to refute such a claim by observing the plaintiff. The opinion then states that the defendant should choose by the time of the pretrial conference whether to use any available surveillance material purely for impeachment purposes, and upon such an election the material need not be disclosed. Since it is difficult to imagine any impeaching use for such material unless the plaintiff's continuing physical condition were in issue, in which event the material would also have a substantive bearing, the opinion does seem to stand for the proposition that a party may elect to use material which is useful both for impeachment and substantive purposes solely for impeachment, and upon that election protect it from discovery or disclosure at pretrial conference. An element of obscurity remains, however, in the court's concluding comment that in order to ensure fairness, any material to be used by the defendant at trial must be submitted to the court for a determination "whether the evidence is substantive or impeaching." Other courts have also adopted this procedure and it has been advocated by some writers.

The major difficulty with this proposal lies in the wild improbability that any fact-finder could, for instance, actually confine to impeachment use its consideration of motion pictures showing a supposedly crippled plaintiff painting a house. Some help may be provided by the suggestion that this approach be limited to material which has impeachment as its "overriding" purpose, but it is difficult to imagine just what such material might be. A more minor difficulty involves the burden which

156. Id.
might be placed on the courts in making such distinctions between substantive and impeaching evidence in advance of trial. Given the relatively narrow range of impeachment material as compared to substantive material in an average case, it may be that the numerical incidence of requests for rulings would not be high. Formalization of requests by plaintiffs for such material, however, could easily lead to the ritual adoption of this technique by defendants in every case in order to obscure the nonexistence of any impeaching information. In addition, it is questionable whether an accurate assessment of the probable trial effects of particular evidence can be made without investing a great deal of time in reviewing the entire case. And even if such an investment could be made, it seems undesirable to inject the judge into this sort of strategic determination, both because his forecast cannot be based on anything more than the cold discovery and pretrial record, and because his involvement in adversary strategic considerations is ill-suited to a role which requires judicial intervention only when the adversaries are bungling rather badly.

Better results could be obtained by a quite different procedure. The values of surprise could be largely preserved by providing discovery or pretrial revelation of impeachment material which falls within the present category only at a time shortly before trial, and only after the party asked about the existence and nature of such material had been given an opportunity—ordinarily by deposition—to commit the inquiring party to a final version of the events and claims related to the impeachment material. This procedure should forestall most conforming testimony, and would afford a reasonably effective means of embarrassing those who might still attempt to meet the impeaching material in untruthful ways. At the same time, it would be possible to prepare to meet impeaching material which is susceptible of honest explanation or refutation. Having preserved the values of surprise, there would be no remaining reasons to deny discovery; claims of invading the mysterious sanctum of work product would have no more remaining force than in the area of any other kind of factual information uncovered or prepared in anticipation of litigation.

(3) Witness Statements
The major remaining category of impeachment materials—and the largest body of case law—involves statements taken from witnesses in anticipation of litigation or actual preparation for trial. Although production of witness statements even at trial
would have had at best an insecure foundation in traditional practice, the Court's opinion in *Hickman v. Taylor* almost seemed to suggest that pretrial production should be ordered whenever requested for purposes of impeachment. It was soon recognized, however, that such an approach would amount to a denial of work product protection. The ensuing attempt to define the appropriate degree of protection has produced many conflicting decisions, interlaced with some confusion as to the difference between the showing of simple "good cause" required to obtain production of any documents under Rule 34, and the stronger showing of justification required to obtain production of work product materials. Subject to this warning, statements obtained in anticipation of litigation by an attorney are generally held to be subject to work product protection. Perhaps a majority of courts would also accord work product treatment to statements obtained by an investigating agent acting under the immediate direction of an attorney, but would

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The best known departure from this rule is found in *Jencks v. United States*, 353 U.S. 657 (1957), and the Jencks Act, 18 U.S.C. § 3500 (1964). Many administrative agencies have followed the lead of this statute in allowing discovery of witness statements only following testimony by the witness at trial. *E.g.*, NLRB Rules & Regulations 29 C.F.R. § 102.118 (1968), as amended, 33 Fed. Reg. 9819 (1968); Star Office Supply Co., 3 CCH TRADE REG. REP. ¶ 18,520 (FTC 1968).

161. Written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. . . . Were production of written statements . . . to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules . . . would be stripped of much of their meaning.

329 U.S. at 511-12. Clear notice that this language should not be taken at face value was provided by the fact that the Court found inappropriate the attempt to secure witness statements in the very case before it.


163. *E.g.*, Ownby v. United States, 12 FED. RULES SERV. 2d 34.411,
deny it to statements obtained by employees acting in the regular course of the business of such institutional litigants as railroads and insurance companies, even though a regular practice of obtaining statements had been set up by counsel in anticipation of predictable litigation.\textsuperscript{164}

Various showings of good cause have been accepted as grounds for production of witness statements, whether or not they were protected by the work product doctrine, such as unavailability or hostility of the witness, or loss of memory.\textsuperscript{165}

For present purposes, greater importance attaches to cases dealing with production for use by way of trial impeachment. The accepted rule in this area is that a witness statement may be obtained from an opposing party only if it can be shown that there is good reason to believe that it is somehow inconsistent with other statements by the same witness; it is not enough simply to request discovery for the purpose of determining whether such inconsistencies exist.\textsuperscript{166} Availability for inspection thus depends on the usually capricious happenstance that something has by chance occurred to justify a reasonable belief that some discrepancy exists. Discovery has been ordered when a deponent was advised by counsel not to answer a question whether there were any discrepancies between his deposition testimony and prior written statements made by him;\textsuperscript{167}

\begin{itemize}

  \item See American Express Warehousing, Ltd. v. Transansa Ins. Co., 360 F.2d 277, 284-86 (2d Cir. 1967) (Lumbard, C.J., dissenting); Southern Ry. v. Campbell, 309 F.2d 569, 572 (5th Cir. 1962); Burke v. United States, 32 F.R.D. 213 (E.D.N.Y. 1963); 2A BARRON & HOLZOFF, FEDERAL PRACTICE § 652.2; 4 MOORE, FEDERAL PRACTICE ¶ 26.23 [8.-1].

  \item Compare Groover, Christie & Merritt v. LoBianco, 336 F.2d 969 (D.C. Cir. 1964) (memorandum of witness interviews conducted by a member of the defendant partnership was not entitled to work product protection); Southern Ry. v. Campbell, 309 F.2d 569, 572 (5th Cir. 1962).

  \item E.g., 4 MOORE, FEDERAL PRACTICE ¶ 34.08, at 2482-93.

  \item The most frequently cited decision is Hauger v. Chicago, R.I. & Pac. R.R., 216 F.2d 501 (7th Cir. 1954). Occasionally a contrary approach is suggested, as in Jarosiewicz v. Baltimore & O.R.R., 21 Fed. Rules Serv. 34.13, Case 5 (E.D. Pa. 1955) where the court found good cause for production of statements of witnesses who had already been deposed in the need to give “an opportunity to check the statements of the witnesses against their testimony.” See also Morrone v. Southern Pac. Co., 7 F.R.D. 214 (S.D. Cal. 1947). Burns v. Mulder, 20 F.R.D. 605, 607 n.3 (E.D. Pa. 1957), shows that the approach taken in the Jarosiewicz case is not yet apt to meet with general approval.

when a deponent was unable to state whether his deposition testimony was in accord with prior written statements because he was unable to recall significant details of the accident in question; and when counsel admitted that there were discrepancies between a statement and deposition testimony, and offered the statement to the court for a determination whether it should be produced.

Examination by the court to determine whether witness statements are inconsistent with other statements of the same witness may seem to offer one way around the apparently arbitrary nature of the rule which requires a showing of probable inconsistency as a condition of inspection. Since discovery may legitimately be directed to the existence rather than the contents of witness statements, such a procedure might seem to ensure discovery whenever it would be of any benefit to the inquiring party. Courts which have used this procedure, however, are generally not enthusiastic. In one of the cases just noted the judge stated that discovery should be allowed because of an admission that discrepancies existed, and because although the statements had been given to him, he did not have "sufficient knowledge of the facts in this case to determine whether the discrepancies . . . are of such a nature as to affect the question of liability." More pointed criticism was offered by another court, which suggested that the burden of determining what discrepancies exist could easily become unmanageable and that it is undesirable to transfer the burden of showing good cause from litigants to the judge in this fashion.

170. See Vetter v. Lovett, 44 F.R.D. 465 (W.D. Tex. 1968), ordering the defendant to submit to the court any witness statements he would not voluntarily turn over to the plaintiff, so that the court might compare such statements with the testimony in any depositions which might be taken, and turn over to the plaintiff any statements conflicting with the testimony in any material respect.
173. Philadelphia v. Westinghouse Elec. Corp., 32 F.R.D. 350, 351-52 (E.D. Pa. 1962). So far as the burden on the court is concerned, it could be alleviated by adopting the alternate suggestion that discovery ought to extend to a request for a statement whether witness statements in the possession of a party vary from the deposition or other
Beyond the difficulties of implementing such a procedure lies the question whether work product protection should be available for witness statements at all. A procedure which results in production of witness statements whenever they may be useful is equivalent to a denial of protection; if this result is justified, it would be far more direct simply to provide for discovery as a matter of course.

The argument against providing special protection from discovery of witness statements is much the same as the arguments against providing special protection against discovery of any other relevant matter. Access to statements of a party's own witnesses may provide the only meaningful opportunity to recall legitimately vanished memory, or to prepare to explain apparent discrepancies between former statement and intended testimony. Access to statements given by an opponent's witness may prove invaluable in curbing his fancy, and in paving the way for effective cross-examination.

Against these obvious benefits, one of the justifications often advanced for extending work product protection to statements prepared by or under the immediate supervision of an attorney is that his trial strategy can be inferred from the material he has seen fit to include. In view of the current statements of the same witnesses, in order to pave the way for a showing of inconsistency justifying discovery of the statements themselves. See Gardner, Agency Problems in the Law of Attorney-Client Privilege: Privilege and "Work Product" Under Open Discovery (Part I), 42 U. Det. L.J. 105, 127, 136-37 (1964). The obvious difficulty with this suggestion is that a party possessing a statement of his own witness is not apt to have a refined notion of inconsistency.

175. E.g., Richards-Wilcox Mfg. Co. v. Young Spring & Wire Corp., 34 F.R.D. 212, 213 (N.D. Ill. 1964); Blanchet v. Colonial Trust Co., 23 F.R.D. 118, 120 (D. Del. 1958); Freund, Work Product, 45 F.R.D. 493, 496-97 (1968). The importance of obtaining statements for purposes of cross-examining witnesses called by the opposing party would justify a "Jencks" rule for production at trial, if pretrial discovery is not available. Compare the observation of William D. Mitchell, former Chairman of the rules Advisory Committee, that the desirability of discovery "depends a lot on whether the inquiry is made before the trial, with a chance to misuse the material, or made after the trial is half through. . . ." 71 A.B.A. Rep. 81, 85 (1946).

The proposed provisions for discovery of expert testimony are founded squarely on the need to prepare for effective cross-examination. See Rule 26(b)(4), and Advisory Committee Note, PRELIMINARY DRAFT 30.

176. This reasoning has prompted some courts to conclude that
trend to discovery of factual and legal contentions, it seems unlikely that this consideration is entitled to any weight: intelligent discovery by the other party will have uncovered everything but the fact that it was a particular witness who provided particular information, and it is always possible that the witness himself may be willing to divulge that information outside the formal discovery processes. When the scope of the revelations compelled at a thorough pretrial conference is added to the balance, along with the possibility of deferring production of the statement to allow protection by prior deposition of the witness, the force of this argument simply vanishes.

Likewise, for the reasons already discussed, it does not seem that allowing production as a matter of course would deter the preparation of written witness statements. It is accordingly difficult to escape the conclusion that the extension of work product protection can be justified, if at all, only on grounds inconsistent with the current premise that discovery should be allowed upon a showing of probable inconsistency between a prior statement and later pronouncements by the same witness. The only available justification, that is, must be that use of inconsistent prior statements for impeachment falls within the area of surprise tactics legitimately employed to improve the fact-revealing processes of adversary litigation. Acceptance of this justification, however, would entail the conclusion that whenever there is a chance that the witness will give testimony favorable to the party seeking discovery, his prior statements should be protected despite the existence of grounds for suspecting inconsistency with his present testimony.

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177. Protecting the statement as such also prevents any need to identify the individual source of the information provided, but the information must nonetheless be provided. See 4 Moore, Federal Practice ¶ 26.23[8.-3], at 1435-36.

178. See Part IV infra.


180. The desirability of maintaining secrecy is underscored by the advice that the existence of inconsistent statements should be concealed even during preliminary stages of cross-examination, lest a shifty witness explain his way out of the trap. See 3 F. Busch, Law and Tactics in Jury Trials § 400 (1960).
On the other hand, when it appears by deposition or otherwise that the witness is likely to testify in all matters favorably to the party possessing the statement, the implications may be thought less clear. In favor of discovery, it could be urged that the importance of impeachment in adversary examination at trial requires production whether or not there is a showing of probable inconsistency. The main argument against discovery would be that use of such a statement to impeach trial testimony more favorable to the party who prepared the statement could artificially taint legitimate testimony. Presumably the statement was prepared as tactical insurance against an unfavorable change in testimony, but there are often proper methods of assisting the witness thereafter to remember events more clearly and favorably. Opportunity to explain any discrepancies at trial might not provide in practice the theoretically perfect resolution of enabling the trier to evaluate credibility by weighing the changes against the explanations, because undue effect might be accorded to a suspicion that the proponent had improperly prevailed upon the witness to go one step further than a statement which was purposely drawn as favorably as more spontaneous recollection would permit.

The obvious shortcomings with all of these arguments are rooted in the shortcomings of surprise impeachment by showing prior inconsistent statements. The comforting assertion by many writers that “no honest witness will ever be surprised,” since “[h]e will testify to what he knows and nothing else,”181 is a transparent simplification which ignores the inevitabilities of dimming memories, and of discrepancies between statements prepared at one time by an attorney hoping to benefit his case and testimony elicited later by an opposing attorney. Even aside from these overriding difficulties, the simple fact that most statements reflect the language and thought patterns of the person preparing them must lead to frequent apparent discrepancies between statement and testimony. Recognition of these weaknesses of surprise impeachment by prior inconsistent statements has led to the long-standing proposal that a party should be able to obtain a copy of a statement which he has given to the opposing party without further showing of cause, because of the admissibility of such statements as substantive evidence under the admissions exception to the hearsay rule and because the untoward damaging effects of impeaching a party’s

own testimony makes it particularly important that inadvertent inconsistencies be avoided. This argument has been accepted in the proposed amendments to the Rules, which provide for production of a party's statement as a matter of course and define "statement" in terms modeled on the Jencks Act.\footnote{182}

If such considerations outweigh the strategic importance of impeachment in the case of statements given by a party, it is difficult indeed to defend a different rule for statements given by any other witness. Discovery rules should be developed in open recognition of the actual trial impact of the material sought to be discovered—surely the formal limitation of inconsistent prior statements of a nonparty witness to impeachment use is a fiction which does not deserve to be enshrined in the discovery process, however useful it may be otherwise.\footnote{183} In this context, the only available distinction between statements of a party and statements of another witness must be that when a party is tarred with the brush of inconsistency, the impact is apt to carry over to his whole case, while similar impeachment of another witness is apt to cost no more than the testimony of that witness. Stated more baldly, the proposition is that use of a party's prior statements against him is apt to result in such irrational misuse as to outweigh the possible contribution of surprise to the fact-finding process, while the balance comes out differently with statements of an ordinary witness.

Categorical demonstration on either side of such a proposition is impossible. It may not be unduly cynical to surmise that lawyers who believe that they or their clients typically have superior means of obtaining witness statements will tend to oppose discovery, while lawyers who believe their opponents have the advantage in time and resources are apt to favor it. Historically, similar doubts have been resolved by continually broadening the scope of discovery, and there is no apparent

\footnote{182. Preliminary Draft, Rule 26(b)(3). The accompanying Note comments on the most prominent discussions of this problem. Id. at 26-27. See also Straughan v. Barge MVL No. 802, 291 F. Supp. 282 (S.D. Tex. 1968). The question whether a criminal defendant has a general right to discovery of his own statements in the hands of the government under Federal Rule of Criminal Procedure 16(a), or whether particular need must be shown, is the subject of much current debate. E.g., United States v. Projansky, 44 F.R.D. 550 (S.D.N.Y. 1968).

183. Cogent expressions of doubt about the desirability of the rule even at trial may be found in C. McCormick, Law of Evidence § 39 (1954); 3 J. Wigmore, Evidence § 1018 (3d ed. 1940). See Gelhaar v. State, --- Wis. ----, 163 N.W.2d 609 (1969) (allowing substantive use of some forms of prior inconsistent statements of nonparty witnesses).}
reason to doubt that more good—in terms of better informed fact-finding—than harm has resulted.\textsuperscript{184} It seems quite likely that allowing discovery of all witness statements\textsuperscript{185} would lead to similar results. Admittedly an experiment in this direction is not likely to be reversible, but past experience with other expansions of discovery warrants resolution of the doubt in favor of abrogating the work product doctrine as to witness statements.

Discovery should be conditioned upon the right of the party possessing the statement to depose the witness before producing the statement, in order to capture and preserve the possible advantages of inconsistency while allowing the witness and counsel opportunity to consider the inconsistency free of the burden of trial surprise. Several courts have already adopted such a protective procedure following a finding that adequate cause existed to order production of a statement in particular circumstances.\textsuperscript{186} The resulting opportunity for anticipation in

\textsuperscript{184} Probably the most important cause for concern with the operation of elaborate discovery devices is the extent of the burden which may be placed on the litigants, and the potential for harassment by intentional misuse. Production of witness statements clearly involves no problems on this score. The comparative ease of accomplishing discovery by production of witness statements is indicated by one judge's observation that until Hickman v. Taylor had suggested that statements are protected as work product, lawyers practising in his court (the United States District Court for the Eastern District of Pennsylvania) ordinarily responded to discovery by producing their witness statements as the total knowledge available to them. Bard, \textit{The Practical Operation of Federal Discovery}, 12 F.R.D. 130, 152, 159 (1952).

\textsuperscript{185} Any effort to thwart discovery by intermingling clearly protectible ruminations of counsel with witness statements could be met by judicial supervision of the producing party's claim that certain portions should be excised. This procedure was used in Maryland Shipbuilding & Drydock Co. v. Baker-Whitely Towing Co., 42 F.R.D. 12 (D. Md. 1967). Subject to this protection, there is no apparent reason to condition discovery upon a further showing that the document sought is a "statement" within the definition now proposed for discovery of a party's statement. If the document is so far a statement as to be admissible for purposes of impeachment, discovery should be allowed for the reasons proposed. And if the document is not capable of such use, it should be protection enough to adopt the rule, suggested earlier, that production precludes any attempt to elicit impeaching testimony from the person who prepared it.

direct examination would greatly diminish the impact of cross-

examination based on inconsistent prior statements, but this re-

sult may well constitute additional support for such a procedure,

particularly if the rules of evidence are eventually relaxed to

permit open consideration of the prior statement as direct ev-

dence.

Denial of work product protection to witness statements

would eliminate any question regarding protection for the trial

preparation work of non-attorneys in the vast majority of

cases. If protection is continued for nonparty witness state-

ments, however, it has been seen that the only sound reason for

extending such protection is the need to preserve surprise ad-

versary impeachment by prior inconsistency. Since this function

is not affected by the provenance of the statement, the deter-

mination of the existence of sufficient cause to justify discovery,

notwithstanding the work product protection, should be made

without regard to the identity of the individual who first pro-
cured the statement. Although this conclusion cuts against
both the current decisions favoring discovery of witness state-

ments made in the ordinary course of business and the com-

ments accompanying the proposed Rule amendments, concern
for the identity of the person obtaining the statement can be
justified only on one of the rationalia for work product pro-
tection examined above and found wanting.

187. See text accompanying note 103 supra.
188. Acceptance of this reasoning would also undo the approach

taken in such cases as Steam Tanker Padre Island, Inc. v. London

Assurance, 277 F. Supp. 319 (S.D. Tex. 1967), finding work product

protection inapplicable to witness statements in the hands of plaintiffs' counsel because they had been obtained by an attorney for a nonparty.

189. The suggestion of the Advisory Committee appears to be that

the identity of the person preparing the material sought to be discov-
ered should be weighed in determining how strong a showing of cause

must be made to justify production. Preliminary Draft 24, 26.

190. The theory that discovery will deter adequate trial prepara-
On the whole, however, it would be better to deny any special protection against discovery of witness statements other than the procedural protection afforded by allowing an opportunity to depose the witness before producing his statement. If accepted, this conclusion would require substantial alteration of proposed Rule 26(b)(3), which now covers all documents or tangible things prepared in anticipation of litigation or preparation for trial. Given the rather narrow scope which would remain for the hard-core work product doctrine, it would probably be best simply to delete the currently proposed revision and, if it seems desirable, add a general reference to work product protection to the provisions for protective orders in proposed Rule 26(c).

IV. WORK PRODUCT AT PRETRIAL

Emerging pretrial conference practices serve to underscore some of the discovery developments outlined above. Following the leads outlined in the Handbook for Effective Pretrial Procedure adopted by the Judicial Conference of the United States,\(^1\) an increasing number of district courts are routinely providing for disclosure of the identity of trial witnesses.\(^2\)

\(^1\) See, e.g., LaFrance, supra note 186, at 376-77 (urging that the notion that discovery discourages preparation applies equally to work performed by agents and by attorneys, and is equally fallacious in each instance); Taine, Discovery of Trial Preparations in the Federal Courts, 50 COLUM. L. REV. 1026, 1063 (1950) (suggesting that discovery would deter performance “of important tasks ordinarily attended to by non-attorneys”). Even if the deterrence of preparation theory of protection is accepted, there is good reason to suppose that the advantages of on-the-spot statements obtained as a matter of ordinary business routine are so great that the risk of deterrence is insignificant. The resulting conclusion of free discoverability could be achieved under the proposed rules by finding that statements prepared in the ordinary course of business are not prepared in anticipation of litigation; the Notes of the Advisory Committee seem to suggest this result. PRELIMINARY DRAFT 26.


\(192.\) E.g., S.D. CAL. R. 9(f)(5); D. DEL. R. 11(D)(g); M.D. FLA. R. 10(c)(5); D. IDAHO R. 10(e)(6); N.D. ILL. Notice and Standing Order Re: Pretrial Conference in Judge Robinson's Court, 37 F.R.D. 303; N.D. IND. R. 12(f)(4), (7), (1); D. KAN. R. 15(c)(1); S.D.N.Y. CALENDAR R. 13(b)(1)(III)(h); S.D. OHIO R. 10(2); W.D. PA. R. 5 II(C); E.D. TENN. R. 9(c). (Unless otherwise noted, the local orders and rules cited in notes 192 to 205 may be found in Fed. Rules Serv. Local Court Rules.) Excellent discussion may be found in Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939 (5th Cir. 1964); Cedolia v. C.S. Hill Saw Mills, Inc., 41 F.R.D. 524 (M.D.N.C. 1967); Taggart v. Vermont Trans. Co., 32 F.R.D. 587 (E.D. Pa. 1963), aff'd per curiam, 325 F.2d 1022 (3d Cir. 1964).
often with a brief summary of the facts or issues as to which each will testify;\textsuperscript{193} for detailed statements of factual contentions and of facts which may be disposed of by stipulation;\textsuperscript{194} for identification of all documents or other items which will be offered as exhibits at trial;\textsuperscript{195} for statements of the legal theories to be relied upon;\textsuperscript{196} and for pre-pretrial meetings by counsel to facilitate agreement on such matters.\textsuperscript{197}

On one level of analysis, such practices merely emphasize the tacit conclusion of the courts charged with day-to-day administration of the discovery and pretrial rules that such openness results in better operation of the adversary system. This conclusion reinforces the proposition that work product protection should be limited to a narrow range of areas of obviously tactical concern.

Pretrial practices of this nature also suggest, however, that many areas of pretrial disclosure may often be effected most efficiently by formal conference procedures under the immediate, or at least impending, judicial control. In highly complicated cases, early pretrial proceedings may be useful in establishing the framework within which discovery should operate.\textsuperscript{198} In more normal cases, where the pretrial conference usually

\begin{itemize}
  \item \textsuperscript{193} E.g., E.D. & W.D. Ark. R. 9(f) (1); D. Colo. R. 9(b) (10); W.D. La., Instructions to Attorneys in Pre-trial Proceedings (2); D. Nev. R. 11(e) (6); E.D.N.C. R. 7 (R); E.D. Okla. R. 17(b) (4); W.D. Tex. R. 26(g) (4). See Mitchell v. Madden, 1 Fed. Rules Serv. 2d 33.333, Case 3 (W.D. La. 1958); J. Wright, \textit{The Pretrial Conference}, 28 F.R.D. 141, 150 (1960).
  \item \textsuperscript{195} E.g., S.D. Cal. R. 9(f) (8); D. Colo. R. 9(b) (8); D. Del. R. 11(c); S.D.N.Y. Calendar R. 13(b) (1) (III) (g); E.D.N.C. Civ. R. 7(G) (1); W.D.N.C. R. 7(f); E.D. Okla. R. 17(b) (2).
  \item \textsuperscript{196} E.g., C.D. Cal. R. 9(e) (6); N.D. Cal. R. 4(8); D. Conn. R. 10(e); D. Del. R. 11(D) (e); M.D. Fla. R. 10(E) (2); D. Idaho R. 10(e) (4); D. Kan. R. 15(e); D. Me. R. 17(b) (2); D. Mont. R. 11(c) (2), (3); D. Nev. R. 11(e) (4); S.D.N.Y. Calendar R. 13(b) (1) (III) (f). See Meadow Gold Prods. Co. v. Wright, 278 F.2d 867, 869 (D.C. Cir. 1960): 
    
    \ldots the pre-trial procedure, when utilized becomes the principle means of defining the issues in a case and the legal theories upon which they are to be tried."
  \item \textsuperscript{197} E.g., D. Alas. R. 9(F); E.D. & W.D. Ark. R. 9(f); C.D. Cal. R. 9(d); S.D. Cal. R. 9(e); D.D.C., Pretrial Instructions to Counsel I; D. Md. R. 15(b).
  \item \textsuperscript{198} See, e.g., D. Mont. R. 11(c) (5); \textit{Handbook of Recommended Procedures for the Trial of Protracted Cases}, 25 F.R.D. 351, 386-80 (1960).
\end{itemize}
should be held shortly before trial, it has obvious advantages in
reducing any temptation to rely on the other side or risk of
misuse, and in avoiding premature demands for exposition of
theories and contentions or other trial plans which often remain
fluid during the initial phases of litigation. At the same time,
the requirement of individual discussion between the opposing
attorneys—occurring in many districts as a pre-pretrial con-
ference—and the influence of the judge himself, coming at a
time when the case should be fully developed, may result in a
much clearer definition of positions than could be accomplished
by discovery. These conditions make it feasible to implement
the definition of issues and trial plans settled in a pretrial order
with reasonable strictness; yet even in this area the courts have
administered the provisions of Rule 16 allowing modification of
the pretrial order “to prevent manifest injustice” with a degree
of liberality which should quiet the fears of those who see, in
the corresponding use of discovery, a return to strict preclusion
of omitted evidence, witnesses, or theories.

Notwithstanding these advantages, the pretrial conference
should not be offered as a substitute for all discovery of con-
tentions. Good faith answers as to the scope of factual con-
tentions, and even the basic lines of legal contentions, provide
assistance in preparing a case which might often come too late
if postponed until the time when final lines are being drawn
for trial. The proposed provisions for discretionary control

199. But see, e.g., E.D.N.C. Civ. R. 7(D) (encouraging attorneys to
use discovery “instead of seeking information or admissions at the
conference of attorneys or at the pre-trial conference”); E.D. OKLA. R.
17(b)(6); W.D. TEX. R. 26(d).

200. E.g., United States v. Maryland & Va. Milk Producers Ass'N,

201. E.g., Brooks v. Wootten, 355 F.2d 177 (2d Cir. 1966); Globe
Indem. Co. v. Capital Ins. & Sur. Co., 352 F.2d 236 (9th Cir. 1965);
Coffey v. United States, 333 F.2d 945, 949 (10th Cir. 1964); Clark v.
Pennsylvania R.R., 328 F.2d 591 (2d Cir.), cert. denied, 377 U.S. 1006
(1964). When modification of the pretrial order is denied, the justifi-
cation is often advanced that it is necessary to prevent callous disre-
gard for pretrial procedures if they are to be effective. E.g., Trask v.
Susskind, 376 F.2d 17 (5th Cir. 1967); Thompson v. Calmar S.S. Corp.,
318 F.2d 657, 662 (3d Cir.), cert. denied, 379 U.S. 913 (1964); Payne v.
S.S. Nabob, 302 F.2d 803, 807 (3d Cir.), cert. denied, 371 U.S. 870
(1962).

202. One practical limitation is that pretrial procedures are not
used in all cases. The Columbia Survey, for instance, found that
“Pretrial conferences were held in slightly less than one half the cases
of the types sampled for this study.” COLUMBIA REPORT III. 32. Com-
pare D. ORE. R. 36(b) (provides for pretrial exchange of exhibits in
cases in which no pretrial conference is held).
over the time for answering discovery requests of this nature are well suited to the avoidance of any rigid timing requirements and provide the only necessary limitations.

One notable feature stands out from many of the broader pretrial procedures. Exception is often made from the requirements of listing witnesses and producing trial exhibits for rebuttal or impeachment materials. As examined above, this exception is often supplemented by a requirement that a party seeking to withhold material for impeachment use must submit it to the court for a determination whether it is indeed impeaching in character. So long as impeaching material is protected from discovery in order to preserve the additional effect resulting from surprise, there is little logical reason to allow pretrial procedures to destroy the surprise. If discovery should become available along the lines suggested above, however, pretrial practice should be changed accordingly.

V. WORK PRODUCT IN CONCLUSION

The case for embodying a specific work product provision in the Federal Rules seems clear enough. Decisional development of the several closely related concepts grouped around this doctrine has spawned what one court calls a “huge jungle of conflicting decisions,” and another judge has labeled a “curi-

203. Preliminary Draft Rules 33(b), 36(a).
204. E.g., E.D. & W.D. Ark. R. 9(f) (1); D.D.C., Pretrial Instructions to Counsel II B, D; N.D. Ind. Pre-Trial Order J (3); S.D. Ind. Notice of Pretrial Conference, 37 F.R.D. 311; N.D. Tex. Notice for Pretrial Order, 37 F.R.D. 380; D. Utah Pretrial Order, 37 F.R.D. 313. See also, e.g., M.D.N.C. R. 22(j) (6) (permitting witnesses not listed in pretrial proceedings to be called when “it becomes necessary to impeach or rebut the testimony of a listed witness, or to meet unexpected developments of the trial”).
205. E.g., D. ALAS. R. 9(G), R. 9-A; C.D. CAL. R. 9(d), 9(e) (8); N.D. CAL. R. 4(10), (11); S.D. CAL. R. 9(e), (f) (8), (9); D. IDAHO R. 10(d), (e) (5); S.D. IOWA R. 9(C) (b); W.D. La. Instructions to Attorneys in Pre-Trial Proceedings (5); W.D. PA. R. 5 II(G); E.D. WASH. R. 9(e). Many local rules provide an exception for impeaching exhibits, but are silent as to impeaching witnesses. E.g., D. NEV. R. 11(d), 11(e) (5), (6); W.D. TEX. R. 26(g) (1), (4); W.D. WASH. R. 26(3), (f) (advance disclosure required for all but rebuttal witnesses, all but impeaching documents). D. MONT. R. 11(e) (2) (v), provides that exhibits to be used for impeachment purposes only may be placed in a sealed envelope, to be opened only on order of the court. Presumably such distinctions are based on an intentional effort to protect witness statements from revelation even at the pretrial conference.
206. See text accompanying note 155 supra.
ous congeries of judicial confusion.\textsuperscript{208} The rulemaking process is in part designed to help remove precisely this kind of problem as developing experience reveals its nature and dimensions.\textsuperscript{209} Although a self-applying rule is unattainable, more than two decades have provided hundreds of reported decisions and scholastic commentary by the ream to illuminate the problem and prepare the way for at least a suggestive restatement.

On first acquaintance, the case on the other side is neither so clear nor so convincing.\textsuperscript{210} The only substantial fear may seem to be that adoption of a rule will preclude reasoned case-by-case balancing of the need for adequate discovery against the need to preserve whatever values inhere in affording some protection to trial preparation,\textsuperscript{211} and this worry is adequately answered by the flexibility built into the provision allowing discovery upon a showing of good cause.

Examination of the claims which have been made for the work product doctrine, and of the actual development of discovery practices which are seldom directly related to it, suggests a more profound concern. Adoption of an express provision addressed only to production of documents or tangible things may serve to distort the legitimate scope of the doctrine and lend it an aura of legitimacy which it does not deserve. This danger may be largely avoided if courts give full effect to the comment in the notes of the Advisory Committee that factual information shall remain freely discoverable, and to the express provisions elsewhere in the proposed Rules for discovery of legal theories and contentions. If so, the proposed protection


\textsuperscript{210} The Notes of the Advisory Committee to the proposed work product provisions of Rule 26(b) (3) state that consideration was given not only to the suggestion that work product protection should be abolished entirely, but also to the suggestion that in any event written statements of witnesses should be freely discoverable. No explanation is offered for rejection of these suggestions beyond the one sentence statement of the general rationale for work product protection as viewed by the Committee. PRELIMINARY DRAFT 24-25.

\textsuperscript{211} See, e.g., Pruitt, Lawyer's Work Product, 37 STATE BAR OF CALIF. J. 228, 236-38 (1962). Compare Professor Cleary's comment that in Hickman v. Taylor, the Court was once more trapped by an apparently felt necessity of saving face by refusing to admit that a contingency had arisen which the rules had not foreseen or had dealt with improvidently. Clearly, Hickman v. Jencks: Jurisprudence of the Adversary System, 14 VAND. L. REV. 865, 866 (1961).
against production of "documents and tangible things prepared in anticipation of litigation or for trial" may well be limited in application to the loosely defined area of "hard-core work product"—which will of course be protected against other methods of discovery as well under an implicit continuation of present practices—and impeaching material, particularly witness statements.

If this is the scope of the protection which is to be given under the proposed Rules—as it should be—the most important remaining question is whether witness statements should be given such protection. Acceptance of the proposal that such protection should not be afforded to witness statements would make it impossible to define the area of work product protection in terms of writings or tangible things prepared in anticipation of litigation. Since the remaining hard-core concept of work product protection involves all forms of discovery, it could be incorporated under the general protective provisions, similar to present Rule 30(b), in proposed Rule 26(c). Given the difficulty of defining the narrow area of appropriate restriction, it would probably be wiser to limit any such provision to a bare reference to protection against discovery of "work product." Alternatively, the doctrine could profitably be left to its present foundations in decisional law. In either case, it would be wise to include in the official comments an observation that work product protection should be accorded only to those parts of the mental impressions and theories of an attorney or other participant in the litigative process which must remain secret for the efficient working of the adversary system. Likewise, it should be noted that the new provisions for production of documents without need for judicial order or showing of good cause extend to production of witness statements.