

A pedestrian filed a federal diversity action against a motorcyclist, alleging that the motorcyclist ran a stop sign and hit the pedestrian in a crosswalk outside of a bar.

During discovery, the pedestrian's attorney interviewed a bartender who was working at the bar on the night the accident occurred. The bartender told the attorney that the motorcyclist drank four bottles of beer and two shots of tequila in the hour immediately preceding the accident. The attorney wrote down the bartender's statements in a document.

The motorcyclist requested that the pedestrian produce all documents related to the case, including statements by potential witnesses. In response, the pedestrian's attorney produced several documents and a privilege log of the documents withheld. The privilege log included a description of the document containing the bartender's statements. The motorcyclist filed a motion to compel production of this document.

Should the court grant the motorcyclist's motion?

- A. No, because the document is inadmissible at trial.
- B. No, because the motorcyclist can obtain the information in the document by other means.
- C. Yes, because the document does not contain the attorney's opinions or legal theories.
- D. Yes, because the motorcyclist has a right to receive all materials containing information relevant to the case.

Explanation:

Work product

(FRCP 26(b)(3))

Type	Definition	Discoverability
Ordinary	Materials created in anticipation of litigation that contain factual information related to case	Not discoverable unless requesting party: <ul style="list-style-type: none">• has substantial need for materials <i>and</i>• cannot obtain information without undue hardship
Opinion	Materials created in anticipation of litigation that contain attorney's mental impressions, conclusions, opinions, or legal theories	Not discoverable unless: <ul style="list-style-type: none">• material concerns attorney's alleged fraudulent/illegal conduct (rare)

FRCP = Federal Rule of Civil Procedure.

During **discovery**, a party can use various methods (eg, request for production) to obtain nonprivileged information that is (1) relevant to any party's claim or defense and (2) proportional to the needs of the case. As a result, a party generally cannot obtain **privileged information**—including materials prepared by or for an attorney in anticipation of litigation (ie, work product) (**Choice D**). **Work product** falls into one of two categories:

- Ordinary – materials containing factual information related to the case (eg, a document containing a witness's statements—as seen here)
- Opinion – materials containing the attorney's mental impressions, conclusions, opinions, or legal theories (eg, a document containing the attorney's trial strategy)

Opinion work product is almost never discoverable.* And **ordinary work product** is only **discoverable if** the requesting party shows that it (1) has a **substantial need** for the materials and (2) cannot obtain the information contained therein without **undue hardship**—eg, the witness dies before the requesting party can interview him/her.

Here, the motorcyclist cannot demonstrate a substantial need for the document or undue hardship in obtaining the information contained therein. That is because the motorcyclist can easily obtain this information by other means—eg, by having his attorney interview or

depose the bartender. Therefore, the court should deny the motorcyclist's motion to compel production of the document.

*Most courts have held that opinion work product is only discoverable in the rare instance when the materials show that the attorney committed fraud or another crime.

(Choice A) The document's *admissibility* at trial has no effect on whether it is *discoverable* because the scope of discovery includes inadmissible information and materials.

(Choice C) The document is not *opinion* work product because it does not contain the attorney's impressions, conclusions, opinions, or legal theories. However, it is *ordinary* work product that is not subject to discovery.

Educational objective:

Ordinary work product is any material prepared by or for an attorney in anticipation of litigation that contains factual information related to the case. These materials are protected from discovery unless the requesting party shows that it (1) has a substantial need for the materials and (2) cannot obtain the information without undue hardship.

References

- Fed. R. Civ. P. 26(b)(3) (work product and trial-preparation materials).
- Hickman v. Taylor, 329 U.S. 495, 511–12 (1947) (explaining the importance of protecting work-product materials from disclosure and when such materials may need to be disclosed).