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PRODUCTION OF STATEMENTS UNDER DISCOVERY PROCEEDINGS IN FEDERAL COURT

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A. Introduction

It is a fact quickly learned through experience that the extent of discovery under the Federal Rules of Civil Procedure may vary depending on the rule employed. The least likely to yield a candid response is the written interrogatory. The response to the written interrogatory in practice is the guarded voice of counsel conceding only so much as the literal phrasing of the question may compel.

Interrogatories in most instances are much less effective than oral depositions in getting at the truth, not only because the answers are studied, but also because questions put without the background of information obtained in answer to other questions cannot hope to match the effectiveness of the free ranging inquiry in oral depositions. An unexpected answer obtained during oral questioning will often suggest other and even more fruitful questions.

But the oral deposition is not always the most candid or complete expression available on the subject under inquiry. There may be written statements taken in connection with the occurrence in litigation which furnish a wholly unguarded and carefully detailed account of the facts sought to be discovered. Typically, this statement is one taken close to the time of the occurrence. Such "on the spot" statements have been described as "a catalyst of unique value in the development of the truth through the judicial process."[1] This study is intended to be a practical consideration of the status of discovery relative to such statements. Primary attention will be given to the law in the Fourth Circuit and to two decisions of the court of this circuit dealing with motions seeking the production of such statements under Rule 34 of the Federal Rules of Civil Procedure.

The decisions chosen for special attention are *Guilford Nat'l Bank v. Southern Ry.*,[2] and *Goosman v. A. Duie Pyle, Inc.*[3] This

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1. DeBruce v. Pennsylvania R.R., 6 F.R.D. 403, 406 (E.D. Pa. 1947).
2. 297 F.2d 921 (4th Cir. 1962).
3. 320 F.2d 45 (4th Cir. 1963).

emphasis is made in the belief that the practicing lawyer for whom this article is written will want to know the rules governing in this circuit as a matter of first concern. The discussion cannot begin, however, without some review of *Hickman v. Taylor*.[4]

B. Hickman v. Taylor Reviewed

The decision of the United States Supreme Court in *Hickman v. Taylor* remains the dominant pronouncement in the field of discovery. The question in *Hickman* arose from an interrogatory of the plaintiff calling on the defendants, who were tug boat owners being sued under the Jones Act for the death of a seaman, to state whether any statements were taken in connection with the accident causing the tug to sink and resulting in the seaman's death. The interrogatory also called for the attachment of copies of all written statements and the exact provisions of any oral statements. The attorney for the owners of the tug boat had interviewed survivors of the sinking and had taken their signed statements. He had also interviewed other persons and made memoranda of what was told to him.

There was confusion in the lower courts on the rules of procedure properly involved in the case and this was discussed by the Supreme Court;[5] however, the Court was not deterred in reaching the basic issue: whether the attorney for the defendants would be obliged to produce the requested statements.

The district court had ordered the tug boat owners and the attorney to produce all written statements obtained by the attorney as counsel and agent for the defendants, and to state in substance any fact concerning the case learned through oral statements made by witnesses to the attorney whether or not included in his private memoranda.[6] The court of appeals of the Third Circuit reversed,[7] holding that the matters sought were

4. 329 U.S. 495 (1947).

5. The procedural problem grew out of the effort to get statements through requesting that copies be attached to answers to written interrogatories propounded under FED. R. CIV. P. 33. The district court concluded Rules 33 and 34 were applicable, but the circuit court felt Rule 26 was the applicable rule. The Supreme Court held that it was clear the plaintiff was proceeding under Rule 33 relating to interrogatories and not by way of deposition under Rule 26. The Supreme Court indicated that the proper procedure would have been to take the attorney's deposition and compel the production involved by a subpoena duces tecum since production under Rule 34 was limited to parties.

6. Hickman v. Taylor, 4 F.R.D. 479 (E.D. Pa. 1947).

7. Hickman v. Taylor, 153 F.2d 212 (3d Cir. 1945).

privileged as the "work product of the lawyer."[8] The opinion of the court of appeals was affirmed by the Supreme Court but on a different ground, and it is the basis of this affirmance that makes *Hickman* a name to be reckoned with in the area of discovery herein under consideration.

The Supreme Court held that the statements were not protected by any privilege.[9] They were not made in confidence by a client to his attorney, and no privilege exists as to information furnished an attorney by a witness nor as to writings prepared by counsel for his own use or reflecting his mental impressions. Nonetheless, the Court declared, before production of documents from an attorney's files will be ordered, the party seeking discovery must show *necessity and justification* for such discovery.

This necessity and justification, in the Court's opinion, had not been shown. In fact, it appeared that the identity of the witnesses in question was known and their testimony was already on file and open to inspection in a public office. Further, the Court observed that searching interrogatories had been answered by the defendants. Under these circumstances, the Court concluded that there was an insufficient showing of necessity and justification to contend, as the plaintiff's counsel did, that the information was needed to help prepare for the examination of witnesses and to insure that nothing was overlooked.

As to the oral statements made to the defendant's lawyer, another question was presented. Here the Court expressed concern that the standards of the profession would suffer if attorneys were forced to disclose what they remember a witness told them or what they saw fit to write down after talking to a witness. The Court declared its view that if there should be a rare situation justifying this sort of production, *Hickman* was not such a case. "[W]e do not believe," said the Court, "that any showing of necessity can be made under the circumstances of this case so as to justify production."[10] Thus, as a practical matter, *Hickman* seems to preclude the discovery of oral statements made to a lawyer.[11]

8. *Id.* at 223.

9. Hickman v. Taylor, 329 U.S. 495, 508 (1947).

10. *Id.* at 512.

11. In the adaptation of the federal rules proposed several times for adoption by the South Carolina General Assembly, the decision of the Court in *Hickman* is reflected in modifications of Rules 26 and 34, appearing in the proposals as Rule 26 (b) and Rule 34 (c). The former provides: "Deponent shall not be required to produce or relate the contents of any document or writing that reflects an attorney's mental impressions, conclusions, opinions of legal theories;

C. Effect of Hickman Where Statements Secured by Claims Investigator

The Court in *Hickman*[12] did not purport to express any rule pertaining to statements or information obtained by someone other than the lawyer. This unresolved question has left the law to be settled on a circuit by circuit basis until the inevitable time when the matter is finally clarified, either by amendment to the rules, or a further decision by the Supreme Court.

It is clear that the Supreme Court in *Hickman* did fashion a new rule by finding that *necessity and justification* must be shown for the discovery there sought. The Court was not concerned with Rule 34 and its requirement that *good cause* must be shown for production from the adversary. Yet the temptation to construe these two notions as one, and thus expand the application of *Hickman*, has been irresistible for some courts. The most important of such decisions is *Alltmont v. United States*, a 1949 opinion of the court of appeals for the Third Circuit.[13]

In *Alltmont*, the statements involved were taken by Federal Bureau of Investigation personnel who were also lawyers. The reasoning of the court, however, did not depend upon their being lawyers. In the court's view it was immaterial that in one case the lawyer does the investigation himself and in another case does it through persons employed by him or his client. The court said:

> In either situation, the rationale of the opinion of the Supreme Court in the Hickman case requires that the same showing of good cause for the production of such statements of witnesses should be made by the adverse party seeking copies of them.[14]

Thus, under the theory of the court in *Alltmont*, necessity and justification must be shown to secure statements taken not only by the lawyer but by the claims investigator as well. In short, the investigator's work product would be entitled to the same protection as the lawyer's work product.

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and except as provided in Rule 34 (c), any statements made by a witness to an attorney." Rule 34 (c) makes such statements unavailable without ". . . a showing that a denial thereof will lead to actual hardship or injustice." See draft most recently introduced as S. C. House Bill 1283 (1963).

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

13. 177 F.2d 971 (3d Cir. 1949), *cert. denied*, 339 U.S. 967 (1950).

14. Alltmont v. United States, 177 F.2d 971, 976 (3d Cir. 1949).

District courts have split on this question.[15] In the Fourth Circuit, the question was raised in *Guilford Nat'l Bank v. Southern Ry.*[16] but was not decided inasmuch as the court had concluded there was not a sufficient showing of good cause. It was not until the decision in *Goosman v. A. Duie Pyle, Inc.*[17] that the court passed on a contention that a statement not taken by the lawyer was entitled nonetheless to the lawyer's work product immunity. In *Goosman*, the statements involved were written reports of the operator of a tractor-trailer. These statements were given to the owners of the tractor-trailer and one Mr. Pyle, the lessee of the vehicle shortly after the accident which resulted in the litigation. The statements were made in compliance with certain rules of the Interstate Commerce Commission. In an opinion by Judge Boreman, the court held that the reports did not represent the lawyer's work product. The holding is not amplified by reasoning on the part of the court. From the discussion and rationale of the supporting citations, however, the court's holding should be the same if the statements involved were taken by a claims investigator.[18]

It is submitted that *Hickman v. Taylor*[19] is properly confined to its facts. The public policy involved dealt only with the need to protect the attorney's part in the judicial process from invasion except in the exceptional case, such as where the witness making a statement is no longer available. The policy reasons for protecting the lawyer's work product simply do not exist in the case of the adjuster's work product.

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15. For holdings that work product immunity does not apply to statements taken by claims investigators see California v. United States, 27 F.R.D. 261 (N.D. Cal. 1961); Dorn v. Balfour, Guthrie & Co., 155 F. Supp. 203 (N.D. Cal. 1957); Brown v. New York, N.H. & H. R.R., 17 F.R.D. 324 (S.D.N.Y. 1955); Durkin v. Pet Milk Co., 14 F.R.D. 385 (W.D. Ark. 1953); Royal Exch. Assur. v. McGrath, 13 F.R.D. 150 (S.D.N.Y. 1952); Szymanski v. New York, N.H. & H. R.R., 14 F.R.D. 82 (S.D.N.Y. 1952); Herbst v. Chicago, R.I. & P. R.R., 10 F.R.D. 14 (S.D. Iowa 1950); Virginia Metal Prods. Corp. v. Hartford Acc. & Indem. Co., 10 F.R.D. 374 (S.D.N.Y. 1950); Therrien v. Public Serv. Co., 99 N.H. 197, 108 A.2d 48 (1954). *Contra*, Snyder v. United States, 20 F.R.D. 7 (E.D.N.Y. 1956); Floe v. Plowden, 10 F.R.D. 514 (E.D. S.C. 1950); Raudenbush v. Reading Co., 9 F.R.D. 670 (E.D. Pa. 1950); Hanke v. Milwaukee Elec. Ry. & Transp. Co., 7 F.R.D. 540 (E.D. Wis. 1947); *cf.* Adams v. United States, 260 F.2d 467 (5th Cir. 1958), *cert. denied*, 359 U.S. 934 (1959).

16. 297 F.2d 921 (4th Cir. 1962).

17. 320 F.2d 45 (4th Cir. 1963).

18. In support of its holding on the point, the court cites United States v. Swift & Co., 24 F.R.D. 280, 282 (N.D. Ill. 1959), *aff'd*, 367 U.S. 909 (1961); Morrone v. Southern Pac. Co., 7 F.R.D. 214 (S.D. Cal. 1947); 4 MOORE, FEDERAL PRACTICE ¶ 26.23, at 1387 (2d ed. 1962).

19. 329 U.S. 495 (1947).

D. The Question of Good Cause Under Federal Rule 34

The extreme showing of necessity and justification required by *Hickman*[20] will probably not be required by the district courts of the Fourth Circuit, particularly in view of *Goosman*, except where the statement or report involved is actually the handiwork of the attorney. While this clarifies the applicable rule, it by no means furnishes an automatic answer to the question of whether or not production will be required in any given case. The battleground simply shifts to the issue of good cause under Rule 34. Here it is undoubtedly the fact that a lesser showing is required in order to prevail. Precisely what is required for a showing of good cause under Rule 34 is the subject of the two recent decisions of the Fourth Circuit, *Guilford Nat'l Bank v. Southern Ry.*[21] and *Goosman v. A. Duie Pyle, Inc.*,[22] both mentioned earlier.

Rule 34 is a comprehensive provision which, among other things, empowers the court on a motion showing good cause to order any party to produce documents and things, not privileged, which constitute or contain evidence relating to the scope of the examination permitted by Rule 26(b). This rule deals with depositions and provides that examination may be had regarding any matter, not privileged, relevant to the subject matter involved in the pending litigation. It is not ground for objection that the testimony will be inadmissible at the trial if it appears reasonably calculated to lead to the discovery of admissible evidence.

In *Guilford*, the court of appeals, in an opinion by Chief Judge Sobeloff, reversed the judgment of the district court which had held the defendant in contempt for refusing to obey an order requiring production, under Rule 34, of statements of witnesses taken by the defendant's claim agent. The action was instituted by an administrator suing for the death of the decedent killed in an automobile-train collision. On the day following the collision, the defendant railway's claim agent secured written statements from six witnesses and, within a week of the accident, from four other witnesses. Additional statements were gathered by the claim agent on two later dates. The plaintiff's attorney was notified of the accident three days after it occurred and began his investigation late on the fifth day following the acci-

20. *Ibid.*
21. 297 F.2d 921 (4th Cir. 1962).
22. 320 F.2d 45 (4th Cir. 1963).

dent. On the sixth, seventh and eighth days, he interviewed witnesses but took no statements. After the institution of suit, the defendant informally disclosed the names and addresses of the train crew and, in answer to interrogatories, furnished the names and addresses of all persons interviewed by it. The plaintiff's motion seeking production of documents, including the written statements, followed.

The court conceding that the statements were in the defendant's sole possession and were relevant to the controversy, holds that this much alone does not constitute good cause under Rule 34. Relevancy, the opinion states, is a requirement of all discovery, including depositions given orally or on written interrogatories. Hence, the additional requirement under Rule 34 and Rule 35 (Rule 35 provides for physical and mental examinations of a party) that good cause be shown indicates the necessity of a *greater showing of need.*

Having concluded that relevancy was not the equivalent of good cause, Chief Judge Sobeloff then considered whether the plaintiff had presented other circumstances sufficient to justify the order for production. The argument was made that some of the statements sought were taken a day after the accident and that the witnesses questioned at a later date would not be able to recapture their immediate preceptions of, and reactions to, the accident. The opinion acknowledged "that the courts are unanimous in holding that a showing that the statements were made at the time of the accident satisfies the good cause requirement of Rule 34."[23] But in such cases, the opinion notes "opposing counsel had no opportunity to question the witnesses until weeks or months later."[24] After observing that the plaintiff began interviewing witnesses six days after the accident and concluded three days later, the court said:

> Absent circumstances to the contrary, there is no reason to suppose that an interview of a witness six days, or even nine days, after the accident is any less reliable than a statement taken on the day following the accident. If there were

23. Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921, 926 (4th Cir. 1962). In support of this point the court cited Reynolds v. United States, 192 F.2d 987, 991-92 (3d Cir. 1951), *rev'd on other grounds,* 341 U.S. 1 (1953); California v. United States, 27 F.R.D. 261 (N.D. Cal. 1961); Brown v. New York, N.H. & H. R.R., 17 F.R.D. 324 (S.D.N.Y. 1955); 4 MOORE, FEDERAL PRACTICE ¶ 34.08, at 2452 (2d ed. 1950); Annot., 73 A.L.R.2d 12, 70-73 (1960); *cf.* New York Cent. R.R. v. Carr, 251 F.2d 433, 435 (4th Cir. 1957).

24. Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921, 926 (4th Cir. 1962).

> circumstances indicating a distinct and irremediable disadvantage to a party who is compelled to rely on statements obtained by him later than those obtained by the other party, a different case might be presented.[25]

In answer to a contention that a special circumstance existed because some of the witnesses were members of the defendant's train crew, the court concluded that although the requirement is more easily satisfied when witnesses are employees, this fact alone is not a sufficient showing of good cause.

Goosman was decided by the court in the following year. In a suit for personal injuries sustained when his automobile collided with a tractor-trailer, the plaintiff was refused production under Rule 34 of written reports made by the driver of the tractor-trailer to the owner and lessee within a short time after the collision. The facts asserted to constitute good cause were set out in plaintiff's motion.[26] It was asserted that the plaintiff was hospitalized as a result of certain injuries suffered on December 9, 1959, and thus was prevented from investigating or engaging counsel to investigate his case for many weeks; that he was released from the hospital on March 11, 1960, and retained counsel on March 15, 1960; that his counsel contemplated making the defendant's driver a party and deemed it improper and unethical to interview him; that when the driver's oral deposition was taken on January 24, 1962, the driver was advised by counsel not to answer when asked if there were any variances or discrepancies between his prior written statements and his statement on deposition. In the court's decision, Judge Boreman quoted that portion of the opinion in *Guilford* that noted the cases are unanimous in holding that a showing the statements were made at the time of the accident satisfies the good cause requirement of Rule 34; the court then compared the two cases:

25. *Ibid.*

26. The court considered a contention that an affidavit was required to show the facts supporting the motion. The court agreed that this is a better practice but not indispensable. The court noted the cases cited in 4 MOORE, FEDERAL PRACTICE ¶ 34.07, at 2442-43, n.6 (2d ed. 1950, Supp. 1962) holding that facts alleged in a motion and not otherwise appearing of record are not required to be sworn to or contained in an affidavit, and concluded that in any event, the instant case would not require a ruling that an affidavit was necessary inasmuch as most of the facts alleged to support good cause were properly before the court in filed interrogatories, depositions, and stipulations, and that other facts could be properly confirmed by counsel at the hearing of the matter before the district court.

> The Guilford case was distinguished on its facts because there plaintiff's counsel had interviewed the witnesses between six and nine days after the accident and, in the absence of circumstances indicating a distinct and irremediable disadvantage to the moving party, the information thus obtained was deemed as reliable as that obtained by the defendant on the day following the accident. Goosman's situation, however, fits the general rule enunciated in the prior cases rather than the exception illustrated by the facts in Guilford. Goosman and his attorneys were not only prevented from taking Anderson's statement for at least four months but, under the facts of this case, Goosman may have sustained a disadvantage affecting the fundamental issues of liability.[27]

The opinion makes it clear that counsel's notion that he could not properly contact the driver, since he intended to make him a party defendant, played no important part in the decision of the court. It was not, in the court's phrase, "essential to a showing of good cause."[28]

The rationale of the decision would appear to be: where one is prevented from investigating an accident for a substantial period of time, he may call on his adversary for statements taken at a time close to the accident. The driver's refusal, on advice of counsel, to answer the question as to any discrepancy between his oral deposition and the earlier statement, while considered as a matter of significance by the court, would not seem to be an essential requirement to a showing of good cause.

Whether good cause is shown will always depend on the circumstances of the particular case. It will also depend to a degree on the particular judge, for the matter is one addressed to the court's discretion. In both *Guilford* and *Goosman*, the district court transgressed what Chief Judge Sobeloff has called the "latitude of discretion."[29] This transgression provided the occasion for the circuit court to furnish some helpful delineation of the boundaries of good cause: applicable at least in the Fourth Circuit.

The opinion in *Guilford* is helpful, not only for its holding, but also for the suggestions that the result might have been dif-

27. Goosman v. A. Duie Pyle, Inc., 320 F.2d 45, 51 (4th Cir. 1963).
28. *Id.* at 53.
29. Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921, 924 (4th Cir. 1962).

ferent under other circumstances, some of which counsel might have controlled. For example, Chief Judge Sobeloff observes that the case might have been different if depositions of the employees had been taken by the plaintiff. Then perhaps, a showing might have been made that the deponents "were reluctant to speak freely, or were openly hostile or that there was some reason to believe that their prior written statements were inconsistent with what they told him."[30] In *Goosman*, where a deposition was taken prior to the motion for production, a reason to suspect inconsistency was present, although, perhaps not necessarily so. It seems likely that where reason exists to suspect inconsistency in a witness' story, the court would order production of a statement by the witness, even though the party seeking it had taken a statement or deposition of the witness at or near the same time.

In citing cases upholding a showing of good cause in each instance, Chief Judge Sobeloff additionally noted that *Guilford* was not a case:

1. Where the witness who gave the adversary their written statements are presently unavailable,[31] or

2. Shown to be hostile,[32] or

3. Where the plaintiff is financially unable to conduct an independent investigation.[33]

The enumerated instances suggest avenues to a showing of good cause which may be present in a given case and which one might fairly expect the United States Court of Appeals, Fourth Circuit to uphold.

E. Conclusions As To Desirable Application Of Rule 34

The requirement of a court order on a showing of good cause under Rule 34 does not appear in any other discovery rule except Rule 35 providing for physical and mental examinations. Obvious reasons exist for the requirement of the showing under Rule 35. The reasons are not equally clear in every case under Rule 34. There is no great physical burden in being compelled to furnish a copy of statements taken in connection with an

30. *Id.* at 926.
31. See Hilton v. Contiship Corp., 16 F.R.D. 453 (S.D.N.Y. 1954).
32. See Mitchell v. Bass, 252 F.2d 513 (8th Cir. 1958).
33. See Naylor v. Isthmian S.S. Co., 10 F.R.D. 128 (S.D.N.Y. 1950).

occurrence in litigation. It may be embarrassing, but it cannot correctly be called harassing or burdensome.

A person hearing a statement not reduced to writing may be required to repeat what was said in the course of an oral deposition or in answer to interrogatories. There is no logical reason for making the contents of a written statement less available.

It is still the law, however, that under Rule 34 such statements can only be obtained on a showing of good cause.[34] As the concept of good cause takes on full shape in this area of discovery, it is hoped that the courts will not set unreasonable obstacles in the way of production. It is submitted that such obstacles are not required or desirable either in logic or by any public policy.

34. An amendment to Rule 34, proposed in 1955 but not acted upon, sought to authorize submission of interrogatories asking that copies of described classes of documents be attached to answers. See 4 MOORE, FEDERAL PRACTICE ¶ 26.23, at 1461-64 (2d ed. 1962) for a discussion of the advisory committee's proposals. The rules proposed for adoption in South Carolina also provide for obtaining copies of designated documents and things without a court order by requesting their attachment to answers to interrogatories. See House Bill 1283 § 34 (b) (1963).