WORK PRODUCT PROTECTION FOR WITNESS STATEMENTS: TIME FOR ABOLITION

KATHLEEN WAITS*

Witness statements taken in anticipation of litigation have been protected as work product since *Hickman v. Taylor*. In this Article, Professor Waits argues that this protection should be abolished. The protection causes unnecessary duplication in the development of facts, can deprive parties of the most reliable eyewitness accounts, and leads to unnecessary costs for litigants. Furthermore, the doctrine as applied is biased toward large institutional litigants. After developing these points, Professor Waits debunks the case for retaining work product protection for witness statements. This case is founded on an implausible "parade of horribles." Even without work product protection, the incentives for lawyers to take witness statements are much stronger than the disincentives. In sum, work product protection for witness statements glorifies the adversary system at great costs to litigants and to the detriment of the search for truth in the courtroom.

I. INTRODUCTION

In *Hickman v. Taylor*,[1] the Supreme Court extolled the virtues of open discovery[2] under the newly adopted *Federal Rules of Civil Procedure*. Nonetheless, the Court held that certain relevant, non-privileged[3] statements made by witnesses to a defense lawyer investigating

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* Assistant Professor, University of Florida, College of Law. A.B., Cornell University, 1972; J.D., Harvard, 1975. My colleagues Martin H. Belsky, Stuart R. Cohn, Stanley N. Ingber, Toni M. Massaro, Michael A. Oberst, Richard N. Pearson, Christopher Slobogin, Mary Twitchell, and Professor Lawrence C. George of Florida State University Law School all made helpful suggestions on an earlier draft of this Article. In addition, the research assistance of Thomas H. Duke, University of Florida, College of Law, Class of '85, is gratefully acknowledged.

1. 329 U.S. 495 (1947). The facts of *Hickman* were as follows: A tugboat accident occurred in which five of nine crewmen aboard died. The cause of the accident was unknown. Three days after the accident, the owners of the tug and their insurers hired an attorney to defend against possible claims by the representatives of the deceased crew members. As part of his investigation, the attorney interviewed the four survivors. Less than two months after the accident he obtained signed statements from them. Nine months after the tragedy, a representative of one of the victims filed suit against the ship's owners and a year after the commencement of litigation, the plaintiff's lawyer demanded that the defendants produce the witnesses' statements.

2. *Id.* at 507. *See infra* note 30.

3. *Id.* at 508-10. The court of appeals had ruled that the attorney-client privilege protected the statements from disclosure, *Hickman v. Taylor*, 153 F.2d 212 (3d Cir. 1945). The Supreme Court disagreed with this rationale, since the witnesses were not the defense lawyer's clients, but reached the same result through the creation of the work product doctrine. The district court had applied the discovery rules literally and had ordered production of the documents, *Hickman v. Taylor*, 4 F.R.D. 479 (E.D. Pa. 1945) (en banc).

an accident were the defense lawyer's "work product" and were therefore not discoverable as of right.[4] And so it has been for four decades, at first through judicial decisions and now by rule:[5] witness statements prepared "in anticipation of litigation or for trial" are not freely discoverable. In order to obtain a work product witness statement, litigants must seek judicial intervention and convince the court that they have satisfied a series of stringent requirements.[6] Only then is the presumption of protection created by *Hickman* overcome.[7]

The work product doctrine is an article of faith in the American legal system. The policies which supposedly justify it have been recited

4. Certain facts in *Hickman* probably made the holding against discoverability of witness statements easier than it might otherwise have been. The witnesses of the accident from which the plaintiff's claim arose had given testimony concerning the accident at a public meeting of the United States Steamboat Inspectors, a governmental investigatory body. This testimony had been taken less than a month after the sinking—before the defendants' counsel had acquired the witnesses' written statements—and was available to the plaintiff's counsel at the time he sought the statements. In addition, the defendants, through their defense attorney Samuel B. Fortenbaugh, Jr., had responded fully to the remainder of plaintiff's discovery requests. This response included full answers to interrogatories in which Fortenbaugh set out his client's version of what had happened on the night in question. *Hickman*, 329 U.S. at 498-99, 508.

Second, the plaintiff wanted much more than just written witness statements. Plaintiff's lawyer, Abraham E. Freedman, came close to asking that Fortenbaugh reveal everything from his investigation. He sought all of Fortenbaugh's "records, reports or other memoranda" concerning the accident, and further demanded that Fortenbaugh "set forth in detail the exact provisions" of any oral statements or reports he had obtained. *Id.* at 499. The extremity of plaintiff's demand probably influenced the Court's response in *Hickman*. *See infra* notes 33 & 61.

Contrary to legal lore, Fortenbaugh did not go to jail in order to contest the district court's order. The contempt citation entered against him by the trial court was the result of an agreement between Fortenbaugh, Freedman and the judge, all of whom wanted to make the issue ripe for appeal. For a fascinating account, see Coady, *Dredging the Depths of* Hickman v. Taylor, Harv. L. Rec., May 6, 1977 at 2.

5. FED. R. CIV. P. 26(b)(3). Rule 26(b)(3) was not added to the *Federal Rules of Civil Procedure* until 1970. For a discussion of work product cases in the years between *Hickman* and the rule, see generally Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269 (1969). The rule does not apply to intangible work product and is thus only a "partial codification" of *Hickman*. Clermont, *Surveying Work Product*, 68 CORNELL L. REV. 755, 755-57 (1983). However, since recorded witness statements are by definition tangible work product, the rule covers their discoverability.

6. Rule 26(b)(3) provides that the party seeking work produet must show that he "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."

Judicial intervention is needed, of course, only if parties holding work product raise the objection and force their opponents to resort to a motion to compel. Given the highly adversarial nature of modern discovery practice, and the advantages of both non-disclosure and delay, such objections are the norm. *See infra* notes 90-96 and accompanying text.

7. For a discussion of pre-*Hickman* law, see generally Special Project, *The Work Product Doctrine*, 68 CORNELL L. REV. 760, 764-73 (1983). The Special Project is an exhaustive study of the work product law. Although this Article takes exception to much of its policy analysis, see, e.g., *infra* text accompanying notes 119-45, the Special Project is an invaluable research tool.

over and over, often with near-religious conviction and fervor.[8] The catechism goes something like this: 1) the adversary system is the best way (or at least a very good way) to ascertain the truth and dispense justice; 2) notwithstanding a policy of open discovery, effective adversarial presentation demands that each side develop information about the case on its own; 3) this independent development of information will not occur if parties are required to share the results of their efforts with the opposition; 4) the benefits of this scheme outweigh its costs; and therefore 5) the work product doctrine is a supportable and even necessary feature of our dispute resolution system.

This Article challenges the underpinnings of the work product doctrine as applied to witness statements and concludes that, contrary to the fourth supposition above, the doctrine's very tangible costs[9] far exceed its highly speculative benefits.[10] The costs include the mandatory duplication of investigative time and effort, the injury to justice when information hidden in witness statements is not revealed from alternative sources, and the astronomical expense of the battles which the doctrine itself generates. On the other hand, the alleged benefits of work product protection for witness statements rest upon inaccurate assessments of the adversary system and overstated claims about the "parade of horribles" which would supposedly follow the doctrine's demise. This Article argues that the adversary process is more sensible for data interpretation than for data collection. Further, the incentives to dig for all relevant information and to record it in witness statement form are so powerful that they will almost always overwhelm the disincentives associated with discoverability.

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8. *See, e.g.*, Kane, *The Work Product Doctrine—Cornerstone of the Adversary System*, 31 INS. COUNS. J. 130 (1964); *see also infra* note 157. The opinions in *Hickman* itself have a certain evangelical tone, although both Justice Murphy (for the majority) and Justice Jackson (concurring) reserved their most passionate rhetoric to inveigh against discovery of intangible and opinion work product. *See infra* note 33.

Although the details of work product protection have sparked controversy, *see* Special Project, *supra* note 7, at 762 and authorities cited therein, there has been little commentary questioning the doctrine's fundamental soundness. Cooper, *supra* note 5, is the most broad-based attack, although Shapiro, *Some Problems of Discovery in an Adversary System*, 63 MINN. L. REV. 1055 (1979) expresses some doubts about the doctrine, at least as it is employed in practice. Additionally, Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1351 (1978) includes a narrowing of work product among his many proposals for making discovery less adversarial. *See also* LaFrance, *Work-Product Discovery: A Critique*, 68 DICK. L. REV. 351 (1964).

To the extent there is judicial discomfort with the work product doctrine, it has manifested itself not through frontal assaults but through decisions which interpret the doctrine's numerous ambiguities in a manner encouraging disclosure. *See infra* notes 87-89 & 107-12 and accompanying text.

9. *See infra* Part II.

10. *See infra* Part III.

This Article argues that work product protection should be abolished for litigation-related witness statements; they should be discoverable under the same conditions as other documents.[11] In a sense, this proposal is so old that it is new. The district court in *Hickman* denied immunity to witness statements nearly forty years ago, only to be reversed by the Supreme Court.[12] Although I believe that the *Hickman* Court was wrong when it invented work product protection for witness statements, abolition of such protection is more timely now than ever. Indeed, abolition is the next logical step in the discovery reform process.[13] There is now an overwhelming consensus that discovery is too expensive and time-consuming,[14] but in recent years the Federal Rules

11. *See* FED. R. CIV. P. 26(b)(1) (scope of discovery) and FED. R. CIV. P. 34 (production of documents) for basic requirements.

12. Hickman v. Taylor, 4 F.R.D. 479 (E.D. Pa.), *rev'd* 153 F.2d 212 (3d Cir. 1945), *aff'd* 329 U.S. 495 (1947). The Supreme Court's opinion in *Hickman* might lead one to believe that the district court had entered a sweeping order requiring the defendants' lawyer to comply with every element of the plaintiff's request. However, this was not the case. The district court had ordered that written witness statements be turned over to the plaintiff. The trial court's primary rationale was that the statements would probably have been prepared even if no suit had been threatened and they were therefore not true work product materials. 4 F.R.D. at 482. Fortenbaugh's internal memoranda were ordered produced for in camera inspection, so that the court could decide what should be revealed to Freedman. *Id.* at 482-83. Unrecorded work product was given full protection; only the "facts" contained in intangible work product had to be revealed. *Id.* at 483. The Supreme Court's opinion in *Hickman* also distinguished between protected work product and discoverable "facts," but applied the distinction to all forms of litigation-related materials. 329 U.S. at 511. Shapiro, *supra* note 8, is an insightful discussion of the difficulties of distinguishing between discoverable "facts" and non-discoverable "work product."

The disagreement between the Supreme Court and the district court boiled down to a burden of proof question. The former placed the burden on the party seeking work product to show why it should be discoverable, while the latter required the party possessing work product to show why it should not. Special Project, *supra* note 7, at 778 n.118.

13. In the past four years, the Supreme Court has adopted two sets of amendments to the discovery rules. *See* Amendments to the Federal Rules of Civil Procedure, 446 U.S. 1003 (1980) (effective Aug. 1, 1980); Amendments to the Federal Rules of Civil Procedure, 51 U.S.L.W. 4501 (Apr. 28, 1983) (effective Aug. 1, 1983).

14. *See generally* D. SEGAL, SURVEY OF THE LITERATURE OF DISCOVERY FROM 1970 TO THE PRESENT (1978); *see also* Committee on Rules of Practice and Procedure, *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 90 F.R.D. 451, 481 (1981) [hereinafter cited as *Preliminary Draft*] (discovery abuse "results in exeessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake").

Brazil, *supra* note 8, is an incisive essay on how the adversary system distorts discovery. Similar conclusions emerge from Brazil's later empirical study of how 180 Chicago lawyers viewed the discovery process. The results of that study, and its author's suggestions for the system's improvement are contained in Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RESEARCH J. 217 [hereinafter cited as *Front Lines*]; Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RESEARCH J. 787 [hereinafter cited as *Problems and Abuses*]; Brazil, *Improving Judicial Controls Over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RESEARCH J. 873 [hereinafter cited as *Improving Judicial Controls*].

Advisory Committee has focused mostly on the problem of over-discovery.[15] The time is now ripe to re-examine the other side of the equation and to realize that too little discovery can be as bad as too much.[16] Additionally, we must look beyond the prescriptions which the rulemakers have implemented so far. Encouraging judicial involvement,[17] increasing lawyer responsibility,[18] and narrowing litigation focus[19] are all good ideas. But these reforms are directed either at managing our current litigation system more effectively or at curbing what are widely recognized as abusive practices.[20] They do not alter or even question the basic practice of discovery.[21] We could accomplish even more by discarding a wasteful doctrine—work product immunity for witness statements—whose perpetuation rests on faith and lawyer self-interest[22] rather than genuine need.

This Article may be heresy, but its heresy is limited. Unlike other recent writers, I do not propose that discovery be transformed to a wholly or even largely non-adversarial process.[23] These radical proposals, whatever their theoretical merits, are unrealistic. The adversarial

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15. The 1983 amendment to FED. R. CIV. P. 26(b)(1) was specifically directed at curbing excessive discovery requests. *Preliminary Draft, supra* note 14, at 481.

16. The original purpose of discovery was to require full revelation of all relevant, non-privileged information, and thereby eliminate the unfairness of surprise and "gamesmanship" in litigation. *See generally* Brazil, *supra* note 8, at 1298-1303 and authorites cited therein. The Advisory Committee recognizes that "evasion or resistance to reasonable discovery requests" continue to "pose significant problems." *Preliminary Draft, supra* note 14, at 480.

17. *See* FED. R. CIV. P. 16(a) (case management is now an explicit purpose of pretrial procedures); FED. R. CIV. P. 16(b) (within 120 days of the filing of a complaint, the judge must enter a scheduling order; scheduling order shall include deadlines for the completion of discovery).

18. *See* FED. R. CIV. P. 26(g) (attorneys are required to certify that discovery requests and responses are not abusive and will be sanctioned for wrongful certifications).

19. *See* FED. R. CIV. P. 16(c) (elimination of frivolous issues and avoidance of wasteful proof are proper subjects for pretrial conferences).

20. *See* Sussman, *Changes in Federal Rules Create Risks, Opportunities*, Legal Times, Sept. 19, 1983, at 34. Marcus, *Reducing Court Costs and Delay: The Potential Impact of the Proposed Amendments to the Federal Rules of Civil Procedure*, 66 JUDICATURE 363 (1983) is a helpful summary of the proposals which became the 1983 amendments.

21. *See* Sussman, *supra* note 20: "The amended rules do not represent a drastic departure from the past. Most of what was appropriate in the past will still pass muster; what was improper will appear more clearly unacceptable and they will be more likely to result in sanctions." *But see* Subrin, *The New Era in American Civil Procedure*, 67 A.B.A.J. 1648 (1981) (proposed 1983 amendments alter assumptions about important issues such as the respective roles of judges and lawyers and therefore represent a significant departure from previous law).

22. *See infra* text accompanying notes 169-78.

23. *See, e.g.*, Brazil, *supra* note 8, at 1348-61 (civil discovery process should be much less adversarial; statements from key witnesses should be taken by impartial government personnel); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) (lawyers should be required to pursue truth rather than clients' narrow interests).

model is too deeply entrenched in the American legal psyche.[24] More modest reforms may at least have a fighting chance.

It should also be emphasized that this Article tackles only one facet of the "small mountain" that is the work product doctrine.[25] The focus here is exclusively on the merits of work product protection for written or otherwise recorded statements by witnesses.[26] This Article does not address whether and to what extent immunity should be accorded to other types of litigation preparation materials.[27]

This limited focus has been chosen because witness statement protection is the most indefensible component of the work product doctrine. Witness statement immunity is simultaneously the most expensive and the least justifiable category of work product protection. It is costly in purely economic terms because witness statements give rise to more litigation than any other type of work product.[28] Non-disclosure of witness statements is also detrimental to justice because it allows much probative[29] and admissible[30] information to be concealed.[31]

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24. Even if this country were willing to adopt a non-adversary system, the costs of making the change might exceed the gains realized. Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 83, 112 (D. Luban, ed. 1983).

25. "Work product is the legal doctrine that central casting would send over . . . [in part because] it has generated a small mountain of lower-court case law, with the foothills forming a labyrinth of rules and wrinkles." Clermont, *supra* note 5, at 755.

26. This Article accepts the definition of "statement" contained in the second paragraph of FED. R. CIV. P. 26(b)(3): "(A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital or an oral statement by the person making it and contemporaneously recorded." *But see* Cooper, *supra* note 5, at 1326 n.185 (definition of "statement" in Rule 26(b)(3) is too narrow).

27. Categories of work product not covered in this Article include opinion work product, *see generally* Special Project, *supra* note 7, at 817-37; litigation-inspired investigative reports, *see generally* Note, *Discovering Investigative Reports Under the Work Product Doctrine*, 34 BAYLOR L. REV. 156 (1982); so-called "intangible" work product—that is, all instances where work product has not been put into documentary form, *see generally* Special Project, *supra* note 7, at 839-43; and work product protection in criminal cases, *see* FED. R. CRIM. P. 16; United States v. Nobles, 422 U.S. 225 (1975).

28. Cooper, *supra* note 5, at 1318.

29. Witness statements are more probative than other forms of work product both because they are reliable, *see infra* text accompanying note 33, and because they contain information from someone with first-hand knowledge of legally relevant events.

30. Modern rules of evidence take an increasingly relaxed attitude on matters such as hearsay, *see* FED. R. EVID. 803(24) (residual hearsay exception; trial judge given broad discretion to admit hearsay which does not qualify under other hearsay exceptions). Thus, it is far more likely that witness statements would be admissible today than when *Hickman* was decided. *See Hickman*, 329 U.S. at 519 (Jackson, J., concurring) (signed witness statements could not be used as evidence except for impeachment).

31. See *infra* text accompanying notes 62-72 & 81-86 for reasons why alternate discovery methods will often fail to divulge all the information contained in work product witness statements.

Moreover, the arguments that might justify immunity for other classes of work product are unpersuasive when applied to witness statements. Reliability is not a problem with these written statements, because the witness has had an opportunity to verify the accuracy of what has been recorded.[32] Witness statements are thus easily distinguishable from situations where work product would likely be tainted by the preparer's bias or inaccurate memory.[33] Nor would free discoverability of witness statements undermine any legitimate interest in "attorney privacy."[34] Unlike opinion work product, witness statements do not reveal the advocate's thoughts or strategies.[35] Indeed, no one claims that revelation of witness statements would lead to the disclosure of lawyers' thoughts and strategies. Rather, defenders of this part of the work product doctrine assert that lawyers need privacy for their investigative as well as their mental processes.[36] This argument, however, rests on a fallacious premise—that revelation of witness statements would lead to inadequate investigation—and thus is not a valid basis for protection.[37]

In short, the costs of continuing to apply work product protection to witness statements are high, and the benefits largely illusory.[38] This

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32. Special Project, *supra* note 7, at 778.

33. *See Hickman*, 329 U.S. at 513 (attorney should not be required to divulge contents of witnesses' oral statements because this practice would "give rise to grave dangers of inaccuracy and untrustworthiness"). Justice Jackson was even more adamant: "I can conceive of no practice more demoralizing to the Bar than to require a lawyer to write out and deliver to his adversary an account of what witnesses have told him. Even if his recollection were perfect, the statement would be his language, permeated with his inferences." *Id.* at 516-17 (Jackson, J., concurring).

34. A lawyer's need for privacy is mentioned in the first paragraph of Justice Murphy's majority opinion in *Hickman*, *id.* at 497, and this theme is reiterated many times thereafter. *See, e.g.*, *id.* at 510-12. *See also Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1027-28 (1961) [hereinafter cited as *Developments*] (privacy of attorney's mental processes important rationale for work product doctrine).

35. *See* LaFrance, *supra* note 8, at 368. Even work product's detractors concede that tactical documents and thoughts should be protected. *See, e.g.*, Cooper, *supra* note 5, at 1283-1301 (party's evaluation of his case is "hard-core" work product). *See also infra* notes 162-65 and accompanying text (documents which assist in information interpretation function of adversary system worth protecting).

36. Special Project, *supra* note 7, at 786. *See also* authorities cited *infra* notes 127-34.

37. *See infra* text accompanying notes 127-34.

38. This Article will focus on a utilitarian critique of the work product doctrine. In passing, however, it should be noted that the doctrine also raises serious moral questions. One consequence of work product protection is that one side will frequently possess information that the other side—and the factfinder—would find very useful. *See infra* text accompanying notes 53-74. This effect is said to be justified by the long-term benefits of full investigation by both sides. *Id.* However, it is not inherently obvious whether, as a moral matter, it is worse for one side to have information and not share it than for neither side to have it.

The weighing of the moral arguments for or against work product are strikingly similar to those which apply to two other adversary process dilemmas, revelation of on-going client fraud and client perjury. *Compare* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1983) com-

Article will proceed by, first, examining the substantial costs engendered by extending work product protection to witness statements. It will then refute in detail the standard arguments for retention of protection for those statements.

II. The Costs of Work Product Protection

In creating work product immunity for witness statements, the Supreme Court intended to strike a balance between what the Court felt were two legitimate but competing interests.[39] The policies underlying the discovery rules seemed to argue in favor of disclosure. After all, those rules rest on a philosophy that "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation,"[40] and the Court stood foursquare behind that philosophy.[41] But the *Hickman* Court also believed that "[n]ot even the most liberal discovery theories can justify unwarranted inquiries into the files . . . of an attorney."[42] From this premise, the Court concluded that our system of justice would founder if witness statements prepared by litigants were freely available to their opponents.[43]

The Court devised a compromise which it hoped would accommodate both these interests. Work product documents were ordinarily not discoverable,[44] but the "facts" contained in them were freely obtainable through interrogatories and other discovery devices.[45] The

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ment (lawyer prohibited from revealing client's intent to commit a crime not involving risk of serious bodily injury or death because disclosure would inhibit clients "from revealing facts which would enable the lawyer to counsel against a wrongful course of action" and "[t]he public is better protected if full and open communication by the client is encouraged") *with* rule 3.3 comment (lawyer required to reveal perjury by client, even criminal defendant, because "if the lawyer does not exercise control over [the perjured testimony], the lawyer participates . . . in deception of the court").

39. "It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task." *Hickman*, 329 U.S. at 497. *But see* Special Project, *supra* note 7, at 787-88 (work product and open discovery are consistent because both promote full issue and fact development).

40. *Hickman*, 329 U.S. at 507.

41. "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Id.*

42. *Id.* at 510.

43. *Id.* at 511. See *infra* Part III for a rebuttal to the arguments in favor of work product protection for witness statements.

44. The Court suggested that the immunity might be abrogated in certain cases, such as where the document might itself be admissible or where the witness was no longer available or difficult to reach. *Hickman*, 329 U.S. at 511-12. See *supra* note 6 for the Fed. R. Civ. P. 26(b)(3) standard for overcoming work product protection.

45. *Hickman*, 329 U.S. at 508-09.

Hickman Court tacitly acknowledged the duplicativeness inherent in its solution,[46] but the Justices believed that this was a necessary price to pay for preserving "the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests."[47]

This Part demonstrates why the work product doctrine is much more costly than is conventionally supposed. First—notwithstanding *Hickman*'s assurances to the contrary—immunizing witness statements from discovery can result in the concealment of relevant information. Replication of the information contained in these statements will often be impossible, yet Rule 26(b)(3) only rarely rescues litigants whom the work product rule has left in the dark. Parties will rarely know that they have missed (or have been maneuvered into missing) potentially helpful information.[48] Even when they suspect that their opponent's work product contains "buried treasure," such suspicions are not usually adequate grounds for overcoming the immunity.[49]

Second, work product protection entails significant systemic costs. The doctrine systematically requires duplication of effort. While lawyers may benefit from this scheme, it is far less clear that society does.[50] Work product costs time as well as money. Our legal system, with its massive litigation costs, should no longer tolerate a rule which so seriously impedes each party's efficient acquisition of information. Furthermore, in their desire to create an elegant answer to a perplexing question, the Court and the rulemakers have overlooked what might be called the "costs of fighting." These are the costs of the disputes generated by the doctrine. For reasons discussed below,[51] work product creates enormous costs of fighting.

Finally, work product is not a politically neutral doctrine. It favors institutional litigants (like insurance companies) over those who litigate on a "one-shot" basis.[52] Perhaps this kind of imbalance is what the American bench and bar want, but they should not be gulled into be-

46. *Id.* at 509 (based on the record before the Court, the information which plaintiff sought had either already been supplied through defendants' interrogatory answers or was "readily available to him direct from the witnesses for the asking [i.e., by conducting his own interviews or taking his own depositions of them]").

47. *Id.* at 511.

48. "[M]any of the most successful abuses of discovery, such as nondisclosure of arguably privileged irrelevant or unsolicited information, probably escape detection by opposing counsel." Brazil, *supra* note 8, at 1308.

49. *See infra* note 64.

50. *See infra* text accompanying notes 170-78.

51. *See infra* text accompanying notes 87-95.

52. Galanter, *Why the Haves Come Out Ahead*, 3 LAW & SOC. REV. 95 (1974).

lieving that work product immunity has no substantive effect on who wins and loses in litigation.

A. Information Concealment—And Why We Should Care About It

Supporters of work product protection for witness statements believe that the legal system can have its cake and eat it too. If statements are protected but the "facts" they contain must be revealed, then adversarial incentives for full investigation remain, but both sides can obtain all relevant information.[53] However, the *Hickman* formula overlooks certain unpleasant realities about litigation. Many parties lack the money to duplicate their opponent's work product.[54] They may forgo discovery (or litigation) entirely[55] or will allocate limited resources unwisely because they cannot identify the most important witnesses.[56] The doctrine gives scant attention to these problems.[57]

Of course, discovery was not intended as a wealth redistribution device. Under the American dispute resolution system, parties must, at least to some extent, pay their own way.[58] However, discovery *was* intended as an information *redistribution* device.[59] Therefore, since par-

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53. Cleary, Hickman v. Jencks, *Jurisprudence of the Adversary System*, 14 VAND. L. REV. 865, 868-9 (1961). *Accord* Special Project, *supra* note 7, at 799.

54. *See infra* text accompanying notes 99-112 (work product is not a politically neutral doctrine); notes 123-25 (permitting parties to share the costs of creating witness statements in cases of extraordinary expense would be more economical than mandatory duplication of investigatory efforts).

55. The most comprehensive study of actual discovery practice found that lawyers who handled "small" cases (median size $25,000) estimated, on the average, that costs affected discovery in only 25% of their cases. *Problems and Abuses, supra* note 14, at 840. Brazil expresses surprise that this figure is not higher, especially given the expense of discovery detailed elsewhere in his report. He hypothesizes that lawyers probably screen out cases where discovery would be too costly, or are reluctant to admit that they consider costs for fear of sounding unprofessional. *Id.*

56. *See* Cooper, *supra* note 5, at 1308-09.

57. A party's poverty does not create the "undue hardship" necessary to overcome work product immunity under FED. R. CIV. P. 26(b)(3). Special Project, *supra* note 7, at 810, states that Naylor v. Isthmian S.S. Co., 10 F.R.D. 128 (S.D.N.Y. 1950) is the only reported case where this argument has been successful. The circumstances of *Naylor* were unusual: the plaintiff was an impecunious widow whom the court did not want to force to choose between an early trial date and adequate preparation.

58. *See* G. HAZARD, ETHICS IN THE PRACTICE OF LAW 134 (1978).

59. Edson R. Sunderland, the primary drafter of the discovery portions of the original *Federal Rules of Civil Procedure*, stated that the philosophy of those rules was that "[e]ach party may in effect be called upon by his adversary or by the judge to lay all his cards upon the table, the important consideration being who has the stronger hand, not who can play the cleverer game." Sunderland, *Discovery Before Trial Under the New Federal Rules*, 15 TENN. L. REV. 737, 739 (1939). While there is some inherent conflict between this philosophy and an adversary method of discovery, *see generally* Brazil, *supra* note 8, our system remains committed to disclosure of as much information as can be reasonably afforded, *see infra* text accompanying notes 73-74 & 192-94.

ties with greater resources will often have a greater ability to develop information,[60] requiring them to share that information is consistent with the purposes of discovery.

The difficulties created by work product protection for witness statements are more than just another example of how the American adversary system disadvantages economically weak parties. Frequently litigants have adequate resources but still are unable to replicate the information contained in their opponents' work product. Even highly competent and well-financed counsel will often fail to recreate the other side's data.

For instance, under the present rule, it is almost impossible for an attorney to find out whether an opposing witness' statement, taken soon after the event in question, differs significantly from later deposition testimony. Modifying the facts in *Hickman*, suppose that one of the witness' statements says that he "believes" he heard the sound of water coming into the vessel for several hours before the disaster occurred. The other three survivors say they heard no unusual noises. When deposed by plaintiff's lawyer, the one crewman admits that he "might" have heard "something," but he says he has no real idea what it was, and isn't sure whether he really heard anything at all.[61] The law would probably not consider this testimony perjurous,[62] yet the crew

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60. *See infra* text accompanying notes 99-106.

61. For present purposes, the key difference between the real facts in *Hickman* (*see supra* note 1) and the hypothetical is the plaintiff's access to the transcript of the government's investigative hearing, a hearing which was held even before defense counsel had obtained written statements. This fact makes *Hickman* aberrational: in most cases the statements taken by a party's lawyer or investigator are the best (and maybe the only) source of contemporaneous information.

Reading the *Hickman* opinions, one suspects that the availability of the crew members' earlier testimony, along with the broadness of plaintiff's demand for intangible and opinion work product, *see supra* note 1, influenced the Court to grant stronger protection for witness statements than it might otherwise have done. *See supra* note 33 (Justices Murphy and Jackson both seemed most concerned about the dangers of discoverability of various forms of work product other than witness statements). *Cf.* Waits, *Values, Intuitions and Opinion Writing: The Judicial Process and State Court Jurisdiction*, 1983 U. ILL. L. REV. 917, 937-48 (unarticulated and intuitive factors may help explain Supreme Court decisions on state court jurisdiction). With respect to written witness statements, Justice Jackson concluded merely that the plaintiff in *Hickman* had not met the "good cause" standard for document production then contained in FED. R. CIV. P. 34. *Hickman*, 329 U.S. at 519 (Jackson, J., concurring). Rule 34 was amended to eliminate the "good cause" requirement in 1970, but rule 26(b)(3), which codified work product immunity for witness statements, was adopted as part of the same set of amendments. During the period between *Hickman* and the rule, there was confusion about the relationship between the work product doctrine and rule 34. *See* Special Project, *supra* note 7, at 780-81 and cases cited therein.

62. If the testimony were perjurous, the company's attorney would be bound by ethical rules to prevent it or, if he could not prevent it, reveal the perjury. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) comment:

> "When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it. . . . [In civil cases, even when client perjury is

member's deposition testimony is different from that contained in his statement.

The problem with this scenario is not that the witness has shaded his testimony. Given human motivations such as embarrassment, ambition, greed, and rationalization, shading will occur frequently.[63] The problem is that the shading has been successfully concealed. If the plaintiff's attorney could obtain a copy of the statement, he could use it to impeach the witness or to hold him to his original version. However, unless the party seeking work product learns fortuitously that an earlier statement is inconsistent with later testimony, that party has no way of showing (and probably no way of knowing) that the witness' story has been altered.[64] Thus, without any incompetence or unethical behavior

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involved] the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party."

A fortiori perjury by a non-client in a civil suit must be revealed.

Because the rules of professional responsibility address the issue, revelation of work product is not technically necessary to rectify the problem of perjured deposition testimony. However, accessibility of witness statements might operate as a check on the well-documented tendency of lawyers to use discovery for their clients' gain.

The hypothetical given in the text assumes that the shading of the witness' testimony occurs at the deposition stage, not during the preparation of his statement. While the possibility of adversarily biased statements must be acknowledged, there is good reason to believe that statements usually will be accurate. *See infra* note 139 and accompanying text.

63. In our hypothetical case, the crew member might hold himself responsible for the deaths of his fellow crewmen. Many people would react to these guilt feelings by convincing themselves that they had not really heard anything. *See* G. HAZARD, *supra* note 58, at 130 ("it seems evident that if the stakes involved are substantial, . . . the parties will distort their submissions to the maximum extent possible. The artistry and self-consciousness of the distortion will of course vary.").

64. According to the case law, the party seeking the witness, statement must show more than a "mere surmise or suspicion" that discrepancies exist between the statement and the witness' later testimony. Hauger v. Chicago, R.I. & P.R.R., 216 F.2d 501, 508 (7th Cir. 1954). The discrepancies must also be major. *See* Hamilton v. Canal Barge Co., 395 F. Supp. 975, 978 (E.D. La. 1974). The burden placed on the discovering party can be satisfied in one of two unlikely ways. First, the party might convince the court to perform an in camera inspection of the statements, a procedure which is so wasteful of judicial resources that many judges will be reluctant to undertake it. *See Improving Judicial Controls*, *supra* note 14, at 887 (judges generally reluctant to get involved in discovery disputes; criminal and civil trials given much higher priority). *Cf.* Cooper, *supra* note 5, at 1321 (judge may not be familiar enough with case to know when a discrepancy is material). *But see* Harper & Row Publishers, Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970) (statement ordered disclosed following in camera inspection). Alternatively, the party must search for extrinsic signs that the witness has changed his or her story. Sometimes witnesses will tell their original version of events to someone other than the statement taker. Unfortunately, tracking down such potential discrepancies is expensive and success is usually a matter of change. Cooper, *supra* note 5, at 1320.

In a backhanded way, the *Hickman* Court recognized this problem. In asserting the availability of alternate sources of information, the Court said, "*[f]or aught that appears*, the essence of what petitioner seeks either has been revealed to him already through [respondent's answers to] the interrogatories or is readily available to him direct from the witnesses for the asking." *Hickman*, 329 U.S. at 509 (emphasis added). How could the Court be confident that reality matched appearances without knowing what the witness statements said? *Cf.* LaFrance, *supra* note 8, at 366

on anyone's part, the work product doctrine has shielded relevant information from disclosure.

Or take the situation where the witness is more likely to be forthcoming with the statement taker than with the other side. In *Hickman*, for instance, the seamen probably would have wanted to cooperate with his employer's attorneys, at least initially.[65] In many other situations, witnesses are aligned with the side which possesses their statement.[66] Nonetheless, the case law presumes that the information obtained from such witnesses through depositions is the "substantial equivalent" of what they told their ally.[67] This claim is either disingenu-

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(*Hickman* is self-contradictory; the Court indicated that it might allow discovery of work product if necessary for impeachment, but then denied plaintiff's request for discovery because he only wanted to prepare himself better for trial). See *also infra* text accompanying notes 82-86 for discussion of why answers to interrogatories will often fail to reveal alterations in testimony.

65. The facts of *Hickman* are summarized in note 1 *supra*. The witnesses in *Hickman* would in all likelihood feel conflicting loyalties. On the one hand, they might feel compelled to cooperate with defense counsel because he represented their employer. On the other, they might feel angry and vengeful toward the tugboat company and sympathetic toward the plaintiff, the family of their deceased fellow crewman.

Due to recent expansions in the coverage of the attorney-client privilege for corporations, the statements in *Hickman* might be privileged today. *See* Upjohn Co. v. United States, 449 U.S. 383, 394 (1981) (communication privileged when provided to corporate counsel by corporate employee in order to secure legal advice for the corporation). *But see* Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 496 n.165 (1982) (statements in *Hickman* should not be considered privileged because Fortenbaugh was acting as an investigator, not as a lawyer, and because employees did not supply information on behalf of corporation, since they had claims against tug company).

Some have argued that broad work product immunity is a good idea because it rests on the same foundation as the attorney-client privilege. *See* Cleary, *supra* note 53, at 886-87. However, comparing work product with basic privilege law can just as easily lead one to conclude that the work product doctrine should be read as narrowly as possible. Both work product and privilege doctrines are an impediment to the search for truth. It is for this reason that the courts have long held that privileges should be created only when absolutely necessary and, once created, should be interpreted narrowly. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 710 (1974); NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965) "[T]he privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* at 907 (quoting 8 J. WIGMORE, EVIDENCE § 2292 at 554 (J. McNaughton rev. 1961)). *But see infra* note 178 (courts may give attorney-client broader scope than other privileges, perhaps because judges are lawyers).

66. When witnesses side with the litigant who does not possess their statement, the second paragraph of FED. R. CIV. P. 26(b)(3) provides a foolproof solution. Witnesses have a right to receive upon request a copy of their statements; friendly witnesses can then turn them over to the party with whom they sympathize. *See infra* notes 151-55 and accompanying text.

67. Only if the witness displays overt hostility to the deposing party may the immunity be overcome. Special Project, *supra* note 7, at 807-08 and cases cited therein.

The assumption that deposition testimony will usually recreate actual events is belied by the finding in *Problems and Abuses*, *supra* note 14, at 819, that significant information is not revealed in about one-half of the depositions taken.

ous or delusional. In either event, once again application of the work product doctrine causes information to be secreted.

The imperfections of human memory provide yet a third reason that alternate discovery may not reproduce witness statement information. Numerous work product cases involve statements which were taken shortly after the litigated incident.[68] Some courts have correctly held that, even under the work product doctrine, contemporaneous statements are "unique catalysts in the search for truth,"[69] and therefore discoverable.[70] Others, however, interpret the "no substantial equivalent" requirement of Rule 26(b)(3) as requiring the party seeking work product to satisfy a heavy burden before discovery is permitted.[71] Decisions in the latter group disregard the rapid deterioration of human memory[72] and sacrifice highly probative and reliable evidence on the altar of work product.

This Section has so far assumed that the use of the work product doctrine for information concealment is a disturbing phenomenon. It may be appropriate to state overtly the reasons underlying this assumption. Whatever the faults of discovery as practiced, American lawyers and judges still agree with the "other half" of *Hickman*—that justice demands full disclosure of relevant information.[73] Recent amendments to the *Federal Rules of Civil Procedure* were designed to curb adver-

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68. *See generally* Special Project, *supra* note 7, at 803-06. From its comprehensive review of the cases, the Special Project concludes that "[i]n most cases, one party will have a contemporaneous [witness] statement." *Id.* at 804 n.271. See *infra* text accompanying notes 99-102 for a discussion of the political implications of who holds work product.

Hickman was not a case where the work product had been created immediately after the incident. However, suit was not filed until nine months after the statements were taken and twenty-one months had passed by the time their production was sought. *See supra* text accompanying note 1. Therefore, even in *Hickman*, the statements probably were more reliable than the witnesses' later deposition testimony.

69. Johnson v. Ford, 35 F.R.D. 347, 350 (D. Colo. 1964).

70. *See* Hamilton v. Canal Barge Co., 395 F. Supp. 975 (E.D. La. 1974). The basis for such a holding is that the litigant seeking the statement has satisfied the "no-substantial-equivalent" test of Rule 26(b)(3).

71. *See, e.g.*, Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968) (witness must have been unavailable to the discovering party for some time after the relevant events); Almaguer v. Chicago, R.I. & P.R.R., 55 F.R.D. 146 (D. Neb. 1972) (mere passage of time is inadequate basis for ordering discovery; witness must admit or otherwise indicate lack of memory). *Lanham* is an example of the puritanical philosophy of the work product doctrine, *see infra* notes 116-18 and accompanying text.

72. *See* authorities cited in Speeial Project, *supra* note 7, at 804 n.270.

73. *See, e.g.*, Frankel, *supra* note 23, at 1041: "Liberalized discovery has helped [improve the search for truth in the litigation process], though the struggles over that, including the well-founded fears of tampering with the evidence, highlight the hardy evils of adversary management." *See also* Brazil, *supra* note 8, at 1298-1303 (compilation of sources, many of them contemporaneous with the adoption of the *Federal Rules of Civil Procedure* in 1938, extolling the virtues of open discovery). Brazil notes that the "drafters and early proponents of the rules of discovery . . . seem to have assumed that the rules themselves would reduce the sizc of the litigation arena in

sarial excesses and to require a cost-conscious examination of discovery, not to alter its basic purpose of information revelation.[74] It is therefore more valid than ever to question a rule of law which allows and even encourages adversaries to hide data from each other.

B. Mandatory Duplication of Investigations

Despite the critique developed in the preceding Section, the adversary system does sometimes work. At times parties can develop information which is functionally equivalent to that contained in their opponents' work product. However, even when the system operates as planned, the *Hickman* scheme exacts substantial costs. The discovering party is required to perform a duplicate and inefficient inquiry, without any of the clues or shortcuts that the adversary's work product might provide.

Work product proponents concede that the doctrine requires duplicate investigations. But their counterargument is that duplication is inherent in the adversary system.[75] This argument misses the point. Naturally there will be times when attorneys, in order to represent their clients adequately, must duplicate their opponents' efforts.[76] But that does not mean that the adversary system should demand dual investigations in every case regardless of the costs to clients and the legal system.[77] One of the most oppressive subdoctrines of work product is that the expense of duplication cannot form a basis for overcoming the immunity.[78]

The work product doctrine treats time as cavalierly as it treats money. It assumes that the delay caused by a duplicative investigation

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which adversary instincts and tactics would predominate." *Id.* at 1299. The remainder of his article details how wrong this assumption was.

74. *See Preliminary Draft, supra* note 14, at 48.

75. Special Project, *supra* note 7, at 810.

76. *See infra* text accompanying note 122.

77. Some might argue that if a duplicate investigation is not in the client's interest, then the lawyer will not do it. However, this argument fails to factor in the effect of uncertainty. When faced with doubts about whether investigation will be fruitful, most lawyers will feel forced to proceed with their inquiries, at least to the extent which their clients can afford. Having access to witness statements should reduce uncertainty.

78. Brennan v. Engineered Prods., 506 F.2d 299, 303 (8th Cir. 1974). *See also* Cohn, *The Work-Product Doctrine: Protection, Not Privilege*, 71 GEO. L.J. 917, 929-30 (1983). The Special Project, *supra* note 7, at 810-11, discusses a few cases, e.g., *In re* International Systems & Control Corp. Sec. Litig., 693 F.2d 1235 (5th Cir. 1982), where the courts did consider expense factors. The Special Project, *supra* note 7, at 811, criticizes considerations of cost issues. The Project's authors believe that work product will not achieve its supposed purposes unless applied uniformly and that the traditional policy justifications for the doctrine are so strong that they outweigh cost considerations. See *infra* text accompanying notes 192-95 for discussion of how this aspect of work product is antithetical to recent discovery reforms.

is a luxury that all parties and the legal system can afford. If American lawyers have learned anything over the four decades since *Hickman*, it is the devastating impact of delay. Delay drains all parties, especially economically weaker ones, and engenders disrespect for the legal system. Perhaps worst of all, the longer it takes for parties to obtain basic information, the more settlements are postponed or occur on unjust terms. It is worth remembering that one of the primary purposes of discovery has always been to encourage expeditious and fair settlement.[79] Today, settlement remains the norm in civil litigation, but too often it happens before both sides acquire all important data.[80] The abolition of work product protection for witness statements cannot alone cure delay, but it is a step in the right direction.

The compulsory duplication of effort mandated by the work product doctrine is wasteful in a final, more subtle way. *Hickman* suggests that the party seeking information can obtain all the relevant "facts" through interrogatories.[81] Production of statements is preferable to interrogatories, but if alternate means of discovery are required, interrogatories are at least the most economical discovery tool. However, interrogatories will never produce the equivalent information to work product in any case where different witnesses give conflicting accounts of the same event.[82] *Hickman* once again provides an illustrative hypothetical.

Assume that one crewmember is positive that the boat had been taking in water and further states that the crew knew about the condition but chose to ignore it. The other three seamen vigorously contest these facts and say they have no idea why the tug sank. The defendants' attorney decides, not surprisingly, that he believes the three witnesses who are good for his case over the one who is not. If the plaintiff promulgated an interrogatory asking, "What caused the accident?" defense counsel could and would reply, "The defendants have no knowledge of the accident's cause." Even though his answer fails to reveal a crucial "fact"—that he has certain information which is inconsistent

79. Brazil, *supra* note 8, at 1302 and authorities cited therein. Thus, yet another problem with the work product doctrine is that it is too focused on trial preparation as opposed to settlement. *See* Note, *The Work Product Doctrine in Subsequent Litigation*, 83 COLUM. L. REV. 412, 425-26 (1983) (one of primary purposes of work product is to protect integrity of trial process).

80. *See Problems and Abuses*, *supra* note 14, at 812-13 (lawyers reported that in 30% of the cases they settled they possessed significant information which their opponents had not discovered at the time of settlement).

81. "Full and honest answers to [plaintiff's interrogatories] would necessarily have included all pertinent information gleaned by Fortenbaugh through his interviews with the witnesses." *Hickman*, 329 U.S. at 508-09.

82. This is to say nothing of the fact that interrogatories are responded to more evasively than any other type of discovery. *Front Lines*, *supra* note 14, at 233. However, our concern here is with admittedly correct and ethical discovery responses, not abusive ones.

with his response—defense counsel has violated no rule of discovery or professional responsibility.[83] In answering interrogatories, parties need only give their version of what happened.[84] True, defense counsel must, if asked, provide the other side with the names and addresses of the witnesses,[85] whose depositions can then be taken. We can at least hope that the plaintiff's lawyer will eventually learn about the favorable witness' testimony.

In the case where there are only four witnesses recounting a fairly simple set of facts, the expense of duplication through deposition may not be justified, but it is not overwhelming. However, as the number of witnesses and the complexity of events grow, truth may suffer along with the discoveror's pocketbook. The more complicated the case, the more difficult it will be: 1) to learn who the important witnesses are;[86] 2) to take their depositions; and 3) to ask the questions which will elicit all the information they have. Discovering counsel may be forced to rely on some of his opponent's interrogatory answers, even though they are

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83. Cooper, *supra* note 5, at 1306 raises the problem of conflicting versions and work product, but does not resolve the question of how the lawyer should answer a general interrogatory.

Shapiro's empirical study involves a slightly different work product situation but illuminates the ways in which lawyers use the work product immunity to hide relevant information. Shapiro constructed the following hypothetical: the client is the executor of an estate. The executor is suing for the decedent's wrongful death in an automobile accident in which the decedent had been the driver. The only witness to the accident, who is now also dead, told the lawyer that the decedent did not come to a full stop. The lawyer did not take a written statement from the witness. The lawyer has no reason to believe the witness was lying, but also has no independent way of verifying the accuracy of the witness's information. Shapiro, *supra* note 8, at 1058. The jurisdiction is a comparative negligence state, so that the lawyer may ethically continue with the litigation despite the deceased witness's statement.

Shapiro received responses from more than 100 Maine and Massachusetts lawyers concerning what they would do in response to various types of discovery. When asked whether the deceased driver had come to a full stop, only 20% of the attorneys responded with a statement or even a hint (through a reference to hearsay, privilege or work product) that the witness existed and had said something about the issue. *Id.* at 1062. When asked for what information they had about whether the driver had come to a full stop, 19% gave no hint of the witness's existence while 27% relied on work product as a basis for refusing to answer. *Id.* at 1063.

84. The case law holds that inquiring parties cannot force their opponents to recreate work product through interrogatory answers. *See, e.g.*, Peterson v. United States, 52 F.R.D. 317, 320 (S.D. Ill. 1971). Shapiro, *supra* note 8, at 1091-92, expresses concern that work product, as currently interpreted, permits attorneys to hide relevant information. *See supra* note 83. He proposes that rule 26 be amended to make clear that work product does not protect the substance of witness statements, although it should continue to protect attorneys' evaluations of whether a witness's statement is truthful.

85. "Parties may obtain discovery regarding . . . the identity and location of persons having knowledge of any discoverable matter." FED. R. CIV. P. 26(b)(1).

86. This search will often be obstructed by the common tactic of responding to interrogatories by listing "dozens of people who 'have relevant information' when only one or two know anything of real significance." *Front Lines, supra* note 14, at 236.

not the same as what a costly series of depositions would reveal. It would be more economical if witness statements were discoverable.

C. The Costs of Fighting Over Work Product—And Why Fighting Is Inevitable

The mandatory duplication inherent in work product immunity is only one element of the doctrine's cost. We must also consider the expense of the numerous litigation struggles generated by the doctrine. This Section will explore why the work product doctrine engenders so many controversies and will try to assess these controversies' costs.

Certain factors help predict whether a rule of law is likely to cause conflict. One important factor is how complex and ambiguous a doctrine is. Any doctrine which calls on the courts to balance competing value choices can be counted on to be complex and ambiguous. Work product—"arising as it does from the colliding thrusts of our discovery and trial processes and from conflicting currents in our modified adversary system"[87] —is no exception to this rule. Judges who doubt the wisdom of work product protection for witness statements will naturally interpret its ambiguities in a pro-disclosure fashion. Since other judges agree wholeheartedly with *Hickman*, the result is a legal principle overrun with conflicting results and theories.[88] To make matters worse, irreconcilable precedents multiply like rabbits: they encourage more disputes, which cost time and money, and create more irreconcilable precedents.[89]

As important as the doctrine's complexity, is whether parties believe that the doctrine is worth fighting over. Since work product is the most frequently litigated discovery issue,[90] it must be consistently perceived as a high stakes issue. Several reasons account for the frequent litigation generated by work product immunity. First, American lawyers are committed to a highly adversarial approach to all aspects of

87. Clermont, *supra* note 5, at 755. *See also* Shapiro, *supra* note 8, at 1069 (ambiguity in distinction between discoverable facts and content of work product creates difficulties).

88. *See, e.g.*, Cohn, *supra* note 78, at 936-38 (confusion in courts concerning whether and when work product protection is waived); Note, *supra* note 79, at 421-24 (conflicting case law on duration of work product protection); Note, *infra* note 111, at 1279, 1292-93 (inconsistent precedents on when the "in anticipation of litigation" test has been satisfied).

89. As long as the work product doctrine remains, little can be done to resolve the conflicts in the case law. The numerous weasel words of Rule 26(b)(3) make irreconcilable case-by-case determinations inevitable. Further, the Supreme Court will never hear enough work product cases to provide more than minimal guidance to the lower courts. *Cf.* Waits, *supra* note 61, at 972-74 (Court will hear state court jurisdiction cases infrequently because other, more fundamental areas of law command the justices' attention).

90. 4 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 26.63[1] at 26-310 (2d ed. 1984).

discovery.[91] Second, work product strikes at the heart of litigators' competitive, adversarial spirit. Parties seeking production of work product will assume that the materials could help their case.[92] On the other side, lawyers who possess work product will say to themselves, "I've worked hard and my client has spent a lot of money to create these documents. I'm not going to give them up without a fight."[93]

The inclination to fight over work product increases because of the differences between who has and who wants work product. Institutional litigants, the typical holders of work product,[94] are also the parties who are most likely to benefit from delay.[95] It will often be in their interest to raise work product claims regardless of whether a document's revelation would be damaging to their case.[96] For their part, lawyers who wish to overcome the immunity may be faced with situations where their clients can afford a battle over the witness statements but could not pay for an entire set of depositions.

Litigation is very costly, in both economic and human terms. Academics and even lawyers tend to forget that every opinion is more than words on a page or a citation in a treatise. It represents expense and probably misery for everyone involved, and for society at large.[97] Any time a doctrine produces a lot of litigation, we have to ask whether a

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91. *See generally* Brazil, *supra* note 8, at 1320-31. *Front Lines, supra* note 14, at 250 nn. 53 & 54, contains illuminating quotes on lawyers' attitudes toward discovery such as: "Our job is to win for our side. We aren't out to do justice; that's the judge's job" and "Never be candid and never helpful and make [your] opponent fight for everything."

92. Work product "will surface frequently, because the protected materials are commonly created by each side but uncommonly useful to the opponent." Clermont, *supra* note 5, at 755.

93. *See* Hazard & Rice, *Judicial Management of the Pretrial Process in Massive Litigation: Special Masters as Case Managers*, 1982 AM. B. FOUND. RESEARCH J. 375, 404-05 (work product immunity often claimed for "innocuous papers").

94. *See infra* text accompanying notes 99-112.

95. *See* G. HAZARD, *supra* note 58, at 123 (discovery is just one example of how "[p]rocedural technicality is routinely exploited [in the American legal system] to impose delay and expense on opposing parties"); Edelstein, *The Ethics of Dilatory Motion Practice: Time for Change*, 44 FORDHAM L. REV. 1069, 1076-78 (1976) (benefit from delay associated with motions is often much greater than any gain from motion's disposition; ethical proscriptions against tactical use of delay inadequate).

96. *See Problems and Abuses, supra* note 14, at 853-54 (defendants are more likely than plaintiffs to use delaying and other tactics to retard their opponents' discovery); *Front Lines, supra* note 14, at 243 n.45 (corporate clients are more likely to resist disclosure during discovery than individuals).

Lawyers who work for institutional litigants may also have purely selfish motivations for interjecting discovery objections. These lawyers are usually paid by the hour, and thus contentiousness is very profitable for them. *See Front Lines, supra* note 14, at 235 ("meter running" is reported to be a common discovery abuse).

97. "It would be better if there were a larger constituency that understood, with Judge Learned Hand, that being in litigation, whatever its outcome, can justly be compared with sickness and death." G. HAZARD, *supra* note 58, at 135.

better way exists. The search for alternatives is even more pressing when the controversial doctrine is procedural rather than substantive.[98] In the case of work product, the need for the doctrine will have to be awfully strong to warrant all the fuss.

D. The Beneficiaries of the Work Product Doctrine

Beyond the question of the costs engendered by work product protection of witness statements, it is important to examine whether the benefits and burdens of this protection are distributed equally among all classes of litigants. In *Hickman*, the deceased seaman's representative argued that adoption of a work product doctrine "would give a corporate defendant a tremendous advantage in a suit by an individual plaintiff."[99] He predicted that if protection were bestowed on trial preparation materials, "the corporate defendant could pull a dark veil of secrecy over all the pertinent facts it can collect after the claim arises merely on the assertion that such facts were gathered by its large staff of attorneys and claim agents."[100] This practice would adversely affect injured plaintiffs, who often would not retain counsel until some time after sustaining their injury.

The Court brushed off this contention by noting that discovery is equally available to both plaintiffs and defendants.[101] This response is reminiscent of Anatole France's oft-quoted observation that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[102] In the case of work product, we should inquire, "Is there a class of litigants which is the most likely to take witness statements?" This group will be the doctrine's primary beneficiary. On the other hand, if we can identify

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98. *See* FED. R. CIV. P. 1 (rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").

99. *Hickman*, 329 U.S. at 506.

100. *Id.*

101.

> "Discovery concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition. It is available in all types of cases at the behest of any party, individual or corporate, plaintiff or defendant. The problem thus far transcends the situation confronting this petitioner."

Id. at 507. Freedman, petitioner's attorney in *Hickman*, was not alone in perceiving the political repercussions of work product. Two unions, the United Railroad Workers of America and the National Maritime Union of America, participated as *amicus curiae* supporting Freedman's position. *Id.* at 497. The American Bar Association and the Maritime Law Association argued in favor of work product. *Id.* Justice Jackson found it "strange" that the unions and plaintiff's attorney took a pro-discovery tack, since plaintiffs had generally opposed broad discovery. *Id.* at 515 (Jackson, J., concurring).

102. A. FRANCE, LE LYS ROUGE ch. 7 (1894) quoted in BARTLETT'S FAMILIAR QUOTATIONS 655 (E. Beck, ed., 15th ed. 1980).

certain types of litigants who do not normally prepare work product but are often on the opposite side from parties who do, then they suffer most from the doctrine's application. When examined from this perspective, it is not hard to see who the winners and losers are. The winners are repetitive, institutional litigants. Insurance companies and corporations which face numerous accident claims[103] are quintessential examples. These parties have the resources, the experience, the personnel and, most of all, the incentive to engage in extensive, early investigation.[104] Such parties will naturally be reluctant to share the materials they have so diligently acquired.[105] On the other side of the ledger are parties, usually individuals of limited means, who are unexpectedly involved in a litigation-creating event; the classic example is the personal injury plaintiff. Parties of this type are doubly disadvantaged by *Hickman* and Rule 26(b)(3): they do not create work product themselves, nor do they have the money to recreate the other side's work product.[106]

Work product case law does not overtly address the question of "repeat player" favoritism. However, judges have not been totally insensitive to the doctrine's social and political consequences. Certain decisions may be best understood as judicial efforts to avoid the most egregious inequities of work product protection.[107] For example, those

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103. For instance, railroads are often involved in witness statement work product cases. *See* Special Project, *supra* note 7, at 804 n.271 and cases cited therein.

104. Galanter, *supra* note 52, at 98-103 lists the many advantages that "repeat players" have over "one shot" players. Repeat players can structure legal relationships, including the litigation process, based on their experience; they have access to specialists (such as investigators); and they benefit from economies of scale. A significant although far from perfect correlation exists between "repeat players" and economic power. *Id.* at 103. For an example of how a repeat player acts with respect to work product, see Special Project, *supra* note 7, at 804 n.271 (railroads have systematic procedures for accident investigation because management realizes that their companies are inviting targets for "deep pocket" litigation).

105. "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." Cooper, *supra* note 5, at 1325.

106. Brazil, in *Problems and Abuses, supra* note 14, at 813-17, confirms that the benefits of discovery are not equally distributed. Lawyers who primarily represented plaintiffs reported that they believed that 40% of the time they settled cases lacking significant knowledge that their opponents possessed, while in only 20% of their cases did they settle while holding information defense counsel had not discovered. Data collected from defense counsel appeared to confirm plaintiffs' lawyers suspicions, since defendants estimated that in 40% of their cases the plaintiff had failed to obtain important data. A similar, although less striking, divergence occurred when attorneys were asked how often they had finished a trial believing that their opponent had not discovered all the significant information. The mean figure for defense counsel was 32% (median 20%); for plaintiffs the mean percentage was 17% (mean) (median 10%).

107. This is not meant as a criticism of these decisions, nor as an accusation that the judiciary has been dishonest or unfaithful to the rule's correct meaning. Because the work product

decisions which permit discovery of contemporaneous statements[108] have the effect of shifting the balance away from the parties who take such statements and toward those who do not.[109] There are also a few cases where work product has been ordered produced because the plaintiff had been unable to obtain counsel soon after the claim arose.[110] The most common situation in which courts confront the issue of institutional bias is when they are asked to interpret the 26(b)(3) requirement that work product be prepared "in anticipation of litigation."[111] Those judges who are inclined to find that documents were prepared "in the ordinary course of business," rather than in anticipation of litigation, probably do so in part because they are uncomfortable with granting systematic protection to entities which frequently litigate.[112] Those who lean the other way presumably believe that full disclosure is less important than protecting the adversary process.

The purpose of pointing out the true beneficiaries of work product is two-fold. First, legal decisionmakers should not delude themselves about the practical effects of seemingly neutral doctrines. Second, a bold course of action is sometimes better than indecisive meandering. The legal system's present response is to preserve work product protection for witness statements while trying to ameliorate its worst effects through case-by-case judicial maneuvering. Abolishing the doctrine entirely in the area of witness statements might make more sense.

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doctrine involves such a difficult balancing test, judges are permitted and even encouraged to make highly individualized decisions. *See supra* notes 87-89 and accompanying text.

108. *See supra* notes 68-72 and accompanying text.

109. *See* Cohn, *supra* note 78, at 931 n.127. While Cohn is generally sympathetic to the traditional policy rationales for work product, he acknowledges that discovery of contemporaneous statements "appear[s] to be viewed as a method of lessening the relative disadvantage that each plaintiff [suffers] because of this lack of information" (citing Teribery v. Norfolk & W.R.R., 68 F.R.D. 46, 47-48 (W.D. Pa. 1975); Gillman v. United States, 53 F.R.D. 316, 318-19 (S.D.N.Y. 1971) as cases where courts dealt sympathetically with the discovering party's predicament).

110. *See, e.g.*, Goosman v. A. Duie Pyle, Inc., 320 F.2d 45 (4th Cir. 1963). These cases typically involve plaintiffs who were too injured to seek counsel, rather than those who were merely too unsophisticated or poor to do so. *See* Special Project, *supra* note 7, at 809.

111. *See generally*, Note, *Work Product Discovery: A Multifactor Approach to the Anticipation of Litigation Requirement in Federal Rule of Civil Procedure 26(b)(3)*, 66 IOWA L. REV. 1277 (1981).

112. *See* Special Project, *supra* note 7, at 848-51 and cases cited therein. The theory behind the "ordinary course of business"/"in anticipation of litigation" dichotomy is that the adversary system should protect only those materials which might not be created at all if they were discoverable by a party's litigation opposition. *Id.* at 843-44. For a sharp criticism of the ordinary course of business "exception" to work product, see *id.* at 852-55.

III. The Justifications For Work Product Protection of Witness Statements—Unpersuasive and Self-Serving

Work product rests, like most rules of law, on faith, not fact. Most judicial opinions are "based on the kind of surmise and conjecture which we deplore in witnesses,"[113] and *Hickman* is no exception. Those who applaud work product protection for witness statements have set out their affirmative case. This Part will present an overdue challenge to the conventional wisdom. The purpose of this challenge is not to "prove" that *Hickman* is wrong in any rigorous, scientific sense. I lack the tools to accomplish that just as surely as the Court lacked the tools to "prove" that its decision was right. Instead, my aim is to show that the views of human nature and the legal system which support the abolition of work product immunity for witness statements are more plausible than the views which support the doctrine's continuation.[114] Realistically, this is about the best one can do.

A. An Unconvincing "Parade of Horribles"

The paramount legal policy question is always "What if?" In *Hickman* the question was "What if work product were freely discoverable?" The Supreme Court's response predicted disaster if an attorney could not "assemble information [and] sift what he considers to be relevant from irrelevant facts . . . without undue and needless interference."[115] Taking their lead from the Court, academics and practitioners have developed a "parade of horribles" which would supposedly befall the legal system in the absence of work product protection. They assert that the doctrine's repeal would have deleterious effects on both litigating parties—both the one that is inclined to prepare work product and the one that is inclined to want the other side's work product. The arguments advanced by these forecasters of doom include the fear that parties will not do their own preparation if they can obtain the witness statements prepared by their opponent and the fear that parties will not fully investigate or fairly record information if they know that they

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113. Cleary, *supra* note 53, at 874.

114. Cooper, *supra* note 5, at 1275 makes a similar point when discussing the alleged need of the adversary system for work product protection:

> "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 [opposite] proposition."

115. *Hickman*, 329 U.S. at 511. When seeking justifications for work product immunity, one must go beyond the *Hickman* opinions, since they did not explicitly articulate the interests being protected nor why the work product protection was necessary to protect those interests. Note, *supra* note 79, at 424.

might eventually have to turn their work product over to the other side. This Section will discuss why this "parade of horribles" is unpersuasive.

The arguments in favor of work product protection of witness statements have one thing in common: a distinctly puritanical tone. *Hickman*'s supporters seem to think that lawyers will be lazy unless the rules force them to be diligent.[116] They further suppose that individuals will be productive only if they are given exclusive dominion over the goods produced.[117] Their theories thus ignore the possibility that other incentives to full investigation and fair recording might exist even if work product had to be shared. Finally, work product apologists overlook resource imbalances and therefore equate diligence with productivity. They conclude that rewarding productivity is fair because they assume that anyone who will produce, can produce.[118] These views are, at best, simplistic and one-sided.

1. HOW LAWYERS WHO MIGHT SEEK WORK PRODUCT WOULD BEHAVE

A party who unsuccessfully seeks an opponent's work product witness statements is told, in effect, that full disclosure of relevant information is less important than preserving the adversary system. This response assumes both that disclosure of witness statements would seriously undermine adversarial presentation and that information development by adversaries is a paramount goal. Subsequent subsections will question both these assumptions.[119] In addition, however, a party who is denied access to the other side's work product is told, "This is for your own good." Work product proponents hypothesize that, were it not for the doctrine, attorneys would sit back and let the other side do all the work. Such laziness is not only morally reprehensible, but it could also easily lead to unjust results. Slothful attorneys, by relying excessively on their opponents' efforts, could easily miss evidence or arguments which might help their own clients.[120]

No one disputes that diligent preparation and fact maximization are good, but that is not the issue. The issue is whether work product immunity is necessary in order to protect these virtues. Attorneys, of all people, know about the risks of letting the other side do their work.

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116. *See infra* text accompanying note 120.

117. *See infra* text accompanying notes 127-29.

118. *See, e.g.*, Cohn, *supra* note 78, at 931 (in the absence of work product protection, "the extremely diligent party or counsel, who gets on top of a case immediately after the incident, is forced to turn over witnesses' statements, whereas the procrastinating party is not similarly penalized by having to turn over his work product").

119. *See infra* text accompanying notes 126-45 (immunity not necessary to encourage full adversarial preparation); 156-68 (adversary system not a good information development method).

120. Cohn, *supra* note 78, at 919-20; Special Project, *supra* note 7, at 786.

They are unlikely to be lulled into complacency.[121] Further, it seems a fair guess that attorneys who do not investigate their cases thoroughly are more likely to suffer from a lack of money than a lack of character.[122] In such cases, the doctrine fails to stimulate independent investigation and only succeeds in retarding information acquisition.

Furthermore, while lawyers seeking witness statements from opponents would receive material for which the opposing party has had to pay, this frequently occurs in discovery. A party seeking responses to interrogatories, requests for admissions, or the production of documents receives the benefit of the opposing party's factual investigation without having to bear the costs of that investigation.[123] This is entirely consistent with the purpose of discovery. In extraordinary cases where the investigating party incurred exceedingly high costs in obtaining witness statements and where it would be patently unfair to allow the opposing party to obtain those statements without cost, judges could order cost sharing.[124] Such orders would also be consistent with present

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121. For purposes of both preparation and settlement evaluation, "no party can afford to forego the kind of preparation he believes is needed." F. JAMES, CIVIL PROCEDURE 206 (1965). *Accord* Cooper, *supra* note 5, at 1280. Although James was referring to reports by non-attorney investigators, Cooper notes that the same analysis applies at least as strongly to lawyers, who may have greater fears about discovery than lay people, but understand even more the dangers of relying on someone else's research. Cooper, *supra*.

122. One might also wonder whether the work product rule has any real impact on lawyers who are naturally lazy. If it does not, then the "innoeent"—i.e., the hard-working lawyers who need the other sides' work product—are punished by a rule that does not even deter the "guilty." It should also be noted that the work product doctrine, like all adversary system doctrines, probably hurts clients and justice more than lazy lawyers.

123. There is widespread concern that allocating the costs of responding to discovery requests to the responding party provides ineentives for tactical manipulation of discovery to increase opponents' costs. *See* Note, *Discovery Abuse under the Federal Rules: Causes and Cures*, 92 YALE L.J. 352 (1982) (arguing that present system encourages inefficient over-discovery). Making witness statements available, however, would likely decrease total discovery costs and ameliorate strategic discovery abuse.

124. There are several reasons why cost-shifting should not occur as a matter of course even if work product immunity for witness statements is ended. First, cost-shifting—whatever its theoretical merits—is not the norm in American litigation. Parties are usually required to bear their own costs even when litigation totally vindicates them and even when they have incurred costs (such as huge attorneys fees and massive trial preparation) which are far greater than the costs of obtaining witness statements. Perhaps the general standard for when costs must be shared should be changed. *Cf.* G. HAZARD, *supra* note 58, at 134-35 (one of the major problems of the American legal system is "the lack of inhibitions on running up an opposing party's costs"). But in the meantime there is no reason to single out work product from other situations for cost-shifting.

Secondly, unless the cost-shifting rule is relatively clear, parties will just change the adversarial battleground from whether work product is obtainable to how much it is worth. Battles over costs would at least have the advantage of focusing on the right issue—something that is not occurring as long as work product protection for witness statements exists. But such battles should still be avoided if at all possible. If cost-sharing were readily available, the issue would be frequently contested and one of the major cost savings from abolishing work product protection for witness statements—decreasing fighting costs (*see supra* notes 87-98 and accompanying text) could

discovery practice.[125]

2. HOW LAWYERS WHO MIGHT CREATE WORK PRODUCT WOULD BEHAVE

Debates over work product have focused primarily on the creators of work product, not the seekers. The opinions in *Hickman* and those of later commentators have made a variety of dire predictions about what parties and lawyers would do if the witness statements they took were freely available to the other side. Their arguments fall into three basic categories. Work product protection for witness statements is needed, they claim, because: 1) it encourages parties to investigate fully and fairly; 2) it encourages parties to record information, and to record it in witness statement form; and 3) it prevents possible misuse of witness statements at trial. These arguments will be examined in the following three subsections. Each argument will be shown to be grossly overstated. Strong incentives for investigation and recording would remain even if trial preparation witness statements were discoverable, and any unfair use of work product at trial can be remedied without much difficulty.

The more extravagant claims in favor of work product protection are undermined by the vagaries of the doctrine's application. Witness statements receive only a qualified immunity, and judicial reactions are varied and unpredictable.[126] Thus, even under the present rule, no law-

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evaporate. Parties today have a fairly good idea about when cost sharing will be required (i.e., almost never in the absence of abusive practices by the other side). No compelling reason exists to change that rule for work product and not elsewhere in the litigation system.

Finally, we should recall that, by and large, the litigants who create work product are wealthy and the ones who need it are poor. *See supra* notes 99-112 and accompanying text. Consequently, unless cost-shifting is such a good idea that it should be implemented throughout the legal system, it would be absurd to select for cost-shifting an area of law where the economic burdens of litigation are generally falling on parties who can readily afford them. *Cf.* FED. R. CIV. P. 26(b)(1) (court may weigh "limitations on the parties' resources" in deciding whether otherwise permissible discovery is "unduly burdensome or expensive").

125. FED. R. CIV. P. 26(c) provides that protective orders may be entered "to protect a party or person from . . . undue burden or expense." *See, e.g.*, River Plate Corp. v. Forestal Land, Timber & Ry. Co., 185 F. Supp. 832 (S.D.N.Y. 1960) (special circumstances merit abrogation of normal rule that each party should bear its own depositions costs). The trend appears to be toward encouraging judges to consider cost-shifting options. *See* FED. R. CIV. P. 26(f) (as part of discovery conference amendment adopted in 1980, "the allocation of expenses" is a proper subject for the court's order following such a conference). Further, the concern for the expense of discovery, the prime reason for the 1980 amendments to Rules 26(a) and 26(b)(1), may well lead to greater use of cost-shifting measures.

126. *See supra* notes 87-89 and accompanying text. Going beyond the question of the doctrine's uneven application, the tests for overcoming the immunity usually rest on factors outside the control of the creator of work product. Subsequent events and the opponent's resources, as well as the judge's inclinations, will be the prime determinants of whether work product must be disclosed.

yer or investigator can ever be absolutely confident that his or her work product will be protected. The fact that parties still choose to take statements indicates that forces other than the work product doctrine encourage the creation of these documents.

a. Incentives to investigate fully

With regard to parties who are inclined to create work product, the arguments about disincentives to investigate are the obverse of the arguments made concerning parties who are not so inclined. First, it is claimed that "a lawyer is entitled to the fruits of his labors,"[127] and that unless he is assured of proprietary control over those fruits, he will not labor at all.[128] Proprietary feelings undoubtedly intrude on the legal mind,[129] but it does not follow that the law must yield to the bar's selfish motives. The question is, as before, whether the advantages of thorough investigation can be achieved without the disadvantages of work product protection. The response to this claim is, not surprisingly, the obverse of the response made above concerning the lazy, work product-seeking lawyer. Because preparation increases the chances of a favorable outcome, it is its own reward. This remains true even if some of the preparatory documents must be shared with the other side. We therefore should not fear that abolition of work product would cause parties to abandon all investigative efforts.

A more legitimate concern is whether witness statement revelation would inhibit thorough preparation, particularly examination of the weaknesses of a party's own case.[130] The advocate will at times be tempted to ignore adverse information.[131] However, litigants usually need to dig into the whole story, not just the part that is good for them.

If witness statements are taken before a situation is highly contentious, an evenhanded investigation is essential to a fair evaluation of

127. Hawkins, *Federal Discovery Procedure—Another Look at Rule* 34, 25 TEX. L. REV. 276, 283 (1947).

128. *See* Special Project, *supra* note 7, at 786. The *Hickman* Court may have been referring to this alleged difficulty when it wrote, "[t]he effect on the legal professions [of open discovery of work product] would be demoralizing." *Hickman*, 329 U.S. at 511. *But see* Cooper, *supra* note 5, at 1274 (expressing deep skepticism about applying a "vested-rights idea" to non-opinion work product); Note, *supra* note 79, at 430-31 (proprietary interests and demoralization of legal profession sometimes mentioned as reasons for work product immunity, but it is the adversary system and trial process interests which are being protected, not attorneys' self-interest).

129. *See supra* text accompanying note 92-93.

130. Special Project, *supra* note 7, at 785.

131. *See infra* note 138 and accompanying text.

whether the case should go forward or be settled.[132] Even at the point when adversarial interests have become primary, the incentives for thorough preparation are still powerful. Just as it is too dangerous to rely on an opponent's diligence, it is too dangerous to rely on an opponent's laziness. Lawyers must be prepared to meet their opponents' facts; this requires them to know what those facts are likely to be.[133] And, since settlement must always be considered, both lawyers and clients need the best information available to make a realistic offer.[134]

b. Incentives to record

The second group of justifications for the work product doctrine centers on fears that parties will not record information if they know the materials created will be discoverable.[135] Because adequate records are essential to proper investigation and efficient law practice,[136] these fears, if founded, would constitute important support for *Hickman* and Rule 26(b)(3).[137]

The arguments about disincentives to record take several forms. As an initial matter, it is alleged that parties will not record negative information at all, for fear that their opponents will later acquire it. This is the same argument as was discussed above, only the context has changed from investigating information to documenting it. While one occasionally encounters lawyers who recommend that only favorable

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132. Statements of this type will be excluded from work product protection if they are found to have been taken "in the ordinary course of business." *See supra* notes 111-12 and accompanying text.

133. *See* Brazil, *supra* note 8, at 1316.

134. *But cf. id.* at 1316-19 (when lawyers believe a suit will settle, their discovery is aimed at convincing their opponents that settlement is advisable, not at learning information which might be needed for trial). Brazil's observations about the differences between settlement-oriented discovery and trial-oriented discovery have great validity. However, since witness statements are usually taken in the early investigative stages, they may be recorded before counsel decides how to categorize a particular case. Additionally, even if the lawyer's guess is that the case will settle, he or she may still take a statement from an unfavorable witness. This is done to pin down the witness to a version of events and to have the statement available for impeachment in case the other side learns about the witness' or the lawyer's guess about the likelihood of settlement turns out to be wrong. *See id.* at 1318. *See also infra* text accompanying note 139.

Even if lawyers sometimes forget the importance of objective assessments of their cases, an increasing number of clients do not make the same mistake. Today it is often the sophisticated client who is demanding that the lawyer consider the propriety of settlement. *See* Ryan, *An Insider's Guide to Legal Service Savings*, Wall St. J., Aug. 13, 1984 at 16.

135. *Hickman*, 329 U.S. at 511.

136. *Id. cf.* Special Project, *supra* note 7, at 868-69 (presumably one reason why Rule 26(b)(3) protects materials prepared by non-lawyers is to encourage the efficient use of other agents).

137. *But see* Special Project, *supra* note 7, at 786 (disincentives for recording are only a secondary consideration in favor of work product doctrine).

information be recorded,[138] the bases for speculating that recording will occur are more persuasive than the bases for speculating that it will not.

At the beginning stages of a claim, parties may not be sure what their theories are; they may therefore not know whether particular information is good or bad for them. Investigators will invariably deal with this uncertainty by taking everything down. Even when a witness' story is clearly detrimental, parties will want to record it as a damage control measure. A document pins the witness down and may have future impeachment value.[139] Lawyers know that, unless they have tangible proof of what the witness said, testimony can easily transform from disappointing to disastrous.

Lastly, the nature of law practice and the maintenance of good client relations demand recording. In large law firms and corporations, the statement taker and the decision maker will not be the same person, so the information cannot merely be kept in one person's head. Oral communication is possible but impractical, given the crush of business, and the amount and complexity of the data. In small firms handling simple cases, a single lawyer may be both investigator and advocate. However, the small firm lawyer usually has a large case load of similar suits, so he or she cannot likely remember important differences among cases without documentation. Finally, clients, especially the institutional clients who are likely to have work product produced for their cases, will not want to make decisions without an adequate paper record. For these reasons, we can be confident that most litigation-inspired investigative information will be recorded.[140]

When discussing incentives for recording, the doctrine's proponents often fail to distinguish among the different types of work product. Because they fear that creation of opinion work product would be deterred if it were discoverable, they assume the same argument holds true for witness statements.[141] However, incentives to record in witness

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138. *See* Frost, *The Ascertainment of Truth by Discovery*, 28 F.R.D. 89, 95 (1960) (Lawyer's possible response to liberal use of witness statements; "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.").

139. *See* authorities cited *infra* note 142. Further, investigators and attorneys cannot afford to exclude unfavorable information from a witness's statement. Bias in a statement destroys the document's subsequent impeachment value. F. JAMES, *supra* note 121, at 206 (investigating agents); Cooper, *supra* note 5, at 1277 (lawyers).

140. The work product rule overemphasizes the differences between litigation and non-litigation settings. The need to memorialize information is so great that it usually surpasses any concern that the data will later come back to haunt the writer—as every lawyer who has discovered a "smoking gun" document can attest. This observation is only slightly less true for lawyers themselves than for other businesspeople.

141. *See, e.g., Hickman*, 329 U.S. at 511-12, (all work product lumped together in Court's discussion of need for lawyer privacy and efficiency). This argument wrongly assumes that attor-

statement form are almost as powerful as the incentives to record generally.[142] This is especially true for the hostile witness. Without documentary evidence ascribed to by the witness, any change of story evolves into a credibility contest between the witness and the investigator.[143] What are the chances that a party's hired investigator is going to win that battle? And what lawyer or client wants to risk a case on the battle's outcome?[144] Many will find that the risks of taking the witness' statement and having it discovered are more palatable.

Institutional factors may also encourage the use of witness statements. If a law firm or client is large enough to be bureaucratic, the people on top will want to make decisions based on more than the say-so of subordinates. They will demand to be presented with files containing evidence that will "stand up in court." Witness statements will satisfy this demand far better than more informal documents.

This refusal to consider each facet of the work product doctrine on its own merits evinces a deep-seated desire to have all litigation-related materials treated identically. American lawyers may fear that unless all work product is protected, none of it will be. Thus, they may interpret a

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neys will do anything to keep work product from being discovered. The argument's supporters may believe that if witness statements are discoverable, attorneys will avoid taking them. Instead, the argument goes, lawyers will create other types of tangible work product, such as internal memoranda describing what the witness said, or will not write anything down and keep the witness' testimony in their heads. The courts will then have to decide how to handle these more problematic forms of work product, whose disclosure conjures up visions of lawyers' having to take the stand against their clients and other cataclysmic events. The basic premise is faulty, *see infra* text accompanying notes 142-49 (incentives to use witness statement form are strong), and judicial supervision can discourage attempts to mix "protectible ruminations of counsel" with discoverable information. Cooper, *supra* note 5, at 1325 n.185.

142. *See* Note, *Discovery of an Attorney's Work Product in Subsequent Litigation*, 1974 DUKE L.J. 799, 808 (incentives to record witness statements much stronger than for other kinds of work product). Cleary, *supra* note 53, at 874 n.53 cites works by several "masters" of litigation, all of which emphasize the importance of taking statements in witnesses' own words.

143. The investigator's credibility would be bolstered if he or she wrote a contemporaneous memorandum to the file detailing the witness' testimony. However, there would still be questions about the memorandum's accuracy. And, if investigators, lawyers or otherwise, find testifying about what they were told so distasteful, *see Hickman*, 329 U.S. at 517 (Jackson, J., concurring) ("[e]very lawyer dislikes to take the witness stand and will do so only for grave reasons . . . he is almost invariably a poor witness"), then the incentive to take the witness' statement only escalates.

144. There are other dangers associated with relying on the statement taker to impeach, if necessary, witnesses who have altered their testimony. By the time of trial, the statement taker may be unavailable or may not remember what was said. In any event, the party would have to pay the investigator for his or her time. There is also a risk that testimony about the witness' prior inconsistent statement will not be allowed at all. The trial judge has broad discretion to exclude collateral or cumulative evidence, *see* FED. R. EVID. 403, and a judge might rule that the investigator's testimony was collateral to the main issues in the case or was a waste of time. *See, e.g.*, Corpus v. Beto, 469 F.2d 953, 955 (5th Cir. 1972) ("In the federal courts, . . . the trial court has the discretionary power to disallow the impeachment of witnesses on collateral matters"). In contrast, impeachment through a written witness statement will almost always be permitted.

proposal to abolish immunity for witness statements as just the beginning of a broad assault on the work product/adversary system citadel.[145] The irony of this posture is that work product is not, and has never been, a monolithic doctrine. Witness statements have always received less protection than opinion or intangible work product. Even if other portions of the doctrine may be justified, those justifications are not a sufficient reason to cling to a part which is not justified.

c. Fear of misuse of statements

A minor justification for nondiscoverability of work product is the supposed fear that lawyers who obtain the other side's work product will misuse it. This justification is more often raised concerning other forms of work product,[146] but may be a factor in witness statement protection as well. Because factfinders, especially juries, tend to give great weight to the written word, there is a fear that they will focus excessively on minor discrepancies between a statement and testimony. Playing on this tendency, counsel might use the statements obtained by the other side to unfairly attack truthful but unfavorable witnesses.[147]

This is a strange argument for anyone with faith in the adversary system to make. Surely the opposing lawyer is in a good position to rehabilitate the truthful witness and help the jury understand how the discrepancies occurred.[148] This argument also overlooks the importance of witness statements for pre-trial preparation and settlement.[149]

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145. For further discussion of why lawyers are so wedded to the work product doctrine, see *infra* text accompanying notes 170-78.

146. *See, e.g., Hickman*, 329 U.S. at 516-18 (Jackson, J., concurring) (feared misuse of attorneys' memoranda restating what interviewed witnesses said).

147. *Id. See also* Cooper, *supra* note 5, at 1324 (fear of misuse discussed and rejected).

148. This is a classic example of the adversarial process fulfilling its information evaluation function, a function it performs well. *See infra* note 162 and accompanying text. Trial attorneys are skilled in helping witnesses explain documentary-testimonial variances, especially if they have been prepared in advance for the issue. *See infra* note 152 (parties and witnesses may obtain their own statements in order to avoid unjust results due to surprise impeachment). The adversary system cannot guarantee that truthful witnesses will always be believed, but this is a risk inherent in any dispute resolution system, and does not justify suppression of relevant information.

149. *See supra* notes 79-80 and accompanying text. Another way in which witness statements might be misused is for "sharp practices," alluded to vaguely in *Hickman*, 329 U.S. at 511, but given scant attention since. The apparent worry is that "red herrings in the form of false statements or misleading briefs or memoranda might be inserted in the file for the purpose of misleading the opposition." Cleary, *supra* note 53, at 869. This argument begs the question; work product is either worth protecting or it is not. If protection is unjustified, discovery "should be made available with suitable sanctions for evasion." Cooper, *supra* note 5, at 1276.

d. The second paragraph of Rule 26(b)(3)—further doubt cast on the appropriateness of witness statement protection

The capriciousness of the application of Rule 26(b)(3) to witness statements has already been mentioned as a reason to doubt the necessity for work product protection.[150] Another reason appears in the rule itself. Under the second paragraph of Rule 26(b)(3), no immunity applies when parties or witnesses wish to obtain their own statements.[151] This exception to the normal work product protection rests on policy grounds which are admittedly independent of those which are said to justify the doctrine's application in other realms.[152] Nevertheless, when the entirety of Rule 26(b)(3) is considered, a disturbing pattern of witness statement protection emerges. From the viewpoint of the party who created the work product, statements by an opponent or by a witness who is allied with an opponent are not protected.[153] Given the traditional justifications for work product immunity, this is anomolous.

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150. *See supra* text accompanying notes 87-89.

151.

> "A party may obtain without the required showing [of substantial need, undue hardship, and substantial equivalence] a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person."

FED. R. CIV. P. 26(b)(3). See *supra* note 26 for how the rule defines the term "statement."

152. Party and non-party witness statements are discoverable for two reasons. First, statements by parties are admissible as evidence, and the basic purpose of discovery is to give litigants an opportunity to confront the evidence against them. *See* FED. R. CIV. P. 26 advisory committee note, 48 F.R.D. 487, 502 (1970). *See also Hickman*, 329 U.S. at 511 (production of work product might be justified when documents are admissible evidence).

The other reason why parties have a right to see their own statements—and the only reason why non-party witness statements are available to the declarant—has to do with the disadvantages of surprise impeachment. The Advisory Committee thought that availability of the statement to the witness would provide adequate time before trial for memory refreshment and for the witness to explain any discrepancies arising from the statement and his or her testimony. The Committee feared that "a written statement produced for the time first at trial may give such discrepancies [in the statement of the truthful witness] a prominence which they do not deserve." Surprise impeachment may make for great drama (e.g., Perry Mason), but most observers would agree with Judge Weinstein: "while surprise has a healthy prophylactic effect against possible perjury, on balance, cases are more likely to be decided fairly on their merits if the parties are aware of all the evidence." Martin v. Long Island R.R., 63 F.R.D. 53, 54 (E.D.N.Y. 1974) (surveillance films ordered produced). *Accord*, Cooper, *supra* note 5, at 1312.

The courts often order parties or witnesses to undergo depositions before allowing them to obtain their previous statements. *See, e.g.*, Smith v. China Merchants Steam Navigating Co., 59 F.R.D. 178 (E.D. Pa. 1972). This gives the adversary at least one opportunity to elicit inconsistent testimony before the written statement is revealed. *But see infra* note 182 (arguing against this practice).

153. A witness can request a copy of his or her statement and then turn it over to the attorney for the party with whom the witness sympathizes. Blair, *A Guide to the New Federal Discovery Practice*, 21 DRAKE L. REV. 58, 63 n.25 (1971).

If the ruledrafters were so concerned with encouraging investigation and recording of negative information, why didn't they protect the two most negative kinds of witness statements? This fact alone should cause us to question how necessary work product protection is for witness statements in all contexts.[154]

The situation becomes even more distressing if we consider what types of statements are protected by the rule. They fall into two categories: statements from neutral witnesses (those who do not care enough to turn over their statements to the party who did not take them) and statements from witnesses who are allied with the statement taker.[155] Thus, the doctrine's effects—duplication of effort and suppression of information—are once again apparent. The Advisory Committee was wise to allow disclosure of statements to parties and witnesses on request; its decision just did not go far enough.

B. The Overstated "Glories" of the Adversary System

If the arguments against protection for witness statements are so strong, and the arguments for it so weak, why is this part of the work product doctrine still held in such reverence by our legal system? One reason—the fear of the "slippery slope" if any portion of the immunity is questioned—has already been mentioned.[156] There are two others, which are interrelated but will be discussed separately. The first is the widespread misunderstanding of the virtues and vices of the adversary system. The second is the self-interest of lawyers in the maintenance of the current legal rule.

Work product proponents have steadfastly maintained that the doctrine is necessary because it promotes the adversarial development of information,[157] and that adversarial development of information is necessary because it promotes truth and justice. They assume that the

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154. *See* Shapiro, *supra* note 8, at 1070 (questioning whether requirement that statements be revealed on request deters their preparation).

155. The statement from one's own client would also be immune from discovery, but such statements would rarely be taken and would usually be privileged.

156. *See supra* text accompanying notes 130-33.

157. *See, e.g.*, Special Project, *supra* note 7, at 785 (work product protection fosters a "competitive relationship that motivates each party to marshall all the law and facts beneficial to its case"). Beyond a belief in the inherent glories of the adversary system, work product's admirers further insist, contrary to the arguments, *supra* text accompanying notes 115-49, that the system's benefits will not be realized unless attorneys and other investigators are granted a zone of privacy for their work. *See* Special Project, *supra* note 7, at 785. *Cf.* Cleary, *supra* note 53, at 866 (work product doctrine and attorney-client privilege both based on belief that privacy is sometimes necessary to preserve lawyers' effective participation in legal system).

adversary process is the best way to get at the truth.[158] In so doing, they have failed to analyze fairly the strengths and weaknesses of the adversary method.

Determining the truth[159] in litigation is really a two-step process. In order to reach a just result, the factfinder[160] first needs to learn as much of the relevant data (documents, testimony) as can be obtained at a reasonable price.[161] This might be called the information development process. After acquiring the raw data, the factfinder must then sort out and evaluate it. He or she must decide which evidence is credible and must choose among competing inferences from the credible evidence. This might be thought of as the information evaluation process.

Those who glorify the adversary model fail to distinguish between these two processes. The adversary system is an excellent method of information evaluation. Adversary preparation and presentation is very effective in helping the factfinder perform the information selection and evaluation function. People are less likely to rush to judgment when alternative explanations and conclusions are being offered to challenge their preconceptions. Thus, advocates play an important role in tempering bias because they force factfinders to think hard before making up their minds.[162] For these reasons, materials which assist at-

158. *See, e.g., Hickman*, 329 U.S. at 516 (Jackson, J., concurring): "[A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary."

159. "Truth" is not, of course, easy to define or determine. *See* Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1076-79 (1975). I am content, though, with the definition in Brazil, *supra* note 8, at 1296 n.4:

> "[T]ruth" in any given case is a functional concept. It is whatever result a duly constituted trier of fact (judge or jury) would reach if it had full access to all the evidence and law that is arguably relevant to the issues in question. "Justice," then, like "fairness" or "truth" is a social product, a product that can result only from a process that reliably exposes all the potentially relevant data."

160. The term "factfinder" is being used extremely broadly here. It includes not only judges and juries at trial, but also lawyers and clients who are trying to determine the merits of a controversy so as to arrive at a fair settlement.

161. *The Federal Rules of Civil Procedure*, with the broad scope of discovery permitted under Rule 26(b)(1), at first put a very high priority on the importance of obtaining information regardless of cost. However, because adversaries abused this provision by seeking burdensome overdiscovery, the recent amendments to rule 26(b)(1) encourage the courts to engage in a cost-benefit analysis of discovery requests. *See Preliminary Draft, supra* note 14, at 481-82.

162. *See* Thibaut, Walker & Lind, *Adversary Presentation and Bias in Legal Decision-making*, 86 HARV. L. REV. 386 (1972). In Thibaut, Walker and Lind's experiment on the effect of adversary and non-adversary presentation on factfinder bias, certain statements were presented as "facts." Thus, the article addresses only the relative merits of the two systems in information evaluation, and not whether one system was better than the other in developing information. For an excellent discussion of the experiment and the strengths and weaknesses of adversary and non-adversary methods, see Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975).

torneys in the information interpretation process are worth protecting.[163]

The same cannot be said for data collection materials. Just because an adversary model is useful in data interpretation is no reason to assume it is equally valuable in basic data acquisition. In fact, the adversary system is a lousy method of information development.[164] As has already been discussed, such a system is horrendously expensive and duplicative.[165] Moreover, when assembling information, advocates do not merely attempt to expose all the evidence which is good for their side; they work equally hard to suppress negative information.[166] Ad-

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As did Thibaut, Walker & Lind, Luban, fails to distinguish adequately between information collection and information evaluation when he says:

> No trial lawyer seriously believes that the best way to get at the truth is through the clash of opposing points of view. If a lawyer did believe this, the logical way to prepare a case would be to hire two investigators, one taking one side of every issue and one taking the other. After all, the lawyer needs the facts, and if those are best discovered through an adversary process, the lawyer would be irresponsible not to set one up.

Luban, *supra* note 24, at 96

Luban is right about the investigative process. However, once lawyers are in the process of evaluating a case (e.g., deciding which evidence to emphasize, anticipating what the opposition will do, determining whether settlement is appropriate, etc.) they will often ask their colleagues to play "devil's advocate." The purpose of this exercise is to force the factfinder (here, the lawyer) to look at all sides of the matter before he or she makes a final decision.

163. *See supra* note 35. *See also* Brazil, *supra* note 8, at 1352 (even if lawyer's duty of zealousness during information collection process were reduced, "[l]itigators would continue to fight, even during the discovery stage, for exposure and interpretation of evidence favorable to their clients").

164. Luban states well the problems with adversarial information development, and contrasts it with adversarial information evaluation:

> [T]here is all the difference in the world between "the facts seen from X's standpoint" and "the facts seen from the standpoint of X's interest." Of course it is important to hear the former—the more perspectives we have, the better informed our judgment. But to hear the latter is not helpful at all. It is in the murderer's *interest* not to have been at the scene of the crime.

Luban, *supra* note 24, at 97 (Emphasis in original).

See also Frankel, *supra* note 23, at 1038: "[w]e leave most of the investigatory work to paid partisans, which is scarcely a guarantee of thorough and detached exploration."

165. Adversarial information interpretation is not nearly as wasteful as adversarial information development, because it is probably more difficult for a single person to present alternative interpretations than it is for a single person to do a thorough investigation. Data collection by adversaries may also accentuate differences in party resources more than does the information evaluation function. Performing the advocate's evaluative role calls for insight and persuasiveness, but these traits will often be found in lawyers whose clients cannot afford the elaborate information gathering devices available to wealthier litigants.

166. Brazil, *supra* note 8, at 1323-31 contains an excellent description of how attorneys responding to discovery withhold damaging information from their opponents. *See also infra* notes 196-98 (withholding of information during discovery is as serious as problem as harassment by overdiscovery).

Rules of legal ethics encourage and may even require attorneys to suppress information whenever they have even marginal legal support for their position. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(1) (a lawyer shall not "[f]ile a suit, assert a position, conduct

versary practices in information development may make sense for the criminal justice system, where the curbing of state power is probably a more important goal than the ascertainment of truth.[167] They are much harder to defend in civil cases, where the accurate recreation of past events is the primary goal.[168]

C. Lawyer Self-Interest in the Perpetuation of the Work Product Doctrine

The work product doctrine is part of an adversary system that most citizens and clients rate as "pretty sick."[169] Nevertheless, lawyers still cling to their faith in the status quo, including the wisdom of the *Hickman* protection. One explanation may rest in the conscious or unconscious desire of attorneys to retain a legal rule which makes them, as a group, both important and rich.

Work product, in conjunction with other adversary sytem doctrines, helps make lawyers the central actors in conflict resolution.[170] Lawyers naturally like the critical role which work product assigns to them.[171] Work product makes lawyers rich in several ways. A doctrine which mandates dual investigations insures that not one but two lawyers will collect fees.[172] Lawyers—or at least those who are being paid

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a defense, delay a trial or take other action on behalf of his client when he *knows* or when it is *obvious* that such action would serve *merely* to harass or maliciously injure another") (emphasis added). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) (lawyer may not assert "frivolous" positions).

167. *See* Luban, *supra* note 24, at 91-92.

168. *See id.* at 92. As Luban points out, defenders of the adversary system usually assume that the criminal defense lawyer is the adversary system's "worst-case scenario." They therefore assume that if the criminal defense lawyer's adversarial posture is justified, then it follows that civil attorneys should use the same approach. See Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975) for an example of this type of reasoning. Such analysis disregards the fundamentally different purposes of the two systems. Many protections exist in the criminal but not the civil system (e.g., the fifth amendment privilege against self-incrimination and the "beyond a reasonable doubt" burden of proof) because our society wants to make it very difficult for the state to exact criminal penalties. *See* Schwartz, *The Zeal of the Civil Advocate*, in THE GOOD LAWYER 150, 155 (D. Luban, ed. 1983). *See also* Brazil, *supra* note 8, at 1296 n.5 (civil and criminal discovery are not identical, nor should they be). *Accord,* G. HAZARD, *supra* note 58, at 150-51.

169. G. HAZARD, *supra* note 58, at 133. Hazard's book is the report of a conference at which lawyers and businesspeople met to examine issues of legal ethics. These experienced litigation participants "thoroughly savaged" the adversary system as a truth-revealing process. *Id.* at 123.

170. *See id.* at 121.

171. Even authors who approve of the work product doctrine recognize that "[n]one of the actors in a courtroom has an undivided interest in piercing attorney privacy." Special Project, *supra* note 7, at 799 n.234.

172. *Cf.* G. HAZARD, *supra* note 58, at 9 (clients often think that conflict of interest rules were devised for lawyers' self-protection); Morgan, *The Evolving Concept of Professional Responsi-*

by the hour—also figure to profit from disputes over work product.[173] Finally, the doctrine encourages the employment of attorneys whenever there is any chance that an incident might lead to litigation. Although Rule 26(b)(3) now protects work product created by non-lawyers,[174] courts will inevitably be more inclined to find that a document satisfies the "in anticipation of litigation" test when lawyers, the masters of litigation, are involved in its creation.[175] Thus, lawyers have devised, from their point of view, a terrific system. They can honestly advise clients that early and active participation by counsel will substantially increase the client's ability to suppress negative information.[176]

It is not surprising that the legal profession's self-interest has encouraged the creation and perpetuation of the work product doctrine. Every profession can be expected to seek rules which benefit its members. Of course, whenever judge-made rules are involved,[177] lawyers have a distinct advantage over other professions, since the rulemakers

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bility, 90 HARV. L. REV. 702, 727-28 (1977) (conflict of interest rules serve interests of legal community by maximizing number of lawyers used, thus often putting clients to unnecessary expense).

173. *See* Brazil, *supra* note 8, at 1314-15 (lawyers make money from obstructionist discovery tactics).

174. Trial preparation materials are protected if created "by or for [a] party or by or for that . . . party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent)." FED. R. CIV. P. 26(b)(3). For a discussion of the pre-1970 case law concerning who could create work product, see Special Project, *supra* note 7, at 865-66 and authorities cited therein.

175. *See, e.g.*, Thomas Organ Co. v. Jadranska Slobodna Plovidba, 54 F.R.D. 367, 372 (N.D. Ill. 1972): ("*any* report or statement made by or to a party's agent . . . which has not been requested by nor prepared for an attorney nor which otherwise reflects the employment of an attorney's legal expertise must be conclusively presumed to have been made in the ordinary course of business" and therefore not entitled to work product protection) (emphasis in original); *see also*, Spaulding v. Denton, 68 F.R.D. 342 (D. Del. 1975); *cf.* Upjohn Co. v. United States, 449 U.S. 383, 397-99 (1981) (in ruling that counsel's internal memoranda were not discoverable, Supreme Court emphasized involvement of petitioner's counsel in investigation of client's affairs and general importance of lawyers to protection of legal rights). *But see* Almaguer v. Chicago, R.I. & P.R.R., 55 F.R.D. 147, 149 (D. Neb. 1972) (work product protected even though created before attorney became involved in claim). *See generally* Special Project, *supra* note 7, at 865-69 and cases cited therein.

176. *See* Cohn, *supra* note 78, at 928-29. *Cf.* Shapiro, *supra* note 8, at 1065 (lawyers responding to survey disclosed more information when witness statement had been made to client rather than lawyer; Shapiro hypothesizes that the reason for this is that they "assumed that an individual unrepresented by counsel is not acting in anticipation of litigation, or, more likely, that no matter how the rule [26(b)(3)] is worded, its central purpose is to protect lawyers and those acting under their direction").

177. Work product has been a judge-made doctrine, both before and after Rule 26(b)(3). *Hickman* was decided by a panel of judges and the Rule was devised under the *Rules Enabling Act*, 28 U.S.C. § 2072 (1982), process. Although the *Enabling Act* gives the general populace, through the Congress, the theoretical power to overrule what two groups of lawyers (the Advisory Committee and the Supreme Court) have done, this power is rarely exercised and was not exercised when Rule 26(b)(3) was promulgated.

will always have been acculturated to their profession's world view.[178] Further, lawyers, like all other human beings, tend to rationalize, to convince themselves that what is good for them and their profession is good for society. The proper response to this tendency is not condemnation but skepticism. Arguments which so clearly benefit the people who are making them should be examined critically before being accepted. To date, lawyers and judges have not engaged in anything approaching an objective review of work product immunity for witness statements.

D. The Grains of Truth in the Justifications for Work Product—And What To Do About Them

So far this Part has discussed the standard work product rationales only to reject them and find them selfishly motivated. However, any fair-minded person must concede that each argument contains a kernel of merit. Surely there are some attorneys who investigate their cases more thoroughly either because they know they cannot obtain an opponent's work product or because they feel assured of the privacy of their own. And, human nature being what it is, lawyers will sometimes seek to avoid unfavorable information. Thus, as long as advocates are also investigators, they will encounter situations where the temptation to turn their backs on bad news may exceed the desire to record it fairly.[179]

However, just because the reasons for work product are not absurd does not mean that the doctrine is correct in all its aspects. Most legal rules have advantages and disadvantages; the sensible ones maximize the former and minimize the latter. The point here has been to show that *Hickman*'s protection of witness statements was, on balance, an unwise choice. The advantages occur in too few cases to justify the significant costs. Furthermore, many of the disadvantages which would supposedly follow the demise of work product protection would disappear over time. It would undoubtedly take some time for lawyers to

178. For instance, judges tend to grant broader coverage to the attorney-client privilege than to other privileges. *See* Saltzburg, *Privileges and Professionals: Lawyers and Psychiatrists*, 66 VA. L. REV. 597, 598 n.4 (1980). One reason is probably that attorney-client issues strike a very personal chord in the judiciary. *See also* Brazil, *supra* note 8, at 1343 (judicial reluctance to impose discovery sanctions may arise from judicial acculturation to adversary practices). The similar formal and informal education which all lawyers receive explains much about both the strengths and weaknesses of our legal system. *See* K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 19-20 (1960) (having "law-conditioned" officials provides steadying influence in legal system).

179. *Cf. Front Lines*, *supra* note 14, at 228 (when trial date is far in future, some lawyers postpone their investigations so as to avoid having to turn over work done to opponent).

adjust to the free discoverability of witness statements.[180] At first some attorneys might not investigate or record fully. Eventually, though, the incentives discussed above would overwhelm this irrational behavior, and the taking of witness statements would resume despite their availability to opposing parties.[181]

IV. THE CURE FOR THE PROBLEM—ABOLITION OF WORK PRODUCT PROTECTION FOR WITNESS STATEMENTS

A. The Proposal—And Why Less Radical Changes Won't Work

The preceding two Sections have argued that the disadvantages of the current system far outweigh its advantages. Now we turn to the question of the proper prescription. Rule 26(b)(3) should be amended to exclude witness statements from work product protection. They should be discoverable on the same basis as other relevant, non-privileged materials. If this amendment were adopted, the exchange of witness statements early in the litigation process[182] would soon be accepted practice.

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180. This kind of initial resistance followed by gradual acceptance has occurred with respect to prosecutors' revelation duties in criminal cases. *Compare* Flannery, *The Prosecutor's Case Against Liberal Discovery*, 33 F.R.D. 74 (1963) (highly critical of discovery) *with* NATIONAL DISTRICT ATTORNEYS ASSOCIATION, NATIONAL PROSECUTION STANDARDS § 13 commentary, at 176 (1977) (accepting propriety of discovery). *See also* ABA, STANDARDS FOR CRIMINAL JUSTICE, § 11-2.1(a) (1982) commentary (experience with board discovery reduced prosecutors' fears and opposition).

181. *See The Practical Operation of Federal Discovery*, 12 F.R.D. 131, 159 (1952) (prior to *Hickman*, at least one district had practice under which witness statements were turned over to opponents as a matter of course).

182. The court, under the scheduling order procedure now contained in FED. R. CIV. P. 16(b), could set the conditions for the exchange. Some judges might be inclined to postpone the acquisition of statements until after the witnesses were deposed. *See supra* note 152 (postponement often required when parties or witnesses request their statements under current Rule 26(b)(3)). Such a policy should be discouraged because it encourages gamesmanship in deposition practice. That is, surprise impeachment during discovery is just as inappropriate as surprise impeachment at trial. *See id. But see* Cooper, *supra* note 5, at 1325-27 (witness statements should be discoverable, but only after party who holds the statement has had opportunity to "pin down" the witness through deposition).

In drafting the rule proposed herein, the Advisory Committee should make clear that it has rejected the concepts of proprietary interest and advocate privacy in the preparation of witness statement work product. Given this guidance, trial judges would realize that they should not allow these outdated notions to impinge on the exercise of their discretion under the discovery rules. For instance, the 1983 amendment to FED. R. CIV. P. 26(b)(1), which gives the court discretion to deny burdensome discovery, should rarely be invoked to prohibit access to witness statements. *See supra* text accompanying notes 75-86 (availability of witness statements is a highly cost-effective means of discovery). Similarly, it is hard to imagine a situation where a Rule 26(c) protective order could be properly granted against discovery of a witness statement.

A straightforward, absolute rule of discoverability is far preferable to a compromise which would leave the immunity in place but make it easier to overcome.[183] This is true even if it is conceded that open discovery of witness statements may have certain deleterious effects,[184] because compromise proposals do not adequately factor in the costs of fighting. Anything less than a clear rule would do nothing to diminish the number of disputes over whether the materials had been prepared in anticipation of litigation.[185] Further, a rule granting an intermediate level of protection to witness statements would still leave the parties free to argue about whether the new standard had been met.

B. Why Abolition Would Be Consistent with Recent Discovery Reforms

Abolition of work product immunity for witness statements would be in keeping with recent events in discovery law. Abolition would be consistent with both the philosophy and goals of the discovery reforms of 1980 and 1983. Unfortunately, while the ruledrafters have begun to cure the ills of the discovery process, their changes have not gone far enough. They have made important amendments to other rules, but they have failed to re-examine Rule 26(b)(3) in light of the altered framework of discovery. Consequently, work product remains a haven for adversarial gamesmanship in a system which is increasingly fed up with lawyers' tricks.[186]

Recent reforms rest on perceptions which support disclosure of witness statements. The Advisory Committee has finally acknowledged the inherent tension between open discovery and an adversarial system

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183. *See* Shapiro, *supra* note 8, at 1071 n.58 (expressing doubts about the need to protect witness statements from discovery, but concluding "there may be some marginal advantage in giving limited protection to such statements").

184. *See supra* text accompanying notes 179-81.

185. Since the costs of fighting are so great and the benefits sometimes so small, it would almost be preferable to have a rule which was more protective of work product than the current hodgepodge of contradictory case law. Such a rule would be unfair to parties who do not create work product, but at least they would know where they stand.

Broad-based change also has the benefit of grabbing the attention of the bar, something which may not occur with more subtle amendments to the rules. *See* Schroeder & Frank, *Discovery Reform: Long Road to Nowheresville*, 68 A.B.A. J. 572, 573 (1982): "There is a little circle of *cognoscenti* who know with precision what is happening to the rules. There are 400,000 lawyers, more or less, who have to live with them."

186. Cooper, *supra* note 5, at 1282, made this point long before the current wave of discovery reform: "The explanations of the need for work product protection . . . 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."

of client representation.[187] With this acknowledgment, the rulemakers are finally starting to grapple with the deficiencies of the adversary system as an information development method.[188] They are rightly expressing concern about the temptations and incentives for adversaries to hide information, and with the costs of fighting that the current system encourages.[189] They are rightly doubting that the system can be self-correcting,[190] or that its benefits will always (or even often) exceed its costs.[191] These perceptions should also cause the Advisory Committee to question a doctrine which assumes that information collection by adversaries should be encouraged and its results secreted, and which breeds contentiousness.

The goals of the amended rules further support abolition. The ruledrafters have been searching for ways to maximize information flow while minimizing retrieval costs. The latter goal has been the subject of amendments,[192] but of equal importance is what the Advisory Committee has not done. The Committee has refused to adopt propos-

187. *Preliminary Draft, supra* note 14, at 481 (citing Brazil, *supra* note 8). See *also* Shapiro, *supra* note 8, at 1056. See *supra* note 73 for discussion of how the original drafters of the federal rules naively believed they could prevent this conflict.

188. *See supra* text accompanying notes 157-68. The 1983 amendments, particularly the cost-benefit analysis now permitted under rule 26(b)(1), probably mark a turning point in the discovery system. For the first time the Advisory Committee is focusing on more than discovery "abuses," if that term is understood to encompass only behavior which is clearly contrary to the intent of the rules of civil procedure and professional responsibility. For instance, most of the 1980 amendments were designed to reaffirm that certain practices were and always had been improper. *See, e.g.*, Committee on Rules of Practice and Procedure, Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323, 341 (1979) (amendment to Rule 33(c) intended to curb abuse whereby "parties upon whom interrogatories are served have occasionally responded by directing the interrogating party to a mass of business records or by offering to make all of their records available").

The distinction between abuses and non-abusive but wasteful adversary practices is subtle but crucial. Abuses can mostly be cured through clear rules and sanctions, *see* Shapiro, *supra* note 8, at 1057. In contrast, accepted but undesirable adversary techniques are both harder to identify and more harmful. *See Problems and Abuses, supra* note 14, at 828-30 (Evasive answers have an "adverse impact on the efficiency and effectiveness . . . of civil discovery," but many lawyers consider evasion aggressive advocacy, not unethical conduct).

189. *See Preliminary Draft, supra* note 14, at 481.

190. The rules' increased emphasis on judicial involvement constitutes an admission that lawyers will not abandon detrimental discovery practices on their own. *See, e.g.*, FED. R. CIV. P. 16 (judicial control through a series of scheduling orders and pre-trial conferences); FED. R. CIV. P. 26(f) (judicial involvement in discovery conferences). *See also Preliminary Draft, supra* note 14, at 482 (amended Rule 26(b)(1) "contemplates greater judicial involvement in the discovery process, and thus acknowledges the reality that it cannot always operate on a self-regulating basis").

191. *See, e.g.*, FED. R. CIV. P. 26(b)(1)(iii) (court may deny otherwise proper discovery if it determines that the discovery is "unduly burdensome or expensive"). Schroeder & Frank, *supra* note 185, at 573, who criticized most of the proposed 1983 amendments, applauded the cost-benefit analysis now permitted by Rule 26(b)(1) as "the best feature of these rule changes."

192. *See, e.g.*, FED. R. CIV. P. 26(b)(1); *Preliminary Draft, supra* note 14, at 481-82.

als which would have severely curtailed parties' access to data[193] because it continues to believe in the value of discovery.[194] As has been shown above,[195] availability of witness statements would be a cost-effective method of information acquisition.

Recent reforms, although commendable, stop too short. Discovery of witness statements would be a further step in the right direction. The Advisory Committee has concentrated more on excessive discovery requests[196] than on unjustified evasion of legitimate discovery,[197] even though both problems are serious.[198] Discoverability of witness statements would bring real benefits to the "discoveror" without imposing excessive burdens on the "discoveree."

Another difficulty of recent amendments is that they rely excessively on judicial control and activism. The reluctance of judges to get involved with discovery disputes and to exact meaningful sanctions against abusers has been well-documented.[199] The recent changes encourage, and at points even require, greater judicial involvement,[200]

193. *See e.g., Preliminary Draft, supra* note 14, at 482 (in restricting discovery, "the court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case").

A similar concern may have been operating in the process which led to the rather limited amendments of 1980. The Advisory Committee rejected the recommendation of an ABA committee that the number of interrogatories which could be served without leave of court should be limited to 30. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 626-27, 648-49 (1978) (rejecting recommendation contained in ABA, *Report of the Special Committee for the Study of Discovery Abuse* in SECTION OF LITIGATION (1977)). The ruledrafters' stated reason was that they feared such a limitation would "involve the courts in endless disputes without guidelines for their resolution." *Id.* at 649. However, the Committee also believed that limitations established by local rule might be appropriate because "[i]t may well be that a district familiar with the generality of its business and the habits of its bar can determine upon a reasonable number of questions." *Id.* This statement was probably an early recognition of what became more explicit policy in the 1983 amendments, namely that local judges know best how to balance the advantages of information revelation through discovery against the disadvantages of potential abuse from overdiscovery.

194. *See supra* note 74 and aecompanying text.

195. *See supra* text accompanying notes 75-86.

196. *Preliminary Draft, supra* note 14, at 481 (amendment to rule 26(b)(1) directed at overdiscovery).

197. *But see* FED. R. CIV. P. 26(g) (attorney responding to discovery must certify that response is proper under standards set forth in rule; sanctions provided for wrongful certification).

198. Evasion may be a worse problem than overdiscovery. *See Problems and Abuses, supra* note 14, at 831, 833 (61% of lawyers surveyed cited evasion as a problem; 49% complained about overdiscovery).

199. *See, e.g.*, Brazil, *supra* note 8, at 1339-43 and authorities cited therein. *Improving Judicial Controls, supra* note 14, at 923-29 catalogues the various reasons why judges are so reluctant to use their sanctioning powers.

200. *See, e.g.*, FED. R. CIV. P. 16(b) (scheduling orders mandatory for all cases except those exempted by local rule).

but judges cannot be expected to cure discovery ills by themselves.[201] Reform in doctrine would be a welcome adjunct to process-oriented reform. Together, they can insure proper and efficient distribution of information.

Finally, my proposal has the advantage of being a clear rule.[202] The Advisory Committee has so far been reluctant to promulgate much in the way of specific guidelines for discovery. It has continued to believe that broad trial judge discretion is, on balance, the best solution.[203] For many discovery issues this balance makes sense. The benefits of flexibility will often be greater than the negative consequences of uncertainty and variability. However, if I am right that the costs of work product immunity for witness statements far outweigh the benefits, then a per se rule is in order.

V. CONCLUSION

Revolutionaries and cynics may properly question whether any change in discovery mechanisms can accomplish much. Frustration with the civil justice system will persist as long as economic incentives to impede justice and adversary ethics remain. But reformers live with the possible, not the ideal, and believe that even limited improvements are worth pursuing.[204] The abolition of work product immunity for witness statements would be a valuable reform.

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201. *See* Frankel, *supra* note 23, at 1041-45 (describing increased judicial activism to curb adversary excesses as an "unpromising" approach). Even those who favor greater judicial involvement recognize that judges can never know a case as well as the parties, and under the adversary system the judiciary cannot rely on lawyers to provide full information. Brazil, *supra* note 8, at 1347.

202. *Cf. Improving Judicial Controls, supra* note 14, at 939-40 (amendments to Rule 26 an improvement over vague Rule 37 standards because "[a] judge who is given a norm, even if it is not perfectly precise, is more likely to feel confident that sanctioning is justified than is a judge who is left to grope for standards in vague impressions of how things are done or the state of the art"). The proposed abolition of work product immunity for witness statements is decidedly clearer than even the new rule 26 standard, and will therefore lead to even stronger judicial action if abused.

203. *See* Marcus, *supra* note 20, at 364 (proposed 1983 amendments "seek to stimulate, but do not require, substantially increased activity on the part of judges who have not used their existing power to the utmost"). *But see* Surbrin, *supra* note 21, at 1650 (arguing that most recent amendments make fundamental changes in judicial role).

204. *Cf.* Uviller, *supra* note 159 (rejects Frankel's more radical proposals for change in adversary system because they will never be accepted, but makes certain more modest suggestions).