



Trial Practice Series – Making the Work Product Doctrine Work for You

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Note on the “Trial Practice Series”: This is the fifth in a series of articles dealing with litigation and trial practice, the brainchild of Bill Wick at the Nash Law Firm, a co-author of this article, and continues the effort to provide a practical view

of common aspects of the litigation and trial process in each issue. WDC members are invited to contact Bill or the Editor, Vincent Scipior (vscipior@cnsbb.com), to suggest future topics that may be of interest.

Every defense attorney has received written discovery seeking information and documents gathered by the insurance company during its investigation and adjustment of the claim, including photographs, statements, notes, and even the entire claim file. The response is usually an objection that the information sought is privileged information and/or work product that is not discoverable. Insurance companies want to protect their work product and – perhaps of greater concern – you want to avoid disclosing potentially damaging information. When there is an objection, opposing counsel may suspect that information is being withheld which would be helpful to their case. This article addresses the scope and limitations of the work product objection in the context of third-party litigation, including what it serves to protect and how to overcome the general prohibition against the discovery of protected work product.

I. Introduction

It is well known that discoverability is far broader than admissibility. Under the current rule, “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case ...”¹ “Information within this scope of discovery need not be admissible in evidence to be discoverable.”²

Though broad, there are some limits to the scope of discovery, including the attorney-client privilege and the work product doctrine. The general rule of attorney-client privilege is that a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating a rendition of professional legal services to the client.³ A discussion of the attorney-client privilege is beyond the scope of this article. Often, however, the distinction between the attorney-client privilege and the work product doctrine is not appreciated.

Under the work product doctrine, materials prepared in anticipation of litigation or for trial by a party or its representatives (including “an attorney, consultant, surety, indemnitor, insurer, or agent”) are not discoverable absent “a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”⁴ The purpose of the work product doctrine is to discourage lack of diligence by opposing counsel and to allow counsel the freedom to develop litigation strategy from the

prying eyes of opposing counsel.⁵ Work product protection extends to “all results of methods used by attorneys to bring more understanding of the merits into the attorney’s file.”⁶

In *Ranft v. Lyons*, the Wisconsin Court of Appeals illustrated a three-step analysis to determine if material is protected by the work product doctrine:

First, a party seeking discovery must show that the items are within the scope of Rule 804.01(2)(a), Stats. Second, if that showing is successful, the party opposing discovery of the items must demonstrate that they were “prepared in anticipation of litigation or for trial.” If so, the items are protected by the work-product doctrine. Third, if tangible items are work-product, the party seeking discovery must demonstrate a “substantial need of the materials in the preparation of the case” and that it “is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”⁷

The burden of proving the first two elements falls on the party seeking to protect the material from discovery.⁸ The last element falls on the party seeking the discovery.⁹

II. The Underlying Facts are Discoverable

There are two types of work product: opinion work product and fact or ordinary work product.¹⁰ The distinction between these two types of work product is important. Opinion work product includes the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.¹¹ Opinion work product is more “scrupulously protected” than ordinary or fact work product.¹² Indeed, even if a work product objection is overruled and disclosure ordered, a court must still protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.¹³

While an attorney’s thought process and mental impressions are protected, the underlying facts are not.¹⁴ This is because, for litigation to be effective, it is essential that all parties have knowledge of all of the facts.¹⁵ Trial by ambush is no longer the approved method in Wisconsin. “Adequate preparation for trial by counsel with full knowledge of the facts before them will result not only in a more orderly trial, but in many cases will result in counsel reevaluating their cases so as to avoid needless trials.”¹⁶

III. Work Product Must be Prepared “in Anticipation of Litigation or for Trial”

When a request is received for materials prepared by the insurance company, you must determine whether the materials were prepared *in the course of investigating and adjusting the claim*, or *in anticipation of litigation or for trial*. If the former, the materials are not work product and the privilege will not attach; if the latter, the privilege will attach, but the materials could still be discoverable. A review of the nature of the document and the factual situation in the particular case must be considered so as to determine if the document can fairly be said to have been prepared or obtained because of the prospect of litigation.¹⁷

The term “litigation” should not be construed narrowly. Any dispute in any organized system, including with an insurance company, through the office of an insurance commissioner, or merely a dispute on paper or a quarrel of words can be considered a form of litigation. The “litigation” need not be the proceeding in which the doctrine is asserted.¹⁸ Nor must the document or information be gathered in anticipation of the litigation in which the document or information is being sought.

Consulting or retaining an attorney to conduct an investigation or engage in negotiations may be insufficient “to establish a reasonable anticipation of litigation.”¹⁹ For example, where an attorney is hired to interview individuals and conduct other fact finding so as to provide a neutral independent report, the information gathered is not the attorney’s work product and not protected from disclosure

if litigation later ensues.²⁰ “The fact that litigation actually ensues or that a party has retained an attorney, initiated investigations, or engaged in negotiations over a claim, is insufficient to conclusively establish that the materials were generated in anticipation of litigation.”²¹ Yet, where an attorney personally prepares a memorandum of an interview with eye towards litigation, the memorandum will qualify as work product even though the attorney is acting primarily as an investigator.²²

“[C]ourts have interpreted the [work product doctrine] to require a more substantial and specific threat of litigation before a party’s anticipation will be considered a reasonable and justifiable motivating force.”²³ The chance of litigation must be more than “‘a remote prospect,’ an ‘inchoate possibility,’ or a ‘likely chance.’”²⁴ Instead, “a party must demonstrate that ‘at the very least some articulable claim, likely to lead to litigation’ had arisen ...”²⁵ There also must be “‘objective facts establishing an identifiable resolve to litigate,’ or an identifiable specific claim or impending litigation when the materials were prepared.”²⁶

Whether materials were prepared “in anticipation of litigation or for trial” is an assessment of the probability of litigation. Time is one factor to consider in assessing whether materials were generated in anticipation of litigation. There seems little dispute that once suit is filed, everything is done “in anticipation of litigation.” Likewise, if the plaintiff retains counsel, the work by the insurance carrier is likely being done in anticipation of litigation.

Another factor to consider in assessing whether materials were generated in anticipation of litigation is the identity of the person who prepared the materials. Investigation and analysis may be done by an insurance company representative, independently or at the direction of counsel, by retained counsel or an employee, representative or consultant of retained counsel, or by retained counsel. When actions are taken and materials and documents generated at the request of, by, and/or for an attorney, the information is likely work

product and privileged. The defense of litigation involves participation by non-lawyers and the preparation of materials for claims that are likely to proceed to litigation.²⁷ Indeed, Wisconsin’s work product statute expressly states that protection is afforded to materials “prepared by a party or its representatives (including ‘an attorney, consultant, surety, indemnitor, insurer, or agent ...’).”²⁸ Hence, the work performed by an adjuster can still be protected work product.²⁹

When investigation is performed by a non-lawyer, the showing required for production is probably less strong than when discovery was undertaken at the direction of an attorney. In addition, simply because an insurance company has lawyers handling claims in-house does not make all materials privileged or work product. This is because an insurer will make a claim decision only after it possesses the minimum amount of information in order to make that decision.³⁰

IV. Routine Reports to an Employer or Insurer are Usually Not Protected

It is almost universally held that a party’s routine report to his or her employer or insurer is not protected work product.³¹ A statement given by an insured or a witness to an insurance carrier when no action has been commenced or is imminent is not covered by the work product doctrine.³² If the documents are regularly produced in the ordinary course of business, they are outside the scope of work product. After all, companies routinely investigate matters for their own purposes independent of the prospect of litigation.³³ Thus, “[n]ot all documents generated from an internal investigation are protected by the work product doctrine ‘simply because a company’s internal investigation is coexistent with a present or anticipated lawsuit that is the same subject matter of the litigation.’”³⁴ There is a causation element needed – the anticipation of litigation must have caused the material to be created.³⁵

This is especially true for insurance companies. When insurers are involved, the issue of what is obtained in anticipation of litigation versus what

is obtained for the purpose of investigating a loss becomes more difficult. The court in *Logan v. Commercial Union Ins. Co.* articulated this conundrum:

While much of the paperwork generated by insurance companies is prepared with an eye toward a possible legal dispute over a claim, it is important to distinguish between “an investigative report developed in the ordinary course of business” as a precaution for the “remote prospect of litigation” and materials prepared because “some articulable claim, likely to lead to litigation ... has arisen.”³⁶

If the documents “would have been created irrespective of litigation [they] are not under the protection of the work product doctrine.”³⁷ Thus, counsel attempting to prevent the disclosure of the information must show that the primary motivation behind the preparation of the document was for the anticipation of some articulable claim likely to lead to litigation.³⁸ In fact, this distinction of anticipation of litigation is one of the reasons why insurer reserve information is protected work product. The setting of a reserve amount constitutes “evaluating the merits and risk of a legal claim” and is therefore protected from disclosure.³⁹

V. Unprotected Material Can Acquire Protection if “Adopted by a Lawyer”

In addition to materials prepared by the lawyer, work product protection applies to materials “adopted by a lawyer,” including “‘materials, information, mental impressions and strategies’ of others which the lawyer assimilates as part of his own work product.”⁴⁰ Thus, the work of an insurance company can *become* the attorney’s work product after the attorney assumes the case.⁴¹ Investigation and research overseen by insurance claims personnel is protected from disclosure when it is adopted by a lawyer “due to the peculiarly quasi-legal nature of the function they perform.”⁴²

In *State ex rel. Shelby Mut. Ins. Co. v. Circuit Court for Milwaukee County*, the Wisconsin Supreme Court ruled that the opinions of experts consulted by the insurer became work product of the attorney when he assumed the file and were protected work product.⁴³ The *Shelby* court cautioned, however, that “[o]nce the insurer invokes the privilege and refuses to divulge the names and reports of expert consultants, it is foreclosed from using such experts as witnesses and from using the experts’ reports as evidence or as a basis of testimony of another, *i.e.*, someone familiar with the reports. In short, the insurer cannot have its cake and eat it too.”⁴⁴

VI. Examples of Protected Work Product

a. Witness Statements

Among the most frequently requested types of work product in discovery are written and recorded statements. In *Hickman v. Taylor*, the United States Supreme Court ruled that oral and written statements of non-party witnesses in the possession of defense counsel made in anticipation of litigation are not discoverable absent a “showing of the necessity for the production of such material or any demonstration that denial of production would cause hardship or injustice.”⁴⁵ The purpose of the rule is to discourage lack of diligence by opposing counsel and to allow counsel the freedom to develop litigation strategy from the prying eyes of opposing counsel.⁴⁶

While written and recorded statement may not be discoverable, the names and addresses of the persons from whom statements are obtained are discoverable.⁴⁷ “Allowing discovery of the names and addresses of the persons who gave statements will give a party the opportunity to fully inform himself of the facts of the case and the evidence which may come out at trial, without requiring disclosure of the contents of the statements themselves.”⁴⁸ This rule makes sense given that, while an attorney’s mental impressions are protected, the underlying facts are not.⁴⁹ It is up to the requesting party to obtain the facts.⁵⁰

Although routine statements given to one's employer or insurance company are typically not protected by the work-product doctrine, statements given to non-lawyer investigators and adopted by lawyers (including claims counsel) after litigation has commenced are typically privileged.⁵¹

Finally, one must keep in mind that a written or recorded statement loses its work product protection once the witness testifies at trial and/or the attorney uses the statement at trial.⁵²

b. Surveillance

Another type of work product frequently requested in discovery is surveillance materials. In *Ranft*, the plaintiff inquired whether he had been subject to post-accident photographic or video surveillance by the defendant.⁵³ No Wisconsin appellate decision had addressed whether the existence of surveillance materials must be disclosed prior to trial.⁵⁴ The majority rule was that a party is entitled not only to know before trial whether he or she has been subjected to photographic or video surveillance but to have pre-trial access to the surveillance materials as well.⁵⁵ The two main reasons given for permitting pretrial access to surveillance materials are: 1) modern litigation favors access to all relevant material rather than to reward "gamesmanship, surprise, or superior trial tactics," and 2) the possibility that the surveillance materials might be misleading or deceptive.⁵⁶ The *Ranft* court was not persuaded, however, and declined to compel pretrial disclosure of surveillance materials.⁵⁷ The court held that disclosure of surveillance materials would impinge on the very core of the work product doctrine:

A lawyer's strategic decision to invest a client's resources on photographic or video surveillance is protected work-product. The decision not only reflects the lawyer's evaluation of the strengths or weaknesses of the opponent's case but the lawyer's instructions to the person or persons conducting

the surveillance also reveals the lawyer's analysis of potentially fruitful areas of investigation.⁵⁸

As long as the *Ranfts* have an opportunity to seasonably challenge any surveillance material prior to the defendants' use of the material at trial, neither the *Ranfts* nor the trial's truth-finding function will be prejudiced.

Since the *Ranft* decision deals with a lawyer's strategic decision to perform surveillance, whether the ruling would apply to surveillance conducted by an insurance company is uncertain, but it seems that the same rationale should apply.

VII. Substantial Need and Undue Hardship

The work product doctrine is a *qualified* privilege.⁵⁹ Work product material can still be discovered upon "a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means."⁶⁰ If the party seeking the discovery can obtain the information by other means, such as taking a deposition, then the protection will be upheld.⁶¹ It is important to remember that simply because the material sought is ordinary or fact work product, it is still work product. As such the party seeking the protected material must prove to a court the substantial need for the material and the inability to obtain the substantial equivalent without undue hardship.⁶²

Hardship can exist where a party cannot obtain the substantial equivalent of the requested work product. The mere passage of time between when a written or recorded statement was obtained should not give validity to the argument that the substantial equivalent cannot be obtained because the witness's memory may have faded. However, if a witness died before a party was aware of their existence and thus, can no longer be deposed, substantial hardship may exist.⁶³ Obtaining statements for mere impeachment is not sufficient to meet the substantial need test in

order to overcome the protections of work product.⁶⁴ Also, the fact that obtaining the information may be costly is itself not sufficient to override the work product protection.⁶⁵

VIII. Good Practice

When asserting a work product objection in response to written discovery, it is good practice to produce a privilege log. A privilege log should separately list each protected document, along with the date it was created, its author, and any recipients. The log should also describe the document's subject matter, the purpose for which it was created, and explain why the document is privileged or protected from discovery. The explanation should contain "sufficient detail" to allow the requesting party and the court to clearly discern the basis for the privilege.⁶⁶ Failure to clearly articulate this information may result in a court finding that the producing party has not met its burden to show that the material is protected work product.

The authors prefer a proactive, rather than a reactive, approach to discovery. If an insurance company feels strongly that requested documents are privileged or protected from discovery, a protective order should be sought under Rule 804.01(3)(a), Stats. Moving promptly for a protective order keeps the case moving procedurally and also avoids giving the court the impression that the defense is playing games, unreasonably refusing to produce documents in discovery, or taking steps to delay the action.

IX. Waiver

The work product privilege is owned by the client.⁶⁷ It "can only be waived voluntarily at the client's direction."⁶⁸ If a client does not authorize the disclosure, then there is no waiver.⁶⁹ Along these lines, inadvertent disclosure is subject to Wisconsin's "clawback rule," which provides:

RECOVERING INFORMATION INADVERTENTLY DISCLOSED. If information inadvertently produced in discovery is subject to a

claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.⁷⁰

Like the attorney-client privilege, if protected work product is shared with third parties, waiver can occur. Hence, rehearsal of a cross-examination in front of third parties who are not under a duty of confidentiality can result in a waiver.⁷¹ That said, even intentional waiver of some information protected by the work product immunity will not automatically result in the waiver of all work product protected material.⁷² "Undisclosed work product remains protected."⁷³ Furthermore, if the intentional disclosure was with another who has a shared common interest in the actual or even potential litigation, waiver will not result.⁷⁴ If such material is to be shared, a joint or common defense agreement should be entered into prior to any disclosure.

X. Conclusion

It is abundantly clear that there is no bright line rule that defines protected work product or when information is gathered in anticipation of litigation. The assessment of what to produce must be made on a case-by-case basis. Arguments for and against production will be based on the type of information being sought, how it was generated, and by whom. As a general observation, the earlier in the process

the information is obtained and if it is before counsel is retained, the more likely it is that production will be ordered. To a large extent, what is discoverable may turn on the predisposition of the judge toward full disclosure weighed against a lack of diligence.

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References

- 1 Wis. Stat. § 804.01(2)(a).
- 2 *Id.*
- 3 Wis. Stat. § 905.03(2).
- 4 Wis. Stat. § 804.01(2)(c)1.
- 5 *See State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 590, 150 N.W.2d 387 (1967); *see also Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (“Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.”) (Jackson, J., concurring); *Hobely v. Burge*, 433 F.3d 946, 947 (7th Cir. 2006); *Coastal States Gas Corp. v. Dep’t of Energy*, 199 U.S. App. D.C. 272, 617 F.2d 854, 864 (D.C. Cir.1980).
- 6 *Dudek*, 34 Wis. 2d at 595. The work product doctrine announced in *Dudek* is unaffected by the later enactment of Wis. Stat. § 804.01, which codified the doctrine. *Meunier v. Ogurek*, 140 Wis. 2d 782, 789, 412 N.W.2d 155 (Ct. App. 1987) (citing Judicial Council Committee’s Note, 1974, 67 Wis. 2d at 659).
- 7 *Ranft v. Lyons*, 163 Wis. 2d 282, 298, 471 N.W.2d 254 (Ct. App. 1991).
- 8 *Id.*
- 9 *Id.*
- 10 *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 768-69 (7th Cir. 2006).
- 11 Wis. Stat. § 804.01(2)(c)1.; *see also Dilger v. Metro. Prop. and Cas. Ins. Co.*, 2015 WI App 54, ¶ 19, 364 Wis. 2d 410, 868 N.W.2d 177.
- 12 *Caremark, Inc. v. Affiliated Comput. Servs., Inc.*, 195 F.R.D. 610, 616 (N.D. Ill. 2000); *see also In re Grand Jury Proceedings*, 33 F.3d 342, 348 (4th Cir. 1994).
- 13 *See Fed. R. Civ. P. 26(b)(3)(B)*. The federal rule is almost identical to the Wisconsin rule. *Compare Fed. R. Civ. P. 26(b)(3)(B) with Wis. Stat. § 804.01(2)(c)1*. As Wisconsin is essentially in accord with the Federal Rules of Civil Procedure, federal authority can assist in the interpretation of the Wisconsin rule. *Rao v. WMA Sec., Inc.*, 2008 WI 73, ¶ 47, 310 Wis. 2d 623, 752 N.W.2d 220. Prudent defense counsel will consult both federal and state case law regarding challenges to the assertion of the work product objection.
- 14 *Patrick v. City of Chicago*, 111 F. Supp. 3d 909, 915 (N.D. Ill. 2015) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981)). For example, photographs taken immediately after an accident, even by an expert retained by a party, are likely not protected work product. *Reedy v. Lull Eng’g Co.*, 137 F.R.D. 405, 407-08 (M.D. Fla. 1991); *Estate of Pratt v. Roehl Transp., Inc.*, No. 12-C-1150, 2013 U.S. Dist. LEXIS 116206, at *4 (E.D. Wis. Aug. 15, 2013). Similarly, information downloaded from an event data recorder after an auto accident in the possession of an insurance company is likely not protected.
- 15 *Id.*
- 16 *Carlson Heating, Inc. v. Onchuck*, 104 Wis. 2d 175, 180, 311 N.W.2d 673 (Ct. App. 1981).

- 17 *Borgwardt v. Redlin*, 196 Wis. 2d 342, 354, 538 N.W.2d 581 (Ct. App. 1995).
- 18 *Fed. Trade Comm'n v. Grolier Inc.*, 462 U.S. 19, 25-26 (1983) (interpreting the federal rule).
- 19 *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 660 (S.D. Ind. 1991).
- 20 *Epic Sys. Corp. v. Tata Consultancy Servs.*, No. 14-cv-748-wmc, 2015 U.S. Dist. LEXIS 166438, *10-11 (W.D. Wis. Dec. 10, 2015); *see also* *Wartell v. Purdue Univ.*, No. 1:13-CV-99-RLM-APR, 2014 U.S. Dist. LEXIS 120080, 2014 WL 4261205 (N.D. Ind. Aug. 28, 2014) (ordering production of investigation materials where the record did not reflect that the attorney “was giving legal advice by conducting the investigation and report”); *In re Raytheon Sec. Litig.*, 218 F.R.D. 354, 359 (2003) (work product privilege does not attach to materials prepared by corporation for audit team).
- 21 *Allendale Mut. Ins. Co. v. Bull Data Sys.*, 145 F.R.D. 84, 87 (N.D. Ill. 1992) (citing *Harper*, 138 F.R.D. at 660); *see also* *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1118 (7th Cir. 1982) (“The mere fact that litigation does eventually ensue does not, by itself, cloak materials prepared by an attorney with the protection of the work product privilege; the privilege is not that broad.”).
- 22 *First Wis. Mortg. Tr. v. First Wis. Corp.*, 86 F.R.D. 160, 165 (E.D. Wis. 1980).
- 23 *Harper*, 138 F.R.D. at 659 (S.D. Ind. 1991).
- 24 *Id.* (citations omitted).
- 25 *Id.* (citation omitted).
- 26 *Id.* (citations omitted).
- 27 *Dudek*, 34 Wis. 2d at 595.
- 28 Wis. Stat. § 804.01(2)(c)1.
- 29 *Id.*
- 30 *Harper*, 138 F.R.D. at 663.
- 31 *Dudek*, 34 Wis. 2d at 592.
- 32 *haw v. Wuttke*, 28 Wis. 2d 448, 455, 137 N.W.2d 649 (1965); *Jacobi v. Podevels*, 23 Wis. 2d 152, 156, 127 N.W.2d 73 (1964).
- 33 *Binks*, 709 F.2d at 1119 (quoting *Janicker v. George Washington Univ.*, 94 F.R.D. 648, 650 (D.D.C. 1982)).
- 34 *Long v. Anderson Univ.*, 204 F.R.D. 129, 136 (S.D. Ind. 2001) (quoting *Caremark*, 195 F.R.D. at 614-15).
- 35 *Allendale*, 145 F.R.D. at 87.
- 36 *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 977 (7th Cir. 1996).
- 37 *Caremark*, 195 F.R.D. at 614.
- 38 *Compton v. Allstate Prop. & Cas. Ins. Co.*, 278 F.R.D. 193, 196 (S.D. Ind. 2011).
- 39 *Schreib v. Am. Family Mut. Ins. Co.*, 304 F.R.D. 282, 286 (W.D. Wash. 2014).
- 40 *State ex rel. Shelby Mut. Ins. Co. v. Circuit Court for Milwaukee County*, 67 Wis. 2d 469, 475, 228 N.W.2d 161 (1975).
- 41 *Id.*
- 42 *Id.* at 474.
- 43 *Id.*
- 44 *Id.*
- 45 *Hickman*, 329 U.S. at 499-500, 508-09; *but see* Wis. Stat. § 804.01(2)(c)2. (“A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party.”).
- 46 *Hobely*, 433 F.3d at 947.
- 47 *Meunier*, 140 Wis. 2d at 790-91; *Sersted v. American Can Co.*, 535 F. Supp. 1072, 1080 (E.D. Wis. 1982).
- 48 *Meunier*, 140 Wis. 2d at 790-91.
- 49 *Patrick*, 111 F. Supp. 3d at 915 (citing *Upjohn*, 449 U.S. at 395-96).
- 50 *Meunier*, 140 Wis. 2d at 790-91.
- 51 *Dudek*, 34 Wis. 2d at 593, 595.
- 52 *State v. Hereford*, 195 Wis. 2d 1054, 1083, 537 N.W.2d 62 (Ct. App. 1995); *Shaw*, 28 Wis. 2d at 456.
- 53 *Ranft*, 163 Wis. 2d at 286.
- 54 *Id.* at 300.
- 55 *Id.*
- 56 *Id.* (internal citations omitted).
- 57 *Id.*
- 58 *Id.* at 301-02.
- 59 *Borgwardt*, 196 Wis. 2d at 353-54 (quoting *United States v. Nobles*, 422 U.S. 225, 237-38 (1975)).
- 60 Wis. Stat. § 804.01(2)(c)1.
- 61 *Meunier*, 140 Wis. 2d at 788 (citing *United States v. Real Estate Bd. of Metro. St. Louis*, 59 F.R.D. 637, 640 (E.D. Mo. 1973)).
- 62 *Borgwardt*, 196 Wis. 2d at 354.
- 63 *State v. Hydrite Chem. Co.*, 220 Wis. 2d 51, 62, 582 N.W.2d 411 (Ct. App. 1998) (interview notes of attorney taken in connection with witness interviews discoverable as witness passed away and carrier was not notified of claim for years after insured commenced its investigation).
- 64 *Hauger v. Chicago, R. I. & P. R. Co.*, 216 F.2d 501, 508 (7th Cir. 1954).
- 65 *United States v. Chatham City Corp.*, 72 F.R.D. 640, 644 (S.D. Ga. 1976).
- 66 *Allendale*, 145 F.R.D. at 88.
- 67 *Borgwardt*, 196 Wis. 2d at 357.
- 68 *Id.*
- 69 *Id.*
- 70 Wis. Stat. § 804.01(7).
- 71 *Kuklinski v. Rodriguez*, 203 Wis. 2d 324, 338, 552 N.W.2d 869 (Ct. App. 1996).
- 72 *Appleton Papers, Inc. v. EPA*, 702 F.3d 1018, 1025 (7th Cir. 2012) (using protected document in support of a consent decree will waive work product immunity only with regard to those documents).
- 73 *Id.* at 1024-25.
- 74 *RMS of Wis., Inc. v. Shea-Kiewit Joint Venture*, No. 13-CV-1071, 2015 U.S. Dist. LEXIS 70469, at *6 (E.D. Wis. June 1, 2015).