

A plaintiff sued a defendant, the owner of a department store, for injuries sustained when he slipped and fell in the defendant's store. The cause of the fall is in dispute. In preparation for trial, the plaintiff's attorney interviewed the only eyewitness to the incident and took notes as the eyewitness narrated the events leading up to the fall. The eyewitness had not spoken to anyone else about the incident and is now deceased. The defendant filed a motion to compel the production of the notes during discovery. The plaintiff's attorney objects on the ground of privilege.

Will production of the notes be required?

- A. No, because the notes are protected by the attorney-client privilege.
- B. No, because the notes are protected by the attorney work-product doctrine.
- C. Yes, because the eyewitness's account is unavailable by other means.
- D. Yes, provided there is good reason to believe that the notes contain inconsistent statements.

## Explanation:

### Attorney work-product doctrine

(protects materials prepared by or for attorney in anticipation of litigation)

	Description	Exception
<b>Opinion work product</b>	Attorney's opinions, legal theories & conclusions, mental impressions	Discoverable in <i>rare</i> instances of compelling need—eg, to show attorney's fraud
<b>Ordinary work product</b>	Facts gathered by attorney—eg, witness statements, notes & other materials	Discoverable in <i>civil</i> suit if requesting party shows substantial need & undue hardship

Under the **attorney work-product doctrine**, materials (eg, documents and tangible things) prepared by or for an attorney in anticipation of litigation are **privileged** and are **generally not subject to discovery**. This doctrine encompasses two types of work product:

Opinion work product – an attorney's opinions, legal theories and conclusions, and mental impressions (not seen here)

Ordinary work product – facts gathered by an attorney as well as witness statements, notes, and other items prepared in anticipation of litigation (as seen with the notes here)

Opinion work product is almost always protected from discovery. However, in **civil suits**,\* a party may **compel the production** of **ordinary work product** if the party demonstrates that it (1) has a **substantial need** for the materials to prepare its case and (2) **cannot obtain** the materials by other means **without undue hardship**.

Here, there is no other eyewitness to the fall, so the defendant has a substantial need for the information in the notes. And since the eyewitness is now deceased, the defendant cannot obtain the information by other means. Therefore, the court will likely require the production of the notes **(Choice B)**.

\*In criminal cases, the prosecution is constitutionally required to disclose exculpatory evidence contained within work-product materials—but not the work product itself. And the defense is only required to disclose work product contained in certain scientific or medical reports.

**(Choice A)** The attorney-client privilege protects **communications** between an attorney and a client that were (1) made for the purpose of obtaining or providing legal assistance for the client and (2) intended to be confidential. Therefore, this privilege does not cover the attorney's notes from an eyewitness interview.

**(Choice D)** Good reason to believe that the notes contain inconsistent statements helps show that the notes are relevant to the defendant's case and therefore within the scope of discovery. But relevancy alone is not a basis to overcome a valid claim of privilege.

**Educational objective:**

Production of ordinary work product—eg, witness statements and notes gathered in anticipation of litigation—can be compelled only if the requesting party demonstrates that it (1) has a substantial need for the materials and (2) cannot obtain the materials by other means without undue hardship.

**References**

Fed. R. Civ. P. 26(b)(3) (attorney work product).

Hickman v. Taylor, 329 U.S. 495, 509 (1947) (recognizing the work-product privilege).

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