Discovery of Attorney's Work Product

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The availability of material gathered by an attorney in preparation for litigation under the deposition and discovery provisions of the Arizona Rules of Civil Procedure[1] was considered for the first time in *Dean v. Superior Court.*[2] The plaintiff, suing for injuries sustained in an automobile accident while a guest in defendant's car, requested production under Rule 34[3] of *inter alia* written statements of witnesses and memoranda setting forth the substance of oral statements of witnesses in the possession, control or custody of the defendant. The trial court granted plaintiff's motion, and the defendant sought a writ of prohibition to restrain the trial court from enforcing its order for production. The Supreme Court of Arizona found prohibition to be the proper remedy[4] and granted the writ.

The decision adopts the rationale of *Hickman v. Taylor*[5] by requiring written statements of witnesses taken by an attorney to be produced for inspection and copying upon a showing of good cause. The requirement of good cause is extended to written statements of witnesses taken by a third party and turned over to the attorney by citing with approval *Alltmont v. United States.*[6] Not all Federal District Courts are in agreement with the *Alltmont* case in applying the *Hickman* doctrine to written statements of witnesses not taken by an attorney.[7] Little could be added to the comprehensive analysis of decisions involving this problem made by Professor Moore.[8] It is enough to say that the *Dean* opinion is not in accord with his views.

A more significant aspect of the *Dean* case is the basis on which

* See Contributors' Section, p. 117, for biographical data.

[1] Rules 26-37, Ariz. Rules of Civil Procedure, 16 A.R.S.

[2] 84 Ariz. 104, 324 P.2d 764 (1958).

[3] Rule 34, Ariz. Rules of Civil Procedure, 16 A.R.S. provides: "Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(c), the court in which all the action is pending may: 1. Order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, . . . not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody or control." The rule is identical to Rule 34, Federal Rules of Civil Procedure, 28 U.S.C.

[4] Only final orders are appealable in Arizona and such an order is not a final order.

[5] 329 U.S. 495 (1947).

[6] 177 F.2d 971 (3d Cir. 1949), certiorari denied 339 U.S. 967 (1950).

[7] MOORE'S FED. PRACTICE, par. 26.23(8), (2d Ed. 1950).

[8] *Ibid.*

the plaintiff's request for memoranda of oral statements made by witnesses was denied. The Court held that such memoranda were absolutely immune from inspection. Although the concurring opinion in the *Hickman* decision is cited as support for the immunity,[9] the holding shuts a door left partially open in the *Hickman* case when the United States Supreme Court suggested that in "rare situations" the production of such memoranda may be justified.[10] Two arguments are presented in support of the holding. First, that the memoranda by their very nature lead to inaccuracies resulting in confusion and misinterpretation rather than to the presentment of the truth, and second, that if the memoranda contained facts inconsistent with the testimony in chief of the witness who made the oral statement, the attorney to whom the statement was made could be called upon to impeach the witness. While the arguments presented warrant permitting inspection only in rare situations, it is submitted that to close the door entirely may necessitate an awkward re-opening in the face of a strong showing of necessity. Situations are conceivable in which the only possible means by which facts or leads thereto could be discovered would be by permitting inspection of memoranda made of oral statements of a witness.[11]

In light of the holding as to memoranda of oral statements of witnesses it is not surprising that the Arizona Supreme Court in dicta extends the absolute immunity to:

> . . . the work product of the attorney prepared in anticipation of litigation which concerns memoranda, briefs, and writings prepared by cousel for his own use, as well as related writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories . . .[12] (Note: hereafter the term "work product" will be confined to the above material.)

The Court reasons that it doesn't matter whether the basis for the immunity is privilege or public policy, but it is essential to an orderly working of our system of legal procedure. No authority is cited in support of the absolute immunity, indeed, no Federal cases providing for more than a conditional immunity are to be found. However, such an immunity was provided for by the Advisory Committee on the Rules of Civil Procedure in their proposed but unadopted amendments to Rule

[9] 324 P.2d 764, 769 (1958).
[10] Hickman v. Taylor, 329 U.S. 495, 513 (1947).
[11] Assume W is the only witness to an accident between P and D in which both P and D are immediately killed. An attorney representing P's estate takes the oral statement of W two days after the accident. A day later W dies before his written statement or disposition can be taken.
[12] Dean v. Superior Court, 324 P.2d 764, 769 (1958).

30(b).[13] Although the *Dean* opinion is the only case which suggests such an absolute immunity, it is probable that all courts under the Federal Rules of Civil Procedure would require an exceptionally strong showing of necessity before permitting inspection of the work product if inspection would be permitted at all.

A possible alternative to allowing inspection of the work product and memoranda of oral statements is to permit discovery of facts contained therein and otherwise unavailable by interrogatories to parties under Rule 33.[14] It appears to be well settled that information gathered by an attorney may be discovered by interrogatories to parties although the information sought has not been communicated by the attorney to the party.[15] The decisions are not clear nor in agreement on whether the good cause requirement extends to information sought under Rule 33.[16] The principal case rejects the rationale of *DeBruce v. Pennsylvania Railroad Co.*[17] which allowed a request that copies of written statements of witnesses taken by third persons be attached to answers to interrogatories without a showing of good cause. The *DeBruce* case reasons that since the substance of the statements may be obtained by interrogatories without a showing of good cause, copies of the statements could also be obtained. It can be argued that by rejecting the *DeBruce* holding the Arizona Supreme Court has impliedly indicated that good cause must be shown before the substance of written statements of witnesses taken by third persons can be obtained by interrogatories, a fortiori as to written statements taken by an attorney, memoranda of oral statements and the facts referred to in the work product. Would the immunity imposed on memoranda of oral statements and the work product preclude discovery of facts referred to therein by interrogatories? Assuming a showing of necessity is required and satisfied it is doubtful whether a refusal to answer interrogatories could be based on the contention that since the answers would come from memoranda of oral statements or the work product the questions need not be answered.

[13] Advisory Committee on Rules for Civil Procedure Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States 39-40 (1946), 5 F.R.D. 456. For a discussion of this and other proposed amendments to the deposition and discovery provisions of the Rules see, Tolman, *Discovery Under the Federal Rules: Production of Documents and the Work Product of the Lawyer*, 58 COLUM. L. REV. 498 (1958).

[14] Rule 33, Ariz. Rules of Civil Procedure, 16 A.R.S.—allows serving of interrogatories to the opposing party after the commencement of the action and without leave of court. The Rule is the same as Rule 33, Fed. Rules of Civil Procedure, 28 U.S.C.

[15] Hickman v. Taylor, 329 U.S. 495, 504 (1947); State of Maryland to use of Peters v. Baltimore & O.R. Co., 7 F.R.D. 666 (E.D. Pa. 1947); see also MOORE'S FED. PRACTICE, *supra*, note 7, pp. 1131-1132.

[16] *Supra*, note 14.

[17] 6 F.R.D. 403 (E.D. Pa. 1947).

To so hold would seem to defeat or unduly limit the spirit of Rule 33.[18] This is not to say that mental impressions, conclusions or legal theories of the attorney could be discovered by interrogatories as discovery should be limited to facts.

The answer to what is good cause is not a settled one, and the good cause concept has been confused by decisions stating that the *Hickman* doctrine requires more than good cause.[19] It is submitted that the *Hickman* doctrine is: that good cause is required before non-privileged and relevant material gathered by an attorney in preparation for litigation may be inspected under the deposition and discovery procedure of the Federal Rules of Civil Procedure. This is not to say that the same showing which would permit inspection of written statements of witnesses taken by employees of the party in the usual course of business at or near the accident would warrant inspection of memoranda of oral statements of witnesses made to an attorney, assuming no immunity. What is good cause should be a function of what is sought.[20]

The *Dean* opinion by its holding rejects suggestions by other courts that the fact the movant was hospitalized after the accident and not represented by counsel and therefore unable to obtain statements from witnesses shortly after the accident is a sufficient showing to permit inspection of statements of witnesses taken by someone other than an attorney, even though the witnesses are available and willing to make a statement at a later date. The cases so stating argue that the statements made by witnesses shortly after the accident are more reliable than later statements, and since this version of the accident cannot be obtained elsewhere by diligent efforts, inspection of the statements should be permitted.[21] However, the position taken by the principal case is not without support.[22]

If the witness whose written statement had been taken was no longer available, or could be reached only with difficulty, or if available, was hostile, most courts would permit inspection.[23] There have been only a few cases deciding when a witness is unavailable and what is a sufficient showing of hostility. The mere fact that a witness is not within the state is not a sufficient showing of unavailability,[24] but the fact that witnesses were in Europe has been considered in allowing inspection of their written statements.[25] If the court lacks personal juris-

[18] *Supra*, note 14.
[19] Scourties v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (D.C. Ohio 1953).
[20] McCormick on Evidence, 1954 § 100, pp.208-209.
[21] DeBruce v. Penn. Railroad Co., 6 F.R.D. 403 (E.D. Pa. 1947).
[22] Goldner v. Chicago & N.W. Ry. System, 13 F.R.D. 326 (N.D. Ill. 1952).
[23] Hickman v. Taylor, 329 U.S. 495 (1947); Dean v. Superior Court, 324 P.2d 764 (1958).
[24] Lester v. Isbrandtse Co., 10 F.R.D. 338 (S.D. Texas 1950); Berger v. Central Vermont Ry. Inc., 8 F.R.D. 419 (D. Mass. 1948).
[25] Royal Exchange Assur. v. McGrath, 13 F.R.D. 150 (S.D. N.Y. 1952).

diction so as to compel compliance with Rules 26[26] and 31,[27] a diligent effort would not necessarily be fruitless as the witness may voluntarily comply. Therefore, if the whereabouts of the witness is known, good cause should require a showing that he would not voluntarily make a statement.

The refusal of a witness to make a voluntary statement should be considered as some evidence of hostility[28] especially where the witness is an employee of the opposing party,[29] or a relative or has a financial interest in the adversary's cause. There is, however, a certain reluctancy on the part of all witnesses to submit themselves to examination by an attorney, and it would therefore seem necessary to show that the witness refused to make a voluntary statement after being informed that his appearance could be compelled. Such a showing would seem to make actual compulsion, which would probably increase hositilities, unnecessary.

Many courts suggest that where the witness' deposition has been taken his written statement may be examined for purposes of impeachment and determining his credibility.[30] Although there are not many cases actually allowing inspection on this basis, it appears that the mere fact the witness' deposition has been taken is not in itself sufficient. There must be some ground to suspect that the disposition contains statements inconsistent with those made to the opposing party.[31] If the deposition contains statements on material matters inconsistent with statements of other witnesses or with answers to interrogatories to parties, there should be sufficient grounds for ordering production of the statements.

[26] Rule 26, Ariz. Rules of Civil Procedure, 16 A.R.S. provides for taking the deposition of any person, including a party by oral examination or written interrogatories after commencement of the action and without leave of the court. This Rule is substantially the same as Rule 26, Fed. Rules of Civil Procedure, 28 U.S.C.

[27] Rule 31, Ariz. Rules of Civil Procedure, 16 A.R.S. provides for the taking of depositions of any person upon written interrogatories. This Rule is the same as Rule 31, Fed. Rules of Civil Procedure, 28 U.S.C.

[28] Hanke v. Milwaukee Electric Ry. & Transport Co., 7 F.R.D. 540 (E.D. Wis. 1947).

[29] Brookshire v. Penn. Ry. Co., 14 F.R.D. 154 (N.D. Ohio 1953).

[30] See note 22.

[31] Hauger v. Chicago Rock Island & Pacific R.R. Co., 216 F.2d 501 (7th Cir. 1954); Martin v. Capital Transit Co., 170 F.2d 811 (D.C. Cir. 1948).