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Defense counsel should give careful thought to the ways strategy may be impacted.

Witness Statements in Investigation, Deposition and Trial

The term “statement” is ubiquitous in the law. A witness can make a statement. An insurance investigator can take a statement from a witness, which is usually electronically recorded. Parties can be asked to produce

statements during the discovery process.

The Rules of Civil Procedure and common law decisions determine the discoverability or non-discoverability of “statements.” A thorough understanding of the law governing the discoverability of statements and their use in the litigation process, including trial, is critical for trial practitioners.

The “Law” of Statements

The term “statement” is defined in the Federal Rules of Civil Procedure. Rule 26(b)(3)(C) (2008) provides:

Any party or other person may, on request and without the required show-

ing, obtain the person’s own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either: (i) a written statement that the person has signed or otherwise adopted or approved; or (ii) a contemporaneous, stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person’s oral statement.

The “required showing” in the rule refers to the burden a party would otherwise have without the statement, i.e., substantial need and undue hardship. FED. R. CIV. P. 26(b)(3)(A). Also, note that the 2007 rule change provided a request procedure for a nonparty witness. *See* Rule 23(b)(3) cmt (2007). Most state courts have a parallel procedural rule. *See, e.g.,* IOWA R. CIV. P. 1.503(3).

How should the defense respond when statements are requested in discovery?

Often, the defense is served a discovery request that reads, “[P]lease produce all statements,” but which does not define the term “statement.” When this occurs, defense counsel should refer to the definition provided in the Rules of Civil Pro-

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cedure. The only “statement” that must be produced is one given by the plaintiff or the requesting party. See FED. R. CIV. P. 26(b)(3)(C).

The mere existence of statements, however, is not privileged from discovery. See, e.g., FED. R. CIV. P. 26(b)(5)(A). This rule applies to trial preparation materials. It provides as follows:

(5) Claims of Privilege or Protection of Trial Preparation Materials.

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable the other parties to assess the claim.

If the statements are withheld based on the attorney work product privilege, a privilege log must be provided for those withheld materials. *Id.*

Obtain discovery of your client's documents held by the plaintiff's counsel

In “pattern”—or repetitive litigation—or suits dealing with the same subject matter, a plaintiff's counsel may have obtained your client's documents from a different source in another case. In any case where this might be a possibility, defense counsel should ask the plaintiff to “[I]dentify any and all documents in your possession, custody or control that you contend constitute a statement or admission of the Defendant.” It is important for a defendant to know that his or her previous statements against interest and business records either are not considered hearsay or are subject to an exception to the hearsay rule and can therefore, be admitted into evidence. See FED. R. EVID. 801(d)(1) and 803(6). Federal courts have upheld this type of discovery request against a blanket assertion

of “work product privilege.” See, e.g., *Bartley v. Isuzu Motors Ltd.*, 158 F.R.D. 165 (D. Colo. 1994); *Bohannon v. Honda Motor Co.*, 127 F.R.D. 536 (D. Kan. 1989).

Discoverability of Statements: *Hickman v. Taylor* and the Work Product Doctrine

One of the authors' abiding memories from law school is discussing *Hickman v. Taylor*, 329 U.S. 495 (1947) in civil procedure class. *Hickman* was the genesis for the attorney work product doctrine. You will often see parties refer to attorney work product, citing *Hickman v. Taylor*; the correct citation should be to FED. R. CIV. P. 26(b)(3), which forms the current basis for work product immunity.

A brief review of the facts of *Hickman* can be instructive to understanding the policy basis underlying the attorney work product protection. In *Hickman*, the attorney hired by the defendant tugboat owners took statements from the four surviving crew members in an admiralty case involving the inexplicable sinking of a tugboat. The plaintiff sought production of these survivor statements in discovery to no avail. Not only did the district court grant the motion to compel, but it took the further step of holding the defense counsel and tugboat owners in contempt, ordering them imprisoned for failing to comply. *Hickman*, 329 U.S. at 500. To the relief of the tugboat owners and their attorney, the Third Circuit reversed. *Id.* Eventually, the Supreme Court upheld the defendants' position and ruled that such matters were not discoverable without a showing by the requesting party—now familiar language—of “necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case.” *Id.* at 509. Although the qualified or limited protection of case materials codified in Rule 26(b)(3) is most often referred to as attorney work product privilege the scope of the privilege offers much broader protection; it also protects the work product of the agents and employees of counsel or the party. As stated in the rule, the immunity protects “materials prepared in anticipation of litigation or trial by or for a party or that party's representative.” See FED. R. CIV. P. 26(b)(3).

In some situations, statements are taken routinely, and if so, they retain their work

product protection. See, e.g., *Ashmead v. Harris*, 336 N.W.2d 197 (Iowa 1983). In *Ashmead*, the issue was whether written materials prepared by a liability insurer in a routine investigation were “prepared in anticipation of litigation” within the meaning of IOWA R. CIV. P. 122(c) (the rule has since been re-numbered 1.503(3)). *Id.* at 198. In *Ashmead*, the defendant had voluntarily produced statements of the plaintiffs, but resisted production of “all notes, correspondence, reports, statements or memoranda produced by defendant or defendant's insurer.” *Id.* at 198. The trial court in *Ashmead* held that the documents were not subject to the privilege because they were “routine,” but on appeal the appellate court reversed that decision. *Id.* at 202. The appellate court reasoned that the materials were subject to the work product privilege and that no showing of substantial need for the materials had been made as required by the rule. *Id.* at 202.

Defense counsel should always beware of a possible breach of the work product privilege by an opponent's “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.” FED. R. CIV. P. 26(b)(3). Courts have broad discretion in determining whether this showing of need for requested materials has been met. See 4 Moore's Federal Practice, ¶26.64[3] at 26-416 to 26-439 (1979). For example, witness statements have been held to be discoverable when they were taken shortly after an event and a lapse of time precluded the movant from obtaining the information through alternative means. See *McDougall v. Dunn*, 468 F.2d 468, 474 (4th Cir. 1972); *Hamilton v. Canal Barge Co.*, 395 F. Supp. 975 (E.D. La. 1974); *Teribery v. Norfolk & Western Railroad*, 68 F.R.D. 46 (W.D. Pa. 1975); see also *Berg v. Des Moines General Hosp. Co.*, 456 N.W.2d 173 (Iowa 1990).

Hickman offers a perfect example of the kind of case-by-case analysis courts must undergo when determining the scope of the attorney work product privilege. The Supreme Court in *Hickman* forbade the production of attorney memoranda and witness statements because (1) the plaintiff had access to prior sworn statements of

many of the same persons examined in a prior agency hearing; (2) the availability of the witnesses was unimpaired; and (3) the plaintiff had obtained answers to interrogatories from the defendant tugboat owners. *Hickman*, 329 U.S. at 508–509. In *Berg*, also instructive, hospital nurses in a medical malpractice case gave statements shortly after the events. During the trial, they

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testified that they lacked memory about the events. In the *Berg* context, the court ordered production of the statements.

Also, if you possess beneficial witness statements, as part of your litigation strategy you can voluntarily produce copies of these statements to opposing counsel. Even though the discovery rules say they may be protectable work product, this does not mean you cannot produce them in discovery, if you think it is in the best interest of your client. Often, by the time a case is filed, two years have passed. One of the authors had a case several years ago which involved a catastrophic injury—quadriplegia—in an automobile accident where a crash-worthiness suit had been filed against the vehicle manufacturer. The plaintiff's counsel conducted a full and complete investigation of the incident right after the accident, which included taking witness statements. Defense counsel simply asked opposing counsel if he would produce those statements, as long as counsel mutually agreed to exchange such materials. The plaintiff's counsel agreed, and the defendant was able to obtain copies of critical, eyewitness statements of the accident and relevant issues. When the defense counsel sent cop-

ies of these statements to the client, the client was surprised and asked, “[H]ow did you get these?” to which defense counsel stated, “[I] just asked for them.”

On the other hand, if your own witness has given a prior statement that hurts your client's case, you should give careful thought to whether you want the witness to review the statement before deposition. For instance, sometimes damaging statements are given to adjusters before litigation counsel is involved. Having the witness review a statement before deposition opens up the possibility that the statement will be noticed when opposing counsel asks, “[W]hat have you reviewed?” ultimately resulting in an order for production. Keep in mind that the mere existence of a statement is likely a proper subject of discovery, and existence of statements is not privileged.

Should I Take a Statement or Deposition?

Some lawyers often focus on the Rule 30 deposition—or the state court equivalent rule—as the primary technique for learning and documenting what a particular witness' testimony may be at trial. In many situations, taking a witness statement may be preferable, and if so, defense counsel should employ specific techniques to protect that statement from disclosure.

Before taking either a statement or scheduling a deposition, consult your common sense. What is this person going to say? Do I expect this person to be less friendly in 30 days, for example, after he or she has been terminated? Do I really want to document what he or she has to say if it could be harmful to my client's cause? Before audio or videotaping a witness statement, try an off-the-record, dry run to determine whether the testimony will be favorable. If the statement is favorable, you may want to formally record it, either in audio or video format. If it is unhelpful, or downright harmful, you may choose to forego taking a statement altogether. In any event, you can make notes of your conversation, and those will generally be protected as attorney work product.

Another strategy is to “statement-ize” a witness by creating a videotape record of the witness demonstrating how a product was used, where he or she was standing when he or she witnessed an accident, and

so forth. Just as in the case of an in-court demonstration, of course, extreme caution is advised. This strategy can be used to preserve evidence and document the particular actions of the plaintiff as witnessed by some other person. Before committing the account to video, have the witness demonstrate for you what he or she saw at the time of the accident. Based on the run-through, you can decide whether to preserve the account. A videotaping strategy can also be employed to take a deposition of a personal injury plaintiff. See *Getting a Witness to Walk the Line: Accident Demonstrations at Videotaped Discovery Depositions*, 30(3) AM. J. OF TRIAL ADVOCACY 487–538 (Spring 2007).

A statement has many advantages over a deposition. A statement may be informal and off-the-record, and, unlike a deposition, no formal notice need be given to your opponent. An informal atmosphere may help you to build rapport with the witness. If facts unfavorable to your client are reported, you can explore them in detail, without dangerously highlighting them for opposing counsel. It is important to be in a position to make these decisions early in a case. Locating and identifying witnesses early gives you a broader spectrum of choices about whether and how to capture witness testimony. Sometimes, there is an added bonus. One of the authors once interviewed a third-party witness thought to be neutral, by all accounts. After the interview, the witness called the author out of concern because he had been contacted by opposing counsel, and he wondered what he should say! Of course, the answer was, “the truth.” But by building rapport early with a witness, he or she can begin—even subconsciously—to identify with your client.

A statement taken of a witness other than of a party to the case is not required to be produced in discovery if it is protectable under the “work product” immunity. But, remember, any person—even a nonparty witness—is entitled to their own prior statement, no matter who took it. FED. R. CIV. P. 23(b)(3). If counsel or a counsel's agent, such as a legal assistant or private investigator, takes the statement of a witness, opposing counsel must make the requisite showing of “substantial need and undue hardship” for the statement to

become discoverable. However, in practice, requesting counsel may simply contact the witness and ask, “[D]o you have a copy of the statement that you gave?” If the answer is yes, counsel merely requests a copy from the witness, muttering something to the effect, “[Y]ou know, to be fair, both sides to the suit should have access to the same information.” If the answer is no, counsel then asks, “[W]ould you like to have one, to refresh your memory or help you prepare for deposition or trial?” At this point, the witness can request a copy of the statement from the party who took it. Again, the statement cannot be withheld because the rules provide that any witness is entitled to a copy of their own statement. Once a witness possesses a copy of their statement, opposing counsel typically requests it and circuitously gets a copy. Of course, plaintiff attorneys don’t monopolize this technique, which can just as effectively be used by defense counsel.

Normally, a witness is deposed with a court reporter present. If counsel takes a statement, he or she has more flexibility. The statement may consist merely of counsel’s or a legal assistant’s interview notes. Counsel can write the statement during the interview, have the witness review it, and have the witness sign and date it. The witness may be interviewed orally, and the interview can be audiotaped or videotaped. Finally, the witness can write their own statement on a blank sheet of paper, and sign and date it.

By the same token, statements have certain disadvantages, when compared with depositions. Normally, the witness is not under oath when providing a statement, although if a legal assistant or private investigator is a Notary Public, you can have the oath administered to the witness. If a sworn statement is taken and the witness later becomes unavailable, it will not qualify under the “former testimony” exception to the hearsay rule and will be admitted into evidence *See* FED. R. EVID. 804(b)(1) (requiring an opportunity by the party against whom the statement is being offered an “opportunity *and similar motive* to develop the testimony by direct, cross, or redirect examination”) (emphasis added). Thus, if a witness is aged or in ill health, a formal deposition with notice to opposing counsel is the best way to guarantee preser-

vation and later use of the testimony should the witness later become unavailable.

Using a Statement as a Recorded Recollection

A witness statement may be used at a deposition or trial as a recorded recollection, which is a recognized exception to the hearsay rule. *See* FED. R. EVID. 803(5). Under the rule, before a memorandum or record can be used, you must establish that the witness previously had knowledge of certain events, but in the moment has “insufficient recollection to enable the witness to testify fully and accurately.” *See* 1972 note (explaining this requirement helps to avoid professionally drafted statements for purposes of litigation). When you invoke this rule, the memorandum or record is not admitted into evidence directly. Instead, “the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.” *Id.* It is preferable for the live witness to testify at trial based on their memory. However, the Rule 803(5) procedure may be your “Plan B” to get the evidence before the jury if the witness on the stand at trial testifies to a lack of memory.

Using a Statement to Refresh a Witness’ Memory

A witness’ statement can also be used to refresh the witness’ memory at trial so that the witness will testify based on that refreshed memory. If this strategy is employed, the statement itself will not be entered into evidence. First, the witness must testify that he or she lacks memory regarding a certain subject matter. Next, the statement is handed to the witness, and the witness is asked to review it. The statement is not read aloud in court, or marked as an exhibit to be offered into evidence, but rather, it is reviewed by the witness. After the witness’ review, the examiner asks the original question, referring to the review of the statement, “[D]id your review of that statement or document refresh your memory on this subject?” If the answer is yes, the statement is removed, and the witness proceeds to testify based on their refreshed memory. If the witness answers no, proof of the information contained within the statement can be entered as evidence either as past-recollection recorded

(previously discussed) or as a prior inconsistent statement for impeachment purposes. *See* FED. R. EVID. 801(d)(2) (if the witness is a “party”); 804(b)(3) (“[S]tatement against interest”) (applies to all witnesses). The statement itself can be entered as evidence upon a proper foundation, or it can be entered as evidence through the testimony of another witness, typically the person who took the statement.

Using a Statement with Your Own Witness

The use of a statement that one of your own witnesses has given depends on the factual context. It is important to consider whether the facts and information in the prior statement are favorable or unfavorable to your case.

For example, if your own witness provided a statement that is very favorable to your client, before deposing that witness you will want to have him or her study the previous statement. Exercise caution here. In a deposition, most thorough plaintiff’s counsel ask, “[W]hat did you review before the deposition today?” If the witness reviewed a previous statement in before providing testimony, the statement may very well become discoverable by your opponent. By the same token, as defense counsel, you should always ask the plaintiff and the plaintiff’s witnesses, “[W]hat did you review before the deposition?” If a witness identifies a prior recorded statement, move for production of the statement. This is particularly important if the witness has testified to any lack of memory. You may even want to keep the record open on the deposition until you have had a chance to review that statement and examine the witness about it.

As discussed above, statements of your own witnesses given to you or your investigator, are subject to work product protection and need not be produced unless the requisite breach to the qualified immunity is shown. *See* FED. R. CIV. P. 26(B)(3). Thus, even if production of such statements is requested in written discovery, and you anticipate that your witnesses will review the helpful statements before their depositions, as a matter of strategy, do not produce your witnesses’ previously given statements. Opposing counsel may forget to ask what your witness reviewed prior to

testifying, or counsel may ask and fail to follow up with a request for the statement. If opposing counsel fails to ask for a statement or to make the required showing of necessity and hardship, you are not obligated to produce a copy of a statement for your opponent.

One of the authors recently had a situation where a former store employee was

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to be deposed by a plaintiff's attorney in a premises liability personal injury case. The employee had previously given a tape-recorded statement over the telephone to an adjuster working on the claim, before the case was in suit and sent to counsel. In the statement, the employee said that just before the accident she had heard three girls talking in the next aisle, discussing the "staging" of a "phony" slip and fall accident on a wet floor. They created a wet condition on the floor by intentionally spilling a product and staged an accident. After the suit was filed, this former employee was deposed. Since she was a former employee and potentially hostile, the associate attorney assigned to the case neglected to give her an opportunity to review the transcript of the earlier telephone interview and previously made statement. In a later deposition, the former employee testified that two girls talked about and took part in the scheme, instead of three girls. Although the case was resolved shortly later for a nominal amount, if the former employee had been given a chance to review her prior statement, opposing counsel would not have had the potential to impeach this critical witness by having knowledge of the existence of a prior inconsistent statement.

The associate attorney likely thought that if she had the witness review the statement prior to the deposition, it might then be-

come discoverable. However, since the statement was very beneficial to the defendant anyway, this concern was unwarranted.

Impeachment at Deposition or Trial

To the extent that a prior statement is inconsistent with testimony given at a deposition or trial, you can use it to impeach the credibility of the testifying witness. Other related issues may be less clear. For example, if you use a prior statement to impeach the credibility of a witness, will a written copy of the out-of-court statement be entered into evidence? Is the prior inconsistent statement read into evidence? What is the most effective way to impeach a witness with a prior inconsistent statement? To what extent is impeachment on a so-called "collateral matter" impermissible?

Several witness impeachment matters are legally well-established. The credibility of any witness may be impeached by anyone, including the party who called the witness to testify. FED. R. EVID. 607. You can impeach your own witness to guard your case if your witness completely "goes off the reservation" with his or her testimony. The authors suggest it is better to spend more time in witness preparation than in worrying about how to impeach a witness that you have called to the stand and has given surprising testimony.

A witness may be examined about a prior statement, whether written or oral, and the statement need not be shown nor its contents disclosed to the witness. However, upon request, the statement must be shown or disclosed to opposing counsel. FED. R. EVID. 613(a). In addition, "extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." FED. R. EVID. 613(b). Subparagraph (b) of Rule 613 "does not apply to the admissions of a party-opponent as defined in Rule 801(d)(2)." *Id.*

Under the rules of evidence, prior statements of a witness are not defined as "hearsay." *See* FED. R. EVID. 801(d)(1). This part of the rule includes prior inconsistent statements that were "given under oath subject to the penalty of perjury at a trial, hearing,

or other proceeding, or in a deposition." FED. R. EVID. 801(d)(1)(A). Under Rule 801(d)(1)(B), a *prior consistent statement* may be used to rebut an "express or implied charge of recent fabrication or improper influence or motive." *Id.*

Prior statements of a witness can also be considered admissions by a party-opponent and not hearsay under FED. R. EVID. 801(d)(2) if made by a party to the case under certain circumstances. If one of the following circumstances exist, a prior statement can be an admission by a party-opponent: (1) the statement is one of the party's own statement, in either an individual or representative capacity; (2) the statement is one of which the party has manifested an adoption of or believe in; (3) the statement is by a person authorized to make a statement concerning the subject; (4) the statement is by the party's agent or servant concerning a matter with the scope or agency or employment, made during the existence of the relationship; or (5) the statement is a statement of a co-conspirator of a party during the course and in furtherance of the conspiracy. Many times conspiracy allegations are made in civil cases, as almost throwaway allegations, but defense counsel should be mindful of the possibility that statements made by alleged co-conspirators, which might otherwise be excludable on hearsay grounds, may be admitted under FED. R. EVID. 801(d)(2)(E).

We are all familiar with the plaintiff's answer to an interrogatory that certain facts are "[U]nknown, but our investigation is continuing." Under the rules of evidence, this is a statement. Consider a final anecdote from a product liability case, for which one author served as defense counsel, illustrating how a seemingly innocuous statement can be used to impeach a witness. The plaintiff was on the witness stand explaining in explicit detail exactly how the accident happened. He was really "laying it on thick," including remarks such as, "[I] will never forget this as long as I live." The testimony was emotion-laden and the jurors were paying attention. The case was at a crossroads. What could the defense do to get the case back on an even keel? Upon cross-examination, defense counsel chose to address the witness' questionable and unbelievable testimony as follows:

Statements, continued on page 89

Statements, from page 48

Q: You have testified here today in great detail about what happened at the time of the accident, correct?

A: Yes, of course.

Q: Do you remember that shortly after you filed this lawsuit, some three years ago, we sent you a set of “interrogatories” or questions for you to answer under oath?

A: Umm, yes, I guess I recall that.

Q: And do you remember Question No. 2, which I have right here and will show you, and I will show it to the jury on the overhead projector here, where we asked: “[P]lease state in detail how the accident happened?”

A: Umm, yes, I guess I remember that.

Q: And do you remember that your answer at that time was “[U]nknown at this time, our investigation is continuing?”

A: Yes, I guess so.

Q: And can you explain for the folks

on the jury here, how it is that today, nearly five years after the accident, that you know every little detail about the accident, but when we asked you the same question three years ago, and closer to the accident date, we asked you for your answer under oath, that you didn’t know how it happened and said “our investigation is continuing?”

A: Umm, I don’t know what happened there.

Q: Let me ask you this—before you took the stand to give testimony in this trial today, did you speak with your lawyers?

A: Yes.

Q: Have you ever heard of the phrase “wood shedding a witness?” (Sounds of the jury snickering in the background.)

Besides being a powerful reminder to supplement discovery responses, the above story illustrates the critical role statements can

serve. A statement can be used to impeach a witness even if the statement itself is not a grand admission. The careful attorney should analyze every statement in the case record. In the mundane or pedestrian statement, a spectacular result could await.

Conclusion

Witness statements can be helpful or hurtful, depending upon how they are used. Defense counsel should give careful thought to the ways in which witness statements may impact defense strategy in a particular case. If witness statements exist, they will always be a critical aspect of discovery. Locating and obtaining statements should be at the top of every lawyer’s discovery checklist. What’s more, being the early bird—the first attorney to establish rapport with a witness—can provide a real advantage in litigation and allow that attorney to choose from several options regarding that witness’ statement that would have been foreclosed later in the life of the dispute. 