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Discovery of Opinion Work Product in Illinois: Toward Defining the Parameters of Consolidation Coal, 16 J. Marshall L. Rev. 49 (1982)

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COMMENTS

DISCOVERY OF OPINION WORK PRODUCT IN ILLINOIS: TOWARD DEFINING THE PARAMETERS OF *CONSOLIDATION COAL*

INTRODUCTION

The purpose of pretrial discovery is to promote full disclosure of relevant factual material so as to increase the probability of a just decision on the merits of the case.[1] Liberal discovery procedures developed as an alternative to "the procedural doctrines which have exalted the role of a trial as a battle of wits and subordinated its function as a means of ascertaining the

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1. The various instruments of discovery now serve (1) as a device . . . to narrow and classify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need to be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

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Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. . . . The deposition-discovery procedure simply advances the stage at which disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947).

"[B]y 'educating the parties in advance of trial as to the real value of their claims and defenses' the ascertainment of the truth and the ultimate disposition of the lawsuit in accordance therewith is expedited." Monier v. Chamberlain, 35 Ill. 2d 351, 361, 221 N.E.2d 410, 417 (1966) (quoting People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 236, 145 N.E.2d 588, 592 (1957)).

The facilitation of pretrial settlement is often stated as a corollary purpose of discovery. If all the factual information relevant to a party's claim or defense is known in advance of trial, the party will be better able to evaluate the value of the case, thereby leading to a settlement, which avoids costly litigation and relieves the pressure on crowded court dockets. Monier v. Chamberlain, 35 Ill. 2d 351, 357, 221 N.E.2d 410, 415 (1966); People *ex rel.* Terry v. Fisher, 12 Ill. 2d 231, 239, 145 N.E.2d 588, 592-93 (1957).

For an analysis of both the purposes of discovery and criticisms of the assumed benefits, see Johnston, *Discovery in Illinois and Federal Courts*, 15 J. MAR. L. REV. 1 (1982) [hereinafter cited as Johnston]; Comment, *Discovery and the Work Product Doctrine*, 11 LOY. U. CHI. L.J. 863 (1980) [hereinafter cited as *Discovery and Work Product*]; Developments in the Law—Discovery, 74 HARV. L. REV. 940 (1961).

truth."[2] To the extent that liberal discovery has replaced the pleadings as a means of narrowing issues and uncovering facts, it is an improvement in our adversary system of litigation.[3] The need to protect an attorney's privacy in the preparation for litigation, so as to promote effective presentation of the client's case,[4] clashes with the purpose of pretrial discovery. This conflict intensifies as discovery attempts to reach not only relevant factual information developed in preparation for litigation, but also pretrial materials which necessarily contain the mental impressions and trial strategy of opposing counsel.[5] Such an intrusion strikes at the heart of the adversary system which assumes independent preparation and diligent presentation of the relevant facts to the court by both sides to a controversy.[6]

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2. Krupp v. Chicago Transit Auth., 8 Ill. 2d 37, 41, 132 N.E.2d 532, 535 (1956). *See also* Pink v. Dempsey, 350 Ill. App. 405, 411, 113 N.E.2d 334, 336 (1956) ("Pretrial discovery . . . is directed toward making the judicial process one of determining the facts appertaining to the issue and rendering a just decision thereon, rather than the promotion of a battle of wits between counsel."); Johnston, *supra* note 1, at 3 (pretrial discovery is a rejection of the "sporting theory" of litigation); Note, Monier v. Chamberlain: *Work Product—Further Erosion of the Work Product Sanctuary*, 1 J. MAR. J. PRAC. & PROC. 146, 148 (1967) (sporting theory of justice no longer a serious argument against pretrial discovery) [hereinafter cited as *Erosion of Work Product*].

3. Hickman v. Taylor, 329 U.S. 495, 500 (1947). Prior to the establishment of pretrial discovery mechanisms, "the pretrial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings." *Id. See generally* Johnston, *supra* note 1; *Erosion of Work Product, supra* note 2.

4. Hickman v. Taylor, 329 U.S. 495, 510 (1947) ("Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.").

5. For an excellent analysis of the opposing interests of discovery and the adversary system from the perspective of the work product doctrine, see Note, *Protection of Opinion Work Product Under the Federal Rules of Civil Procedure*, 64 VA. L. REV. 333, 334-36 (1978) [hereinafter cited as *Protection of Opinion Work Product*].

6. Work product which contains an attorney's mental impressions and opinions is frequently referred to as the core of work product. That is, the very heart of an attorney's role in the adversary system is the application of his special knowledge and expertise for the benefit of the client in preparation for trial, which generates certain strategies, opinions and conclusions with respect to evidence and witnesses. The attorney's expertise will also be used in gathering relevant evidence for trial, but the material gathered will be based in part upon the attorney's strategies and conclusions. Therefore, work product which reveals the mental processes of an attorney is at the core of trial preparation materials. *See* United States v. Nobles, 422 U.S. 225, 238 (1975); Cooper, *Work Product of the Rulesmakers*, 53 MINN. L. REV. 1269, 1283 (1969) [hereinafter cited as Cooper]; *Protection of Opinion Work Product, supra* note 5, at 333; Comment, *Ambiguities After the 1970 Amendments to the Federal Rules of Civil Procedure Relating to Discovery of Experts' and Attorneys' Work Product*, 17 WAYNE L. REV. 1145, 1155-56 (1971) [hereinafter cited as *Ambiguities*].

The adversary system assumes that bilateral preparation and presentation is the primary force in ascertaining the truth in a controversy. Only by

This competition between the interests of pretrial discovery and the interests of the adversary system has necessitated a balancing of these interests to allow equal access to relevant information while preserving the essential nature of the adversary system.[7] This balancing, in its various forms, has come to be known loosely as the work product doctrine.

The Development of the Work Product Doctrine

Although the work product doctrine had its origin in the common law, *Hickman v. Taylor*[8] was the seminal case in developing the doctrine in its present form. In that case, the United States Supreme Court recognized a qualified immunity from discovery for the work product of an attorney.[9] According to the Court, work product includes "interviews, statements, memoranda, correspondence, briefs, mental impressions [and] personal beliefs" generated by an attorney preparing for litigation.[10] The protection afforded by the Court, however, is not absolute;[11] only if the party who seeks discovery can show that the work-product materials are essential to his case is discovery permitted.[12]

The *Hickman* decision outlined several practical considerations which support the qualified immunity. Allowing free ac-

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diligent two-sided preparation and presentation of all the facts is the necessary "friction" which generates the truth produced. Any procedure which interferes with a party's preparation of the case, such as the discovery of trial preparation materials, reduces the necessary adversary position and self-interest of the parties, thus impairing the judicial search for the truth. *Protection of Opinion Work Product, supra* note 5, at 334. *But see* Comment, *The Potential for Discovery of Opinion Work Product Under Rule 26(b)(3)*, 64 IOWA L. REV. 103, 113-14 (1978) (protection of the adversary system provides a weak basis for supporting work product protection) [hereinafter cited as *Potential for Discovery of Opinion Work Product*].

7. Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("discovery, like all matters of procedure, has ultimate and necessary boundaries"). *See also Discovery and Work Product, supra* note 1, at 863; *Protection of Opinion Work Product, supra* note 5, at 333.

8. 329 U.S. 495 (1947).

9. *Id.* at 511.

10. *Id.*

11. *Id.*

12. *Id.* For a discussion of work product protection prior to *Hickman* and the development of the *Hickman* doctrine, see generally Note, *Discovery of an Attorney's Work Product in Subsequent Litigation*, 1974 DUKE L.J. 799, 801-05 [hereinafter cited as *Work Product in Subsequent Litigation*]; *Discovery and Work Product, supra* note 1, at 868-69; Note, SEC v. International Student Marketing Corp., *Work Product Immunity Inapplicable to Attorney-Defendant Where Work Product Is At Issue and Former Client Is No Longer an Interested Party in the Suit*, 6 LOY. U. CHI. L.J. 447, 449-51 (1975) [hereinafter cited as *Work Product Immunity*]; Note, *The Implications of* Upjohn, 56 NOTRE DAME LAW. 887, 897 (1981) [hereinafter cited as *Implications of* Upjohn]; *Ambiguities, supra* note 6, at 1152-56.

cess to opposing counsel's work product, thus allowing one attorney to rely on the efforts of another, would deter written preparation and would discourage the attorney whose files are invaded from using his or her best efforts in representing the client.[13] Free access to work product would result in "[i]nefficiency, unfairness, and sharp practices . . . in the giving of legal advice and in the preparation of cases for trial."[14] The legal profession would be "demoralized" and clients "poorly served."[15]

The *Hickman* decision is also responsible for formulating the distinction between ordinary and opinion work product. Opinion work product consists of materials generated in anticipation of litigation which reveal the mental impressions, opinions, or trial strategy of an attorney.[16] An example is memoranda prepared by an attorney which reflect his personal and professional evaluation of a prospective witness.[17] Ordinary work product encompasses relevant factual material developed for trial which does not disclose such "conceptual data."[18]

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13. Hickman v. Taylor, 329 U.S. at 511.

14. *Id.*

15. *Id.* Some commentators have questioned the practical significance of the factors outlined in *Hickman* which support work product protection. *See* Cooper, *supra* note 6, at 1276-82; *Potential for Discovery of Opinion Work Product, supra* note 6, at 113-16.

16. Hickman v. Taylor, 329 U.S. at 512 ("But as to oral statements made by witnesses . . . whether presently in the form of his mental impressions or memoranda, we do not believe that any showing of necessity can be made under the circumstances . . . to justify production."). *Accord* Upjohn Co. v. United States, 449 U.S. 383, 400 (1981) (discussing the special *Hickman* protection for opinion work product); Monier v. Chamberlain, 35 Ill. 2d 351, 360, 221 N.E.2d 410, 416 (1966) (opinion work product includes an attorney's impression of a prospective witness, trial briefs, documents marshalling evidence for trial, and any documents or materials made in preparation for trial which reveal the attorney's "mental processes").

17. Monier v. Chamberlain, 35 Ill. 2d 351, 360, 221 N.E.2d 410, 416 (1966).

18. *Id.* The problem of defining the scope of trial preparation materials has resulted in diverse views in the federal courts. The federal rules and the Illinois rules both require that materials, to qualify for work product protection, must be prepared in "anticipation of litigation." *See* FED. R. CIV. P. 26(b)(3); ILL. REV. STAT. ch. 110A, § 201(b)(2) (1981) (ILL. SUP. CT. R. 201(b)(2)).

The courts and commentators have proposed several definitions of "anticipation of litigation." *See, e.g., In re* Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979) (some possibility of litigation must exist); Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 604 (8th Cir. 1978) (work product protection does not apply to documents prepared where there is only a remote possibility of litigation); Harper & Row Pub., Inc. v. Decker, 423 F.2d 487, 492 (7th Cir. 1970) (materials prepared with an eye toward litigation), *aff'd by an equally divided court*, 400 U.S. 955 (1971); Home Ins. Co. v. Ballenger Corp., 74 F.R.D. 93, 101 (N.D. Ga. 1977) ("substantial probability that litigation will occur and that commencement of such litigation is imminent"); *In re* Grand Jury Investigation, 412 F. Supp. 943, 948 (E.D. Pa. 1976) (threat of litigation is "real and imminent"). *See also* 4 J. MOORE & J. LUCAS,

Examples are a verbatim statement of a prospective witness[19] and photographs of an accident site.[20] Under the *Hickman* rule, ordinary work product is discoverable upon showing that the material sought is essential to the case, but opinion work product is discoverable, if at all, only in "rare situation[s]."[21]

The *Hickman* opinion is not a model of clarity or certainty, and federal courts have come to disparate conclusions as to the scope of the protection. The courts had problems both in determining the requisite showing for discovery of ordinary work product,[22] and in determining the discoverability of opinion work product.[23] These problems led the Illinois Supreme Court, in 1966, to formulate a unique approach to protection of attorney work product.

Work Product in Illinois

In *Monier v. Chamberlain*,[24] the Illinois Supreme Court rejected the *Hickman* protection of ordinary work product. The court felt that requiring a showing of substantial need or "good cause" before permitting discovery of work product had led "to a

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MOORE'S FEDERAL PRACTICE ¶ 26.63, at 26-349 (2d ed. 1981) (litigation must have been "reasonably" anticipated or apprehended) [hereinafter cited as J. MOORE]; 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2024, at 198 (1970) ("in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation") [hereinafter cited as WRIGHT & MILLER].

The United States Supreme Court recently addressed the work product issue in Upjohn Co. v. United States, 449 U.S. 383 (1981). The Court held that the work product doctrine applied to an Internal Revenue summons seeking information about questionable payments to foreign officials. *Id.* at 397. Noticeably absent from the decision is any discussion of the anticipation of litigation requirement of Rule 26(b)(3). One commentator has taken the position that in a case, such as *Upjohn*, of questionable payments to foreign governments the Court would hold that litigation could be assumed. J. WEINSTEIN, WEINSTEIN'S EVIDENCE ¶ 503(b)[04], at 503-56.2 (1975). *See also In re* Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979) (questionable payments by corporation raised possibility of litigation, so work product protection applied to corporate attorney's investigation materials).

19. Monier v. Chamberlain, 35 Ill. 2d 351, 360, 221 N.E.2d 410, 416 (1966).

20. *Discovery and Work Product, supra* note 1, at 881.

21. Hickman v. Taylor, 329 U.S. 495, 513 (1947). "Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential, discovery may properly be had. . . . But as to oral statements made by witnesses . . . whether in the form of [the attorney's] mental impressions or memoranda," discovery would only be had in a rare situation. *Id.* at 511-12.

22. *Ambiguities, supra* note 6, at 1156-57.

23. *See infra* notes 36, 46 & 53 and accompanying text. *See also Ambiguities, supra* note 6, at 1156-57.

24. 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

huge jungle of conflicting decisions."[25] Moreover, the "good cause" standard required too great a degree of judicial intervention into the discovery process. The court observed that under Illinois practice discovery is meant to be self-executing with the impetus to proceed supplied by the parties to the dispute.[26] Thus, the court held that ordinary work product would be freely discoverable.[27] While the court was cognizant that the Illinois rule would "occasionally penalize diligent counsel and reward his slothful adversary," it held that the ascertainment of the truth and the expeditious disposition of the litigation overrode these considerations.[28] The *Monier* court, however, agreed with the *Hickman* decision that opinion work product should be af-

25. *Id.* at 361, 221 N.E.2d at 417.

26. *Id.* at 357, 221 N.E.2d at 415. *Accord* Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 110, 432 N.E.2d 250, 253 (1982) (Illinois discovery procedures contemplate that discovery will procede without judicial intervention); Williams v. A.E. Staley Mfg. Co., 83 Ill. 2d 559, 563, 416 N.E.2d 252, 254 (1981) ("discovery will generally proceed without judicial intervention and . . . the great majority of discovery questions will be resolved by counsel themselves").

27. Monier v. Chamberlain, 35 Ill. 2d at 361, 221 N.E.2d at 417.

28. *Id.* The *Monier* decision was the culmination of a series of cases which had gradually eroded what had once been absolute immunity for all trial preparation materials. *Discovery and Work Product, supra* note 1, at 875. Prior to *Monier*, the Illinois Supreme Court began to create exceptions to the absolute protection for all work product. First, the court held that names and addresses of prospective witnesses could not be withheld under a claim of work product protection. Krupp v. Chicago Transit Auth., 8 Ill. 2d 37, 42, 132 N.E.2d 532, 536 (1956). Later, the court held that the material and evidentiary facts that would be independently admissible at trial are not protected by the work product doctrine. Stimpert v. Abdnour, 24 Ill. 2d 26, 31, 179 N.E.2d 602, 605 (1962). The Illinois appellate courts had likewise begun to formulate exceptions to work product protection. One court, relying on *Stimpert*, held that a witness' statement gathered in preparation for trial was not exempt from discovery under the work product doctrine. Oberkircher v. Chicago Transit Auth., 41 Ill. App. 2d 68, 77, 190 N.E.2d 170, 173 (1963). Another court held that reports to an attorney about the prior condition of a gas main, which exploded and gave rise to the litigation, were not protected work product. Day v. Illinois Power Co., 50 Ill. App. 2d 52, 61, 199 N.E.2d 802, 807 (1964). In 1965, the Illinois Supreme Court Rules Committee proposed a new work product rule which incorporated the exceptions created in the case law. *See* 53 ILL. B.J. 572 (1965). *Monier* did away with the need to adopt the proposed rule by holding all ordinary work product freely discoverable.

This aspect of the *Monier* decision met with criticism, but was also praised in some commentary. *Compare* Watson, *The Settlement Theory of Discovery*, 55 ILL. B.J. 480 (1967) *and Erosion of Work Product, supra* note 2, *with* Philips, *Anti-Monierism*, 55 ILL. B.J. 920 (1967). The drafters of the Illinois Supreme Court Rules attempted to eliminate the possibility of one attorney relying on the efforts of his opponent by allowing the trial judge to apportion the costs of discovery. ILL. REV. STAT. ch. 110A, § 201(b)(2) (1981) (ILL. SUP. CT. R. 201(b)(2)). *See also Discovery and Work Product, supra* note 1, at 899-900. *Cf.* Cooper, *supra* note 6, at 1331-33 (while not referring to *Monier* specifically, the article comes to a conclusion similar to the Illinois work product rule).

forded greater protection, and held that such work product is absolutely exempt from discovery.[29] This privilege-like exemption remained the rule in Illinois for sixteen years.

In *Consolidation Coal Co. v. Bucyrus-Erie Co.*,[30] the Illinois Supreme Court again addressed the scope of work product protection in Illinois. The court modified the *Monier* standard of absolute protection to allow for discovery of opinion work product where procuring the information from other sources is absolutely impossible.[31] The court declined to elaborate any further. This lack of guidance may lead the Illinois courts to look to other jurisdictions, especially the federal courts, in determining the parameters of the new rule. A critical analysis of *Consolidation Coal* is necessary to determine the questions left unanswered by the decision. An attempt will be made to set out a framework within which the Illinois courts may work to determine the boundaries of the exception.

DISCOVERY OF OPINION WORK PRODUCT: JUDICIAL INTERPRETATION OF *HICKMAN V. TAYLOR* AND RULE 26(b)(3)

In 1970, Rule 26 of the Federal Rules of Civil Procedure was amended to reflect the *Hickman* work product rule, and to clarify the standard of protection for attorney work product.[32] The amended rule, 26(b)(3), creates a clearer distinction between ordinary and opinion work product with regard to their discover-

29. Monier v. Chamberlain, 35 Ill. 2d at 361, 221 N.E.2d at 417. The codified version of the Illinois work product rule states:

Privilege and Work Product

. . .

Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.

ILL. REV. STAT. ch. 110A, § 201(b)(2) (1981) (ILL. SUP. CT. R. 201(b)(2)).

The majority of states have adopted the federal rule with little variation. *See, e.g.*, ARIZ. R. CIV. P. 26(b)(3); COLO. R. CIV. P. 26(b)(3); DEL. CT. COMM. PLEAS CIV. R. 26(b)(3); IDAHO R. CIV. P. 26(b)(3); IND. R. TRIAL P. 26(b)(2); MASS. R. CIV. P. 26(b)(3); ME. R. CIV. P. 400; MINN. R. CIV. P. 26.02(3); N.D.R. CIV. P. 26(b)(3); OHIO R. CIV. P. 26(b)(3); WASH. SUPER. CT. CIV. R. 26(b)(3); WYO. R. CIV. P. 26(b)(3). Texas grants absolute immunity to all work product materials. *See* TEX. R. CIV. P. 186a. In 1978, Pennsylvania amended its work product rule to protect only opinion work product, thus joining Illinois in allowing the free discoverability of ordinary work product. *See* PA. R. CIV. P. 4003.3. For a discussion of the various state approaches to work product protection, see Comment, *Texas Work Product Protection: Time For A Change*, 15 HOUS. L. REV. 112 (1977).

30. 89 Ill. 2d 103, 432 N.E.2d 250 (1982).

31. *Id.* at 111, 432 N.E.2d at 253.

32. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DISCOVERY, ADVISORY COMMITTEE COMMENTS, 48 F.R.D. 487, 499-502 (1970).

ability.[33] Ordinary work product is discoverable upon a showing of substantial need and undue hardship in obtaining the materials from other sources.[34] The rule, however, is not clear as to the standard of protection to be afforded to opinion work product, and states only that "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation."[35]

Reacting to *Hickman* and Rule 26(b)(3), the federal courts developed various guidelines to determine when, if ever, opinion work product is discoverable. Three distinct approaches have emerged: (1) absolute immunity, (2) the "at issue" and crime or fraud exceptions, and (3) the balancing approach.

Absolute Immunity

Several federal courts have determined that opinion work product should be absolutely exempt from the discovery process.[36] The courts have reasoned that the considerations outlined in *Hickman*[37] and Rule 26(b)(3) of the Federal Rules both

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33. Rule 26(b)(3) states:

Trial Preparation: Materials

. . .

[A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation by or for that other party's representative . . . only upon a showing that the party seeking discovery 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. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

FED. R. CIV. P. 26(b)(3). *See also* Upjohn Co. v. United States, 449 U.S. 383 (1981). The Court in *Upjohn* held that Rule 26(b)(3) sets up different standards of protection for ordinary and opinion work product. Documents and tangible things which do not reveal an attorney's mental processes are discoverable upon showing substantial need and undue hardship. No showing of the substantial need and undue hardship contemplated by the rule, however, would be sufficient to compel production of opinion work product material. A far stronger showing of need would have to be demonstrated by the party seeking discovery. *Id.* at 400-02.

34. FED. R. CIV. P. 26(b)(3).

35. *Id. See also Potential For Discovery of Opinion Work Product, supra* note 6, at 113; *Ambiguities, supra* note 6, at 1156-57.

36. *See, e.g.*, Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); *In re* Grand Jury Proceedings, 473 F.2d 840 (8th Cir. 1973); *In re* Grand Jury Investigation, 412 F. Supp. 943 (E.D. Pa. 1976). *See also* WRIGHT & MILLER, *supra* note 18, at § 2026 (1970 & Supp. 1981); *Potential For Discovery of Opinion Work Product, supra* note 6, at 113-14; *Protection of Opinion Work Product, supra* note 5, at 337-40.

37. *See supra* text accompanying notes 13-15.

require absolute immunity. In *In re Grand Jury Proceedings*,[38] the Eighth Circuit held that opinion work product is absolutely protected from discovery.[39] The decision is clearly based on the distinction in *Hickman* between ordinary work product and work product which reflects an attorney's mental impressions.[40] Implicit in the decision is the court's concern that the dangers to the adversary system which would ensue from allowing discovery of work product are even more pronounced with respect to opinion work product.[41]

The Fourth Circuit, in *Duplan Corp. v. Moulinage et Retorderie de Chavanoz*,[42] granted absolute immunity for opinion work product on a much clearer analysis. According to that court, Rule 26(b)(3) of the Federal Rules commanded courts to protect opinion work product absolutely, as opposed to ordinary work product which could, in some instances, be discovered.[43] The court also felt that the possibility of fostering sharp practices and inefficiency compelled absolute protection from discovery for opinion work product. Furthermore, the court feared that discovery of opinion work product, in any instance, would discourage written preparation for trial;[44] if opinion work product remained unwritten, clients would be poorly served and truth would be "lost in the murky recesses of the memory."[45]

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38. 473 F.2d 840 (8th Cir. 1973). In *In re Grand Jury Proceedings*, the government sought to compel the disclosure of summaries of interviews with nonemployees conducted by an attorney for the corporation.

39. *Id.* at 848.

40. *Id.*

41. *Id.* (citing C. WRIGHT, LAW OF FEDERAL COURTS 362 (2d ed. 1970)). The Eighth Circuit, however, in *In re* Murphy, 560 F.2d 326 (8th Cir. 1977), recognized a limited crime or fraud exception to the protection of opinion work product. *Id.* at 338. The *Murphy* case suggests a retreat from the court's holding in *Grand Jury Proceedings* that opinion work product is absolutely protected. *See supra* text accompanying note 39. On the crime or fraud exception, see *infra* notes 51-53 and accompanying text.

42. 509 F.2d 730 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

43. *Id.* at 734.

44. *Id.* at 736.

45. *Id.* The *Duplan* court's holding has been criticized for several reasons. One argument is that the history of Rule 26(b)(3) does not support absolute immunity from discovery. In 1946, the Advisory Committee on Rules for Civil Procedure proposed an amendment to the rules which would have granted absolute immunity to opinion work product. The proposed rule stated: "The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinions or legal theories. . . ." REPORT OF PROPOSED AMENDMENTS TO RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, 5 F.R.D. 433, 457 (1946). The amendment was never adopted. The 1970 amendment to Rule 26 requires only that the court "shall protect" against the disclosure of opinion work product. FED. R. CIV. P. 26(b)(3). If the drafters of Rule 26(b)(3) had wanted to grant absolute protection to

The "At Issue" and Crime or Fraud Exceptions

Several courts have refused to adopt an absolute immunity for opinion work product. Rather, these courts have developed certain well-defined exceptions to an otherwise strict protection of opinion work product.[46] In *Handgards, Inc. v. Johnson & Johnson*,[47] the court recognized the "at issue" exception to the almost absolute protection of opinion work product. The plaintiff brought an antitrust action claiming that the defendant had instituted a series of patent infringement suits against it in bad faith as part of a conspiracy to restrain trade. The plaintiff sought access to the litigation files of the attorneys who had represented the defendant in the prior patent suits in order to learn those attorneys' opinions about the validity of the patents in the earlier litigation.[48] The defendant resisted discovery on the ground that the requested documents were opinion work prod-

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opinion work product, such an intention could have been more explicitly stated. *Protection of Opinion Work Product, supra* note 5, at 338-39.

The *Duplan* court's reference to *Hickman* as supporting absolute immunity has little substance. The *Hickman* Court did not rule that opinion work product is absolutely immune from discovery, but rather held that only in rare circumstances would production be justified. *See supra* text accompanying note 21. Thus the *Hickman* decision does not require absolute immunity, but rather only requires greater protection for opinion work product materials. *Protection of Opinion Work Product, supra* note 5, at 339. *See also Potential for Discovery of Opinion Work Product, supra* note 6, at 110; *Ambiguities, supra* note 6, at 1162.

The *Duplan* decision also seems to recognize the limited "at issue" exception to an otherwise strict protection of opinion work product. The court cited with approval Bird v. Penn Cent. Co., 61 F.R.D. 43 (E.D. Pa. 1973), which held that "a party cannot affirmatively assert reliance upon an attorney's advice and then refuse to disclose such advice." *Duplan*, 509 F.2d at 735. For a discussion of the "at issue" exception, see *infra* text accompanying notes 47-50.

The Fourth Circuit also favorably discussed the crime or fraud exception to work product protection. Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1220 (4th Cir. 1976). *See also Protection of Opinion Work Product, supra* note 5, at 338 n.38.

46. *See, e.g., In re* Murphy, 560 F.2d 326 (8th Cir. 1977) (crime or fraud exception); Panter v. Marshall Field & Co., 486 F. Supp. 1168 (N.D. Ill. 1978) ("at issue" exception), *aff'd*, 646 F.2d 271 (7th Cir.), *cert. denied*, — U.S. —, 102 Sup. Ct. 658 (1981). American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706 (W.D. Mo. 1978) (crime or fraud exception); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976) ("at issue" exception); Truck Ins. Exch. v. St. Paul Fire & Marine Ins. Co., 66 F.R.D. 129 (E.D. Pa. 1975) ("at issue" exception); SEC v. National Student Mktg. Corp., 18 Fed. R. Serv. 2d (Callaghan) 1302 (D.D.C. 1974) ("at issue" exception); Bird v. Penn Cent. Co., 61 F.R.D. 43 (E.D. Pa. 1973) ("at issue" exception); Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 296 F. Supp. 979 (E.D. Wis. 1969) ("at issue" exception). *See also* J. MOORE, *supra* note 18, ¶ 26.64[4] at 26-447 (2d ed. 1981 & Supp. 1981-82); *Potential for Discovery of Opinion Work Product, supra* note 6; *Discovery and Work Product, supra* note 1, at 874, 896-97; *Work Product Immunity, supra* note 12; *Implications of* Upjohn, *supra* note 12, at 898-99; *Protection of Opinion Work Product, supra* note 5, at 341-44.

47. 413 F. Supp. 926 (N.D. Cal. 1976).

48. *Id.* at 928.

uct and thus absolutely protected. The court disagreed and held that the files were discoverable.[49] The court based its conclusion on the fact that the attorney's opinion of the validity of the prior patents was directly at issue in the plaintiff's claim. The only proof on the issue of validity was contained in the work product of the defendant's attorneys. The court held that where the information sought is "directly at issue, and the need for its production is compelling," production will be ordered.[50]

The crime or fraud exception is similar to the "at issue" exception. If the crime or fraud of the party opposing discovery is the basis of the claim or defense of the party seeking discovery, and if proof of the crime or fraud cannot be obtained from any other source, the opinion work product containing such information is discoverable.[51] In *In re Murphy*,[52] the court developed a two-pronged test which the party seeking discovery had to meet before production would be compelled: (1) the client must be engaged in or planning a criminal or fraudulent scheme when he seeks the advice of an attorney to further the scheme; and (2) the opinion work product must bear a "close relationship" to the client's scheme to commit a crime or fraud.[53]

The Balancing Approach

Several courts have read *Hickman* and Rule 26(b)(3) to require balancing the need of the party seeking disclosure and the attorney's privacy.[54] In *Xerox Corp. v. IBM Corp.*,[55] the court

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49. *Id.* at 931.

50. *Id.* at 933.

51. *See Protection of Opinion Work Product, supra* note 5, at 343 & n.64. *See also In re* Murphy, 560 F.2d 326 (8th Cir. 1977); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215 (4th Cir. 1976); American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706 (W.D. Mo. 1978).

52. 560 F.2d 326 (8th Cir. 1977). The *Murphy* litigation arose from an antitrust and fraud action alleging a monopoly in the manufacture and distribution of tetracycline against several pharmaceutical companies. The government contended that the companies involved had defrauded the U.S. Patent Office by withholding important information concerning the tetracycline patents. The government sought discovery of documents from prior patent infringement suits which involved the manufacturers. The court held that the government had failed to make a *prima facie* showing that the manufacturers had defrauded the Patent Office, and thus the exception was not available to compel the production of the documents in question. *Id.* at 339. See *Potential for Discovery of Opinion Work Product, supra* note 6, for a discussion and analysis of the *Murphy* decision.

53. 560 F.2d at 338.

54. *See, e.g., In re* Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979); Harper & Row Pub., Inc. v. Decker, 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971); Xerox Corp. v. IBM Corp., 64 F.R.D. 367 (S.D.N.Y. 1974); International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177 (M.D. Fla. 1973). *See also Discovery and Work Product, supra* note 1, at 874; *Protection of Opinion Work Product, supra* note 5, at 344-45.

55. 64 F.R.D. 367 (S.D.N.Y. 1974). For the facts of the *Xerox* case, see

held that *Hickman* called for the protection of an attorney's opinion work product when feasible, "but not at the expense of hiding non-privileged facts from adversaries or the court. Thus, the right of privacy of an attorney's notes must be balanced against the critical need for the facts."[56]

A variant of the balancing approach has developed in a few courts which hold that, as the quantity of opinion work product in a document increases, the requirement of substantial need increases proportionately. A representative case is *Harper & Row Publishers, Inc. v. Decker*,[57] where the court held that "the less the lawyer's 'mental processes' are involved, the less will be the burden to show good cause."[58]

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infra text accompanying notes 127-29.

56. 64 F.R.D. at 381.

57. 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

58. *Id.* at 492. The court refused to compel the disclosure of interview memoranda even though six years had passed since the interviews were conducted, and even though, as the court conceded, memories would dim over that long a period of time, making the witnesses' later depositions subject to inaccuracies. *Id.*

The balancing approach has been criticized for several reasons. One commentator has argued that the discretion of the trial judge is too great in balancing the interests of privacy and disclosure. This wide discretion could lead to erratic and uncertain protection. The attorneys' uncertainty about the protection could deter written preparation and lead to poorly-represented clients. *Protection of Opinion Work Product, supra* note 5, at 344-45.

Another commentator has labeled the balancing approach the "one-dimensional" approach to work product protection. That is, the courts which use the balancing rationale fail to distinguish the differing standards of protection for opinion work product embodied in Rule 26(b)(3) and *Hickman*. The commentator points out that the recent Supreme Court decision in Upjohn Co. v. United States, 449 U.S. 383 (1981), clearly acknowledges the distinction, and is thus a rejection of this one-dimensional approach. *Implications of* Upjohn, *supra* note 12, at 900-01. While these criticisms have some merit, a closer analysis of some of the instances in which the balancing approach has been used reveals that the courts which use the approach are nevertheless giving greater protection to opinion work product than to ordinary work product materials. Those courts which have allowed discovery seem to be describing the rare situations contemplated by the *Hickman* decision. *See, e.g.*, *In re* Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (memoranda from attorney interview with now-deceased witness, which could contain opinion work product, is discoverable because of the "stark inability" of the government to procure the information from other sources); Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974) (facts critical to a party's case, which are uniquely within the knowledge of a witness who has failed to remember the essential facts at deposition, are discoverable by producing opinion work product in the form of interview memoranda because of the "total inability" to obtain those facts from other sources). *See also infra* text accompanying notes 124-27, 129-31.

Opinion Work Product Intertwined With Ordinary Work Product

The several different approaches to discovery of opinion work product reflect the frequent problem of opinion work product existing in the same document with relevant factual information developed by the attorney. The Advisory Committee Notes to Rule 26(b)(3) allow a court, where feasible, to excise opinion work product from the document to allow discovery of the factual material upon a showing of substantial need and undue hardship in procuring the information from other sources.[59] The more difficult problem arises when the opinion work product cannot be excised without destroying the value of the document to the party seeking discovery. The courts which absolutely protect opinion work product would be likely to bar disclosure.[60] The courts which recognize the narrow "at issue" exception or crime or fraud exception would probably allow discovery if the opinion work product fit within the exceptions.[61] The courts which balance the need for discovery with the need for protection would allow discovery if the need to obtain the material was critical to the party's case.[62]

The preceding discussion demonstrates the ambiguities of *Hickman* and Rule 26(b)(3), and the different conclusions and

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59. *See* PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DISCOVERY, ADVISORY COMMITTEE COMMENTS, 48 F.R.D. 487, 502 (1970). *See also* WRIGHT & MILLER, *supra* note 18, at § 2026 (1970 & Supp. 1982).

60. *See* Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 736-37 (4th Cir. 1974) (court may excise opinion work product, but must take care to protect against disclosure of such work product). *See also Protection of Opinion Work Product, supra* note 5, at 340.

61. None of the courts which recognize the exceptions have dealt with the excising problem. *Cf. Protection of Opinion Work Product, supra* note 5, at 346 (commentator proposed amendment to Rule 26(b)(3) which would protect opinion work product unless it fits within the two exceptions).

62. *See* Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974). The holding in *Xerox* is quite remarkable because it would allow the production of opinion work product in the form of interview memoranda, where excising is not feasible, so long as the substantial need and undue hardship criteria are met.

A literal reading of *Xerox* would yield the conclusion that the court would give opinion work product which can be excised greater protection than that given to opinion work product which cannot be excised. *See Protection of Opinion Work Product, supra* note 5, at 341. The *Xerox* holding also seems contrary to FED. R. CIV. P. 26(b)(3) and Upjohn Co. v. United States, 449 U.S. 383, 402 (1981), which require that a far stronger showing of necessity and undue hardship would have to be demonstrated in order to compel the disclosure of opinion work product than is necessary to compel discovery of ordinary work product. *See also supra* text accompanying note 21. *But see supra* note 58 (*Xerox* case demonstrates rare situation contemplated by *Hickman* and *Upjohn* where opinion work product would be discoverable).

approaches which can be justified under the federal work product rule.[63] The Illinois Supreme Court, in *Monier*, avoided this result by simply declaring ordinary work product discoverable and opinion work product absolutely exempt from discovery. Absolute exemption, however, may by its inflexibility work injustice and frustrate the fair disposition of litigation in some circumstances.[64] The Illinois Supreme Court realized this problem after reviewing documents which contained opinion work product in *Consolidation Coal Co. v. Bucyrus-Erie Co.*[65] The court's attempt to create a narrow exception to the otherwise absolute immunity is commendable, but may give rise to problems of interpretation in Illinois (much like the disparate results in the federal courts which followed *Hickman*), as the state trial courts struggle to set the bounds of discovery. Moreover, the decisions in the federal courts will undoubtedly be looked to by the Illinois courts in their attempt to define the parameters of the *Consolidation Coal* decision.

THE *CONSOLIDATION COAL* CASE

Facts and Procedural History

In January, 1977, Consolidation Coal Co. (Consol) brought an action against Bucyrus-Erie Co. (B-E) in the circuit court of Cook County to recover damages sustained when a wheel excavator collapsed at one of Consol's coal mines. The wheel excavator was designed, manufactured, and repaired for Consol by B-E. Consol commenced discovery and filed a production request for all of B-E's documents relating to the excavator, including documents relating to B-E's investigation of the

63. Recently, in Upjohn Co. v. United States, 449 U.S. 383 (1981), the United States Supreme Court had the opportunity to clarify the scope of opinion work product protection under Rule 26(b)(3), but refused to do so. Instead, the Court referred to the *Hickman* decision and stated in dictum that, at the least, "a far stronger showing of necessity and unavailability by other means" than is required to discover ordinary work product would be necessary to compel disclosure of opinion work product. *Id.* at 401-02. *Upjohn*, in effect, has left the ambiguities unresolved and the formulation of standards to the lower courts. Concededly, the main thrust of the *Upjohn* opinion dealt with attorney-client privilege for corporate employees, and the Court was asked to decide only if work product protection extended to Internal Revenue Service summonses issued under 26 U.S.C. § 7602. *Id.* at 397. As to the effect of the *Upjohn* holding on work product protection for corporate employee interviews, see *infra* note 81.

64. *See Discovery and Work Product, supra* note 1, at 902, 904. *See also* Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 111, 432 N.E.2d 250, 253 (1982) (recognizing the need to create a narrow exception to the otherwise absolute protection of opinion work product because of situations where a party might not be able to obtain critical facts from other sources).

65. 89 Ill. 2d 103, 432 N.E.2d 250 (1982).

excavator's collapse.[66] B-E produced thousands of documents, but refused to produce a metallurgical report,[67] another report prepared by its director of engineering,[68] and memoranda and notes of interviews with various B-E employees prepared by in-house counsel.[69] B-E based its refusal on the attorney-client privilege and the work product doctrine.[70] After an *in camera* inspection, the trial court ordered B-E to produce the documents in question except for certain deleted portions which the trial court ruled were work product,[71] and the engineering director's report which was exempted by the attorney-client privilege.[72]

On appeal, the appellate court affirmed the trial court with some modifications.[73] The court held that the metallurgical report was solely factual material, thus it was not work product under the Illinois rule.[74] As to the interview memoranda and notes, the court noted, after an *in camera* inspection, that with limited exceptions the interviews contained solely factual information and were not protected work product.[75] The court also found that one document did contain opinion work product and ordered that certain material be deleted before production of the document to Consol.[76] B-E appealed to the Illinois Supreme Court.

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66. *Id.* at 106-07, 432 N.E.2d at 251.

67. The metallurgical report was a notebook which contained mathematical computations, tables, drawings, photographs, industry specification data, and handwritten notes prepared by an employee of B-E investigating the excavator's collapse. The legal department at B-E never communicated with the employee; the report was requested by his supervisor. The report was transferred to the legal department six months to a year after it was prepared. *Id.* at 111-12, 432 N.E.2d at 254.

68. *Id.* at 107, 432 N.E.2d at 251.

69. The attorneys for B-E conducted oral interviews with various employees of B-E regarding both the manufacture and collapse of the excavator. The substance of the interviews was contained in both typewritten memoranda and handwritten notes. *Id.* at 110, 432 N.E.2d at 253.

70. *Id.* at 107, 432 N.E.2d at 251.

71. *Id.*, 432 N.E.2d at 251-52.

72. *Id.*, 432 N.E.2d at 252. The trial court's ruling on the engineering director's report was not an issue on appeal.

73. Consolidation Coal Co. v. Bucyrus-Erie Co., 93 Ill. App. 3d 35, 44, 416 N.E.2d 1090, 1097 (1980), *vacated*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982).

74. *Id.* at 41, 416 N.E.2d at 1095. The court held that the report contained only material and objective information that did not disclose the theories, mental impressions, or litigation plans of B-E's attorneys. *Id.*

75. *Id.* at 42, 416 N.E.2d at 1095. The court found, however, that one document was entirely work product because it contained the attorney's arrangement of the facts. *Id.*

76. *Id.* at 42-43, 416 N.E.2d at 1096.

The Illinois Supreme Court Opinion

Writing for the court, Justice Underwood vacated the appellate court's decision as to the interview memoranda and notes, while upholding the appellate court as to the metallurgical report.[77] The Illinois Supreme Court held that counsel's interview memoranda and notes which are not verbatim or verified[78] are protected opinion work product because they necessarily reveal in "varying degrees" the attorney's mental process in evaluating the communications.[79] The court also held that the task of reviewing material, which contains opinion work product mixed with relevant factual material, in order to excise the protected material, would place too great a burden on the trial courts.[80] The court went on to hold that, while not routinely discoverable, opinion work product materials would be discoverable upon a conclusive showing, by the party seeking discovery, of the absolute impossibility of obtaining necessary information from other sources.[81] According to the court, the exception was inapplicable to this case because B-E had made available volumes of ma-

77. Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 122, 432 N.E.2d 250, 259 (1982). B-E also argued that the metallurgical report was protected by the attorney-client privilege. The court rejected this argument because the employee who had prepared the report was not within the "control group" of the corporation as defined by the court. *Id.* at 121-22, 432 N.E.2d at 258. For a discussion of the attorney-client privilege as applied to corporations and the *Consolidation Coal* opinion in particular, see Johnston, *supra* note 1, at 14-17. *See also* Upjohn Co. v. United States, 449 U.S. 383 (1981) (rejecting the "control group" test for determining what members of a corporation would enjoy the attorney-client privilege in federal court litigation).

78. The *Consolidation Coal* court defined "verified" as the process by which the interviewee reviews, alters, corrects, or signs the statement taken by the attorney. 89 Ill. 2d 103, 109, 432 N.E.2d 250, 252-53.

79. *Id.* at 109, 432 N.E.2d at 253.

80. *Id.* at 110, 432 N.E.2d at 253.

81. *Id.* at 111, 432 N.E.2d at 253. *See also* Upjohn Co. v. United States, 449 U.S. 383 (1981). In *Upjohn*, the Court rejected the "control group" test and appeared to accept the "subject matter" test. *Implications of* Upjohn, *supra* note 12, at 893. If a corporate employee disclosed to an attorney confidential information related to the subject matter of his employment, the disclosure would be protected from discovery by the attorney-client privilege without respect to the employee's status in the corporate hierarchy. This decision has important implications for federal work product protection of attorney interviews with employees of corporate clients. The *Upjohn* holding makes work product protection for such interview memoranda unnecessary in many instances because it will be absolutely protected by attorney-client privilege.

This is not the case in Illinois. The *Consolidation Coal* holding, which embraces the "control group" test, excludes a large portion of corporate client employees from enjoying the attorney-client privilege. Thus, in a corporate client context, work product protection is still a very important discovery defense in Illinois.

terial which would satisfy Consol's needs, thus making discovery of the interview memoranda unnecessary.[82]

ANALYSIS OF THE ILLINOIS SUPREME COURT'S POSITION

The Scope of Work Product Protection

The initial issue facing Justice Underwood was whether interview memoranda and notes, which had not been verified by the witness, were protected work product. In *Monier*, the court had only gone as far as to say that memoranda made by counsel of his impression of a prospective witness were protected work product.[83] This included any material which contained an attorney's "conceptual data."[84] The appellate and trial courts in *Consolidation Coal* had read *Monier* to protect only notes and memoranda which evaluate a prospective witness.[85] The appellate court reasoned that notes and memoranda which merely record the responses of the witness were like verbatim statements and thus not protected under Illinois' narrow definition of work product.[86]

Justice Underwood disagreed with this interpretation of *Monier*. He instead read *Monier* in light of *Hickman* and *Upjohn Co. v. United States*.[87] In those cases, the United States Supreme Court had held that memoranda and notes regarding the oral statements of a witness necessarily reflected, in "varying degrees," the attorney's mental processes in evaluating the witness' remarks.[88] Such notes and memoranda, although recording factual material, would be "permeated" with the attorney's inferences and opinions.[89]

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82. "[T]here is nothing which indicates that Consolidation does not already have or cannot obtain through its attorneys' efforts and depositions the same factual information that is now included in the form of B-E's attorneys' work product." *Id.* at 111, 432 N.E.2d at 253-54.

83. Monier v. Chamberlain, 35 Ill. 2d 351, 360, 221 N.E.2d 410, 416 (1966).

84. *Id.*

85. Consolidation Coal Co. v. Bucyrus-Erie Co., 93 Ill. App. 3d 35, 42, 416 N.E.2d 1090, 1095 (1980), *vacated*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982).

86. "We believe these notes are similar to verbatim statements of witnesses which, in *Monier v. Chamberlain*, were distinguished from memoranda made by counsel of impressions of prospective witnesses. *Monier* held the latter exempt from discovery because they revealed the attorney's mental processes . . . ." *Id.*

87. 449 U.S. 383 (1981).

88. *Id.* at 399 (citing Hickman v. Taylor, 329 U.S. 495, 513 (1947)).

89. Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 109, 432 N.E.2d 250, 253 (1982) (citing Upjohn Co. v. United States, 449 U.S. at 399-400).

An attorney's memoranda and notes from witness interviews resist classification as either opinion work product or ordinary work product. On the one hand, they contain relevant factual material elicited from the witness during the interview. But on the other hand, they also tend to reveal

To show the correctness of his assertions, Justice Underwood then turned to the memoranda and notes themselves. The memoranda in question represented B-E's attorneys' efforts to review, summarize, and analyze the portions of the interviews which were important to B-E's case.[90] As such, they revealed the shaping process by which B-E's attorneys arranged the evidence for use at trial. The notes contained a mixture of factual material and the attorneys' "conclusions, characterizations and summaries," and thus they, too, were protected work product.[91] Underwood felt that the protection of interview memoranda and notes, therefore, was within the scope of the *Monier* decision.[92]

Justice Underwood could have ended his inquiry at this point and ruled that the memoranda and notes were absolutely protected under *Monier* and Illinois Supreme Court Rule 201(b)(2).[93] The appellate court, however, had allowed discovery after attempting to excise the protected work product.[94] Thus Justice Underwood was forced to address the propriety of the appellate court's interference in the discovery process in undertaking the excising chore.

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the attorney's impression of the witness and his marshalling of facts important to his client's case. *See* Johnston, *supra* note 1, at 26.

The federal courts, addressing the issue of whether interview memoranda and notes are opinion work product, have uniformly held that such materials are opinion work product deserving greater protection from the discovery process. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 399-400 (1981) ("Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes.") (citations omitted); *In re* Grand Jury Subpoena, 599 F.2d 504, 512 (2d Cir. 1979) (memoranda based on oral interviews are opinion work product); *In re* Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (interview memoranda "may indirectly reveal the attorney's mental processes, his opinion work product"); Diversified Indus. Inc. v. Meredith, 572 F.2d 596, 604 (8th Cir. 1977) (report of interviews with individuals contains opinion work product); *In re* Grand Jury Proceedings, 473 F.2d 840, 848 (8th Cir. 1973) (court distinguished between verbatim statements and memoranda summarizing oral interview with witness; latter held to be opinion work product); *In re* Grand Jury Investigation, 412 F. Supp. 943, 949 (E.D. Pa. 1976) ("Such notes are so much a product of the lawyer's thinking and so little probative of the witness's actual words that they are absolutely protected from disclosure."); Xerox Corp. v. IBM Corp., 64 F.R.D. 367, 381-82 (S.D.N.Y. 1974) (interview memoranda are opinion work product).

90. 89 Ill. 2d 103, 110, 432 N.E.2d 250, 253 (1982).

91. *Id.*

92. *Id.* According to the court, such memoranda "reveal the shaping process by which the attorney[s] [have] arranged the available evidence for use in trial as dictated by [their] training and experience." *Id.* (quoting Monier v. Chamberlain, 35 Ill. 2d 351, 359, 221 N.E.2d 410, 416 (1966)) (citations omitted).

93. *See supra* note 29 and accompanying text.

94. Consolidation Coal Co. v. Bucyrus-Erie Co., 93 Ill. App. 3d 35, 42-43, 416 N.E.2d 1090, 1096 (1980), *vacated*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982).

Excising Opinion Work Product From Relevant Factual Material

The Illinois Supreme Court rejected the appellate court's deletion of protected opinion work product from otherwise factual material based solely on considerations of judicial economy. Justice Underwood felt that in many instances opinion work product would be so "inextricably intertwined" with relevant factual material that excising the protected material would be virtually impossible.[95] To place the burden of reviewing documents on the trial courts would adversely effect the efficient disposition of litigation. The *Monier* court had rejected the federal "good cause" test for precisely the same reasons.[96] Allowing such review would also increase judicial intervention into the discovery process, a problem which *Monier* sought to prevent.[97] Justice Underwood reasoned that such an intervention would "increase the burden of already crowded court calendars, and thwart the efficient and expeditious administration of justice. . . ."[98]

What is not clear from the decision is whether the court may excise opinion work product, where feasible, if the party has shown the absolute impossibility of procuring the factual material from other sources. The problem becomes one of balancing judicial efficiency with the need for the unprotected material and the need to protect the "conceptual data" of an attorney preparing for litigation.

Rejection of Absolute Immunity for Opinion Work Product

After an *in camera* inspection of the documents in question, Justice Underwood concluded that in some instances interview memoranda and notes may be the sole source of relevant factual material for a party seeking discovery.[99] He reasoned that if that were the case, then the court could recognize a narrowly limited exception to the otherwise absolute protection afforded opinion work product and held that "if the party seeking disclosure conclusively demonstrates the absolute impossibility of securing similar information from other sources," discovery would

95. Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 110, 432 N.E.2d 250, 253 (1982).

96. *Id. See also supra* text accompanying note 28.

97. 89 Ill. 2d 103, 110, 432 N.E.2d 250, 253 (1982). *See supra* text accompanying note 26.

98. 89 Ill. 2d 103, 110, 432 N.E.2d 250, 253 (1982) (quoting Monier v. Chamberlain, 35 Ill. 2d 351, 357 (1966)).

99. *Id.*

be allowed.[100] Justice Underwood was aware of the *Monier* problem of judicial intervention into the discovery process created by the exception.[101] He dismissed the proportions of the problem by contending that the narrowness of the exception would keep it from being invoked frequently, thus keeping conflicts and judicial intervention at a minimum.[102] The problem, however, is defining absolute impossibility. Even with the admonition that the exception will be rarely used, the court has given courts and attorneys a new tool which, in the end, can be used to frustrate both the discovery process and the adversary system. Attorneys who unjustifiably attempt to invoke the exception could frustrate the *Monier* ideal that discovery should be relatively free from judicial intervention.[103] The utilization by the trial courts of such a nebulous standard may lead to erratic application resulting in an attorney being uncertain of the protection.[104] All this could result in an aggravation of the dangers of poorly-served clients and the demoralization of the legal system which the work product doctrine seeks to prevent.[105] Such problems can be resolved by providing clear and certain instances in which the exception will apply.[106] Unfortunately, the *Consolidation Coal* court failed to supply the needed direction.

DEFINING THE PARAMETERS OF *CONSOLIDATION COAL*

As noted previously, the federal courts working under *Hickman* have developed various approaches and instances in which opinion work product is discoverable. A close look at these decisions may provide a basis for addressing the problems created by *Consolidation Coal*.

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100. *Id.*

101. *Id.*

102. *Id.*

103. *See supra* text accompanying note 26.

104. It can be argued that discovery of opinion work product, by itself, does not create the problems of deterring written preparation and of poorly-served clients, but rather it is when such discovery is frequent or erratic, thus leaving an attorney unsure as to when the work product is protected, which leads to such untoward results. Discovery of opinion work product, therefore, must be based on certain and clear guidelines or well-defined exceptions to the rule. *See Work Product in Subsequent Litigation, supra* note 12, at 814-15; *Discovery and Work Product, supra* note 1, at 902-903; *Protection of Opinion Work Product, supra* note 5, at 343.

105. *See supra* text accompanying notes 13-15.

106. *See Protection of Opinion Work Product, supra* note 5, at 343.

Excising Opinion Work Product

One unanswered question in the *Consolidation Coal* decision is whether the trial courts may attempt to excise, where feasible, protected work product from factual materials where a party has conclusively shown the absolute impossibility of obtaining the materials from other sources.[107] The court's reluctance to allow excision is understandable under the circumstances presented in that case, but beyond that, such a rejection appears unreasonable. The reason for the court's rejection can be seen, however, when the federal work product rule is compared with the Illinois rule.

Under the federal rules and decisions, excision is allowed, where feasible, upon the requisite showing of substantial need and undue hardship.[108] The showing of substantial need justifies the court taking upon itself the burden of reviewing the material to determine if distillation of the factual material is feasible. This furthers the goals of discovering relevant factual material while at the same time protecting opinion work product from disclosure.

Illinois, on the other hand, does not require a party to show substantial need in order to compel disclosure of factual material developed by the attorney. Such material is freely discoverable.[109] Thus if a party claims that a document prepared by the attorney for litigation contains solely factual material, no further showing is required to compel production. In *Consolidation Coal*, the appellate court took upon itself the task of excising the opinion work product without requiring any justification for assuming the burden.[110] At the very least, the party seeking disclosure should have to show difficulty in obtaining the material from other sources before a court assumes the task of reviewing possibly thousands of documents, but if the party has conclusively shown the requisite absolute impossibility, it would seem that the justification for assuming the burden has been met. Excision, where feasible,[111] could provide one last barrier for pro-

107. *See supra* text accompanying notes 93-96.

108. *See supra* notes 59-62 and accompanying text.

109. *See supra* text accompanying note 27.

110. Justice Underwood pointed out in his opinion that the material contained within the disputed documents was available both from the other documents supplied by B-E and also could be obtained by deposition of the interviewed employees. 89 Ill. 2d 103, 111, 432 N.E.2d 250, 253-54. Thus, even under FED. R. CIV. P. 26(b)(3), a federal court could not have attempted the excising chore because the requisite substantial need and undue hardship would not have been shown. *See supra* notes 59-62 and accompanying text.

111. Feasibility does not depend only on the separability of factual material from protected work product. Feasibility can also be determined from the number of documents which have to be reviewed. Thus if excising

tecting an attorney's mental impressions and opinions before allowing discovery. While the *Consolidation Coal* court's rejection of excision is reasonable in the context of that case, a wholesale rejection of the approach should not be maintained if the party has met the impossibility standard.[112]

The excision approach, however, is not a panacea for the problem of protecting opinion work product while allowing the discovery of relevant factual material.[113] As the *Consolidation Coal* court noted, in many instances the factual material will be inseparable from the protected material.[114] Thus the problem of defining the scope of the impossibility standard still remains.

Acceptance of the "At Issue" and Crime or Fraud Exceptions

The "at issue" and crime or fraud exceptions should be accepted by the Illinois courts. Both exceptions require that a party exhaust all available means of obtaining the information before discovery is allowed.[115] Moreover, the work product sought under these exceptions is likely to be information peculiarly within the knowledge of the opposing attorney.[116] Thus the exceptions fit within the *Consolidation Coal* impossibility standards.

The "at issue" and crime or fraud exceptions also provide clear, certain standards under which the courts can operate and which would be applicable in very few cases.[117] Because the exceptions are limited and certain, they would not discourage attorneys from exerting their best efforts or deter written preparation.[118] Such effects would be more likely to occur where discovery of opinion work product was frequent or erratic because of unclear standards.[119] The exceptions, however, relate particularly to pure opinion work product in many cases.

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would entail reviewing a large volume of material, a court could rule that excising is not feasible. This would relieve the concern, expressed in *Consolidation Coal*, that excising would unduly burden trial courts. *See supra* text accompanying note 98.

112. Some federal courts have also allowed the party resisting discovery to perform the excising task before producing the documents. *See, e.g., In re* Grand Jury Investigation, 599 F.2d 1224, 1232 (3d Cir. 1979) (government agreed to allow corporation under investigation to delete opinion work product material from deceased employee's interview memoranda). *See also* WRIGHT & MILLER, *supra* note 18, at § 2026 (Supp. 1982).

113. *Discovery and Work Product, supra* note 1, at 898.

114. Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 110, 432 N.E.2d 250, 253 (1982).

115. *See supra* text accompanying note 51.

116. *See Protection of Opinion Work Product, supra* note 5, at 343.

117. *Id.*

118. *Id.*

119. *Id. See also supra* note 104.

That is, the party seeking discovery is trying directly to compel disclosure of the attorney's opinions and mental impressions rather than disclosure of relevant factual material which incidentally reveals the attorney's shaping and analysis of the material.[120]

On the other hand, the *Consolidation Coal* court was concerned with factual material intertwined with protected work product contained in interview memoranda.[121] Therefore, the *Consolidation Coal* impossibility standard arguably does not encompass the two exceptions. Moreover, it is arguable that the court was aware of the development of these exceptions in the federal courts[122] and could have written the opinion to embrace these exceptions under the absolute impossibility rule. The exceptions, however, are within the spirit of absolute impossibility and, as such, should be considered by the Illinois courts as part of the definition of absolute impossibility.

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120. For example, in Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926 (N.D. Cal. 1976), the court held that the attorney's *opinion* about the validity of certain patents was at issue in the litigation and thus discoverable. *Id.* at 931. While it can be argued that the attorney's opinion becomes a relevant "fact" in the litigation, the party seeking discovery is still attempting to compel the disclosure of the attorney's opinion. In other cases, the party seeking discovery wants to compel the disclosure of documents which reveal the attorney's knowledge of the attempt by his or her client to commit a crime or fraud. *See, e.g., In re* Murphy, 560 F.2d 326 (8th Cir. 1977) (attorney's knowledge of fraud upon U.S. Patent Office); American Standard, Inc. v. Bendix Corp., 80 F.R.D. 706 (W.D. Mo. 1978) (attorney's knowledge of client's fraud). These cases can be distinguished from the situation where a party is seeking to discover relevant factual information contained in interview memoranda which also tend to reveal the attorney's mental processes.

The "at issue" and crime or fraud exceptions share another common problem; often the work product sought was developed in previous terminated litigation. This brings into focus the problem of whether to continue the work product protection in the subsequent action. The federal courts have developed three approaches to the problem. One view is that the protection does not extend beyond the litigation for which the materials were prepared. *See, e.g.*, United States v. IBM Corp., 66 F.R.D. 154, 178 (S.D.N.Y. 1974); Honeywell, Inc. v. Piper Aircraft Corp., 50 F.R.D. 117, 119 (M.D. Pa. 1970). Another view is that the work product protection only extends to related subsequent litigation. *See, e.g.*, Midland Inv. Co. v. Van Alstyne, Noel & Co., 59 F.R.D. 134, 138 (S.D.N.Y. 1973). A third view is that the protection remains in all subsequent litigation regardless of relatedness. *See, e.g.*, Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 736 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975). *See generally Work Product in Subsequent Litigation, supra* note 12; *Work Product Immunity, supra* note 12. The Illinois courts have not ruled on this issue. For a discussion of which direction the Illinois courts are likely to take, see *Discovery and Work Product, supra* note 1, at 892.

121. Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 110, 432 N.E.2d 250, 253 (1982).

122. Justice Underwood cited *Discovery and Work Product, supra* note 1, which discusses the exceptions at length.

Defining Absolute Impossibility Beyond the "At Issue" and Crime or Fraud Exceptions

Since the *Consolidation Coal* court was addressing situations different from the "at issue" and crime or fraud exceptions, Illinois trial courts will be faced with defining other circumstances which constitute absolute impossibility. To foster the necessary certainty of application, these situations should be limited to looking at the status of the witness whose statement is contained in the protected memoranda. Witness availability and cooperation present two narrow bases upon which absolute impossibility may be defined. Two federal cases which purport to use the balancing approach[123] are representative of these two situations.

In *In re Grand Jury Investigation*,[124] the government sought to compel the disclosure of a corporate attorney's memoranda of interviews with thirteen employees of a corporation which was involved in questionable payments to foreign officials. One of the employees was deceased at the time the government sought discovery. The Third Circuit held that the interview memoranda discussing the statements of the twelve living employees were protected opinion work product,[125] but allowed the disclosure of the interview memorandum of the deceased employee.[126] The court stated that the "stark inability of the government to procure the information from any more reliable sources" provided the justification for compelling disclosure.[127]

The death of a prospective witness thus provides a possible basis for showing absolute impossibility. Other forms of witness unavailability may also provide a basis for requiring production of opinion work product, and should include a witness who becomes mentally or physically incapacitated after giving an oral statement to one attorney, but prior to the opportunity of the opposing attorney to interview that witness. Absolute impossibility should not include, however, witnesses who are unavailable because of where they reside. Undue hardship may be proven in that instance, but not absolute impossibility.[128]

123. *See supra* notes 53-58 and accompanying text.

124. 599 F.2d 1224 (3d Cir. 1979).

125. *Id.* at 1232.

126. *Id.* at 1232-33.

127. *Id.*

128. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981). In *Upjohn*, the government sought to discover interview memoranda from corporate counsel who had investigated questionable payments to foreign officials. The government contended that, because the employees who had been interviewed were scattered all over the world, making depositions burdensome, the burden of showing undue hardship was overcome. *Id.* at 399. The Court

A second situation which may create absolute impossibility is one in which a witness whose information is necessary to a party's cause refuses to cooperate, or is unable to cooperate, with the party seeking disclosure. In *Xerox Corp. v. IBM Corp.*,[129] Xerox brought actions for patent infringement and misappropriation of trade secrets against IBM. Xerox sought to discover the interview notes of the IBM attorney who had investigated IBM's possible utilization of Xerox trade secrets. Xerox sought discovery because in its own deposition of the employees interviewed by IBM's counsel, the employees claimed to be unable to recall the information sought by Xerox.[130] The court held that the "total inability" of Xerox to obtain material critical to its case compelled the disclosure of otherwise protected opinion work product.[131]

Witness unavailability or lack of witness cooperation are two situations in which trial courts may find absolute impossibility. Other factors, though, should be considered in determining whether impossibility exists. In *In re Grand Jury Investigation*, noted above, the court allowed the discovery of an attorney's notes from an interview with a deceased witness.[132] The court did not, however, consider the possibility that the necessary information may have been supplied by the twelve living witnesses who were available for deposition. The court also did not take into consideration the other materials supplied by the corporation which may have contained the factual information sought by the government.[133] While witness availability and cooperation provide bases for discerning abso-

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disagreed and held that, while the government had shown the substantial need and undue hardship contemplated by FED. R. CIV. P. 26(b)(3), such a showing was sufficient to order the disclosure of ordinary work product, but not the opinion work product embodied in the interview memoranda. *Id.* The Court held that the rule required greater protection for opinion work product. *Id.* at 400. *See also supra* note 33. In its simplest terms, the decision demonstrates that, as long as deposition is possible, opinion work product is not discoverable.

129. 64 F.R.D. 367 (S.D.N.Y. 1974).

130. *Id.* at 375.

131. *Id.* at 376. *See also In re* Grand Jury Subpoena, 81 F.R.D. 691, 695 (S.D.N.Y. 1979) (interview memoranda of interviews with witnesses hostile to the party seeking discovery held discoverable without discussion of the opinion work product implications).

132. *See supra* text accompanying note 126.

133. There was no discussion by the *Grand Jury Investigation* court as to the value of the other documents provided to the government except to say that they had been provided. Moreover, the twelve living employees who were still available for deposition all had some connection with the questionable transaction. It is not likely that the deceased employee had knowledge of the transaction which the others did not have, and the court gives no indication that the employee had such unique information to give. *In re* Grand Jury Investigation, 599 F.2d 1224, 1228 (3d Cir. 1979).

lute impossibility, they should only be considered where the factual information sought is peculiarly within the knowledge of the unavailable or uncooperative witness.[134]

Another problem which may be encountered by Illinois courts is whether to allow discovery if the absolute impossibility arises through the fault of the party seeking disclosure. If an attorney negligently fails to interview an available witness, and the witness later dies or becomes incapacitated, should the attorney be allowed to discover the opposing attorney's interview notes concerning that witness? Allowing discovery would foster the *Monier* ideals of ascertaining the truth and expediting the fair disposition of litigation, but it would also reward an inefficient attorney with the unexpected bonanza of both factual and opinion work product. In *Monier*, however, the court held that finding the truth and streamlining litigation overrode the concern that slothful counsel could take advantage of his diligent adversary.[135]

A final problem in accepting witness availability and cooperation as possible bases for determining absolute impossibility is certainty. An attorney preparing interview memoranda cannot predict with accuracy if the witness will later die or claim an inability to remember the facts. Under the *Hickman* rationale for work product protection, the uncertainty of whether such notes may become discoverable may deter written preparation

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134. This requirement makes the suggested situations for determining absolute impossibility similar to the "at issue" and crime or fraud exceptions. *See supra* text accompanying note 116.

135. An analogous situation arises when a plaintiff's case is involuntarily dismissed because of the failure of plaintiff's counsel to prosecute or to comply with the procedural rules. *See* FED. R. CIV. P. 41(b). When a court is considering the propriety of such a dismissal, the issue of the innocent client comes into focus. That is, should the innocent client suffer for the negligence or misconduct of his attorney? Predictably, courts deciding this issue have come to disparate conclusions. *Compare* Jackson v. Washington Monthly Co., 569 F.2d 119 (D.C. Cir. 1977) *with* Kung v. Fom Inv. Corp., 563 F.2d 1316 (9th Cir. 1977). In *Jackson* the court stated:

> Dismissals for misconduct attributable to lawyers and in no wise to their clients invariably penalize the innocent and may let the guilty off scot-free. . . . When the client has not personally misbehaved and his opponent in the litigation has not been harmed, the interests of justice are better served by an exercise of discretion in favor of the appropriate action against the lawyer as the medium for vindication . . . .

Jackson v. Washington Monthly Co., 569 F.2d at 123-24. But in *Kung* the court stated: "Moreover, while it may seem unfair to Kung that the delays of his attorneys should be visited upon him, litigants are bound by the conduct of their attorneys, absent egregious circumstances which are not present here." Kung v. Fom Inv. Corp., 563 F.2d at 1318.

While the effects of denying discovery of opinion work product may not be as drastic as those of involuntary dismissal, in some cases the facts may be critical to the case and denying discovery on the basis of attorney negligence may severely prejudice a fair result at trial.

and would discourage an attorney's best efforts on behalf of the client.[136] If the trial courts are diligent in limiting discovery to only those instances where the information sought is solely within the knowledge of the unavailable or uncooperative witness, however, the discovery of opinion work product will be very rare and as a practical matter would not discourage proper preparation by an attorney.[137]

CONCLUSION

The purpose of discovery is to allow equal access to relevant factual material by both sides to a dispute. Clashing with this purpose is the need of an attorney to work in privacy while preparing for litigation. The work product doctrine was developed to prevent discovery from becoming a means by which an attorney could operate on the "borrowed wits" of opposing counsel.[138] As such, it provides a qualified immunity from disclosure of trial preparation materials. The protection is almost absolute if the materials reflect the attorney's mental impressions or trial strategy.

In Illinois, the development of the work product doctrine diverged from what is ordinarily assumed to be protected. Illinois allows free discoverability of relevant factual materials generated from an attorney's preparation for trial, while absolutely protecting attorney work product which contains conceptual data. *Consolidation Coal*'s recognition of a narrow exception to this absolute protection is a significant change in Illinois law, and reduces the chances of injustice which absolute immunity could engender, but the nebulous nature of the exception will make it hard to apply and confine within narrow bounds.

Acceptance of the "at issue" and crime or fraud exceptions should be immediate, and could be effected by a change in the Illinois Supreme Court Rules. The trial courts should also accept the unavailable and uncooperative witness problems as possible bases for determining absolute impossibility. If encouragement of written and adequate preparation is the goal of the work product doctrine, these suggestions should be adopted

136. *See Protection of Opinion Work Product, supra* note 5, at 341.

137. *Id.* at 343. Like the "at issue" and crime or fraud exceptions, the application of the witness availability and cooperation criteria would not result in frequent discovery of opinion work product because of the requirements that (1) the witness is totally unavailable or uncooperative, and (2) the information sought contains facts solely within the knowledge of the unavailable or uncooperative witness. It is unlikely that a trial court, applying the suggested criteria, would conclusively find both requirements met in very many cases.

138. Hickman v. Taylor, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

by the courts to provide clear and certain bounds upon which attorneys may rely while preparing cases for trial.

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