DePaul Law Review

Volume 16
Issue 2 *Spring-Summer 1967*

Article 8

Governmental Aid to Church-Related Colleges - Side-Stepping the Wall of Separation

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to one who in fact does not have good credit. The public that receives such cards unsolicited need only discard them as it does any other unwanted mail. Legislation should not seek to prohibit or penalize unsolicited mailing, but only seek to compel the issuers to pay for actual damages and expenses incurred. Suppose a bank sends a card to *A*. *A* did not apply for the card and before it reaches A, it is intercepted by *B*. *B* makes purchases that are subsequently billed to *A*. *A* refuses to pay and is sued by the bank. *A* would have to hire an attorney and defend the action. These actual expenses and damages should be paid by the issuer. It is important to note that *A* is protected when the card comes unsolicited. In the hypothetical situation just given, if *A* had applied for the card, the contract would come into existence when the issuer dispatched the card. If it were intercepted, *A* would be liable under the terms of the contract. Before any legislation is passed, it should be considered carefully and not acted upon out of deference to public furor or misunderstanding.

CONCLUSION

In conclusion, several observations can be made concerning the Midwest Bank Card system. First, the MBC is and shall in the future increasing become a substantial factor in the financing of small loans and small credit purchase transactions in the midwest. Second, with these objectives in mind, it can be said that these goals can be admirably met to the satisfaction of all the parties concerned, by the proper use of the MBC. Third, any extreme legislative proposal to curtail the flow and/or use of these MBC cards will be a severe blow to a very ingenious and potentially valuable method of financing small credit transactions. However, adequate legislative safeguards should be introduced to awaken the potential and actual customers of MBC as to just what obligations they are assuming through the acceptance of the proffered card.

Victor Savikas and Fred Shandling

GOVERNMENTAL AID TO CHURCH-RELATED COLLEGES—SIDE-STEPPING THE "WALL OF SEPARATION"

Throughout the past century, proposals and programs involving types of financial aid to church-related institutions have been a recurring source of controversy.[1] This discordance results from the interpretations given the wording of the first amendment which forbids laws respecting an establishment of religion.[2] The problem that will face the courts will pertain

[1] DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 165 (1st ed. 1963).

[2] U.S. CONST. amend. I.

to the quantity and the character of aid that can be given to church related colleges by federal and state government, without violating the establishment clause. This question is of particular importance, today, because of the increased demands by all private colleges for governmental aid to enable them to meet the increased costs of education.

To examine this problem as a constitutional question, it will be necessary to survey the colonial church-state relations which ultimately led to the drafting of the first amendment. Following that, the various interpretations of the first amendment will be analyzed to determine the allowable extent of governmental relations with religion or religiously affiliated organizations. Types of governmental aid will be shown both on the federal and state levels in order to present the probable Supreme Court outlook on the constitutionality of governmental aid to church related colleges.

HISTORICAL DEVELOPMENT

Throughout the long and illustrious history of our country, controversy as to the relative position of the church has been present. In England, during the late 16th and 17th centuries, the unity of the people was destroyed because of the religious controversies which arose.[3] Many people immigrated from England and its established church to seek new horizons of religious freedom in America. But before too much time had past, the colonists found themselves establishing churches in their own colonies and passing laws making their own religion the official religion of their respective colonies.[4]

The Puritan colonists believed very strongly in education and developed a system of public schools.[5] These were sectarian schools in which the public supported a single established religion. Other colonies also set up public school systems based upon their colony church.[6] Soon, trade and travel began to spread among the colonies, a common political unity in defiance of England developed, and slowly the colonies began to discard their established churches.[7] By the time that the United States Constitution was adopted, religious tolerance was generally accepted by the states.[8]

In 1784, some Virginia clergymen sought to extend state support to include religion. In response, James Madison composed his "Memorial and Remonstrance" which manifested that any financial support of religion

[3] BOLES, BIBLE, RELIGION, AND THE PUBLIC SCHOOLS (2nd ed. 1963).

[4] See 1 PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGHT 5-50 (1930).

[5] BOLES, *op. cit. supra* note 3, at 4.

[6] *Id.* at 5. See also, 2 STORY, COMMENTARIES ON THE CONSTITUTION § 1879 (1905).

[7] Pfeffer, *Religion, Education, and the Constitution*, 8 LAW. GUILD REV. 387 (1948). The colonial churches diminished from eight to five between 1776 and 1787.

[8] *Ibid.* See generally, COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902).

was antithetical to freedom of conscience; he termed any tax support "an establishment of religion."[9] Those opposed to the established church in Virginia, led by Madison and Thomas Jefferson, obtained the enactment of the famous "Virginia Bill for Religious Liberty," which put all religious groups on equal footing in the eyes of the state.[10] By the time of the Constitutional Convention, Americans had developed an awareness of the danger of a union of church and state which undoubtedly led to our concept of separation of church and state. In an attempt to avert some of the dangers attested to by the past, the first amendment stated:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .[11]

To better understand the meaning which the framers intended in the "religious" portion of the first amendment, the various drafts of the amendment should be scrutinized.[12] It appears that the intention underlying the drafts is the guarantee of equality of all religions and churches by keeping the federal government from bringing about an inequality of religions, and thus preventing an "establishment" of religion.[13] The Supreme Court, in *Engel v. Vitale*,[14] decided that the purposes underlying the establishment clause were that, "a union of government and religion tends to destroy government and . . . degrade religion."[15] The court went on to say that the Founders felt that religion was too personal, social, and holy to permit its "unhallowed perversion" by a civil magistrate,[16] and it would be best for both government and religion to keep them apart. Jefferson, in his letter to the Danbury Baptist Association, enunciated that religion is be-

[9] Rafalko, *Federal Aid to Private School Controversy: A Look*, 3 DUQUESNE L. REV. 211, 213 (1964).

[10] FISKE, THE CRITICAL PERIOD IN AMERICAN HISTORY 78–82 (1899). See also, COBB, *op. cit. supra* note 8, at 74–115.

[11] U.S. CONST. amend. I. Also see, *The Constitution of the United States;* S. DOC. No. 39, 88th CONG., 1st Sess. 846-47 (1964).

[12] Six versions in all were proposed: (1) "The civil rights of none shall be abridged on account of religious belief, nor shall any national religion be established, nor shall the full rights of conscience in any manner or on any pretext be infringed." 1 ANNALS OF CONG. 434 (1789). (2) "No religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.* at 729. (3) "Congress shall make no laws touching religion, or infringing the right of conscience." *Id.* at 731. (4) "Congress shall make no law establishing religion, or to infringing the rights of conscience." *Id.* at 731. (4) "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.* at 766. The House adopted the fourth version but the Senate rejected it and adopted its own version which the House then rejected. Finally, a committee of three from each House of Congress wrote a final version which is our first amendment.

[13] Costanzo, *Federal Aid to Education and Religious Liberty*, 36 U. DET. L. J. 1. 5 (1958).

[14] 370 U.S. 421 (1962). [15] *Id.* at 431. [16] *Id.* at 432.

tween man and his God and that man owes account to none other for his faith; and, he concluded that the establishment clause built a "wall of separation" between church and state.[17]

A Senate Committee, in 1853, investigating the constitutionality of chaplains in the military, gave an authoritative view of the limitations of the establishment clause.[18] The committee concluded that laws in favor of any church or system of religious belief would be invalid if they provided for endowment at the public expense, or for any particular privileges to its members. It should be noted that there is no mention in the first amendment, or even in the deliberations of Congress on the first amendment, of policy or aid in regard to any type of education, religious or nonreligious.[19] To examine the constitutionality of governmental aid to church related colleges, the interpretation underlying the establishment clause will be discussed.

INTERPRETATION OF THE ESTABLISHMENT CLAUSE

The Supreme Court's interpretation of the establishment clause must be analyzed regardless of any intent which the framers may have in mind. It is the Supreme Court's interpretation of the Constitution that has given us our substantive law. The establishment clause was first invoked in *Bradfield v. Roberts*,[20] wherein the Court sustained a federal appropriation for the construction of a public ward for indigent patients at the Providence Hospital, which was under the control of the Sisters of Charity. The Court found no conflict between the appropriation and the establishment clause because of the public function which the hospital performed.

The expenditure of federally controlled funds to religious schools was first examined by the Supreme Court in 1908.[21] It was held that provisions in certain Indian appropriation acts, prohibiting the use of public funds for the education of Indians in sectarian schools, did not prevent trust funds belonging to the Indians, and administered by the federal government, from being used for such schools at their request. But perhaps the best and most influential interpretation of the establishment clause was stated by Mr. Justice Black in *Everson v. Board of Education of Ewing Twp.*,[22]

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither

[17] Moehlman, *Wall of Separation: The Law and the Facts*, 38 A.B.A.J. 281, 284 (1952).

[18] S. REP. No. 376, 32nd CONG., 2d Sess. (1853).

[19] PRITCHETT, THE AMERICAN CONSTITUTION (1959).

[20] 175 U.S. 291 (1899).

[21] Quick Bear v. Leupp, 210 U.S. 50 (1908).

[22] 330 U.S. 1 (1947).

can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[23]

The *Everson* case involved a New Jersey statute which authorized local school districts to make rules for the transportation of children to and from school. A local school board, pursuant to the statute, authorized reimbursement of money to parents for their children's transportation on commercial buses to school. Part of this money was paid for transportation to parochial schools. A suit was brought challenging the constitutionality of reimbursement to parents of parochial school students. The Supreme Court held that the first amendment does not prohibit this reimbursement because it is a part of a general program in which the fares of students attending all schools are paid. It was pointed out that the first amendment requires the state to be neutral in its relation with groups of religious believers and nonbelievers and not to be an adversary of religion. The statute was sustained as public welfare legislation, for the benefit and safety of children, and was not considered an establishment of religion.

In *McCollum v. Board of Education*,[24] the releasing of public school children from classes for religious education by outside teachers within the public school building was held to have breached the wall of separation. However, the problem of releasing students for religious instruction came up again in *Zorach v. Clausen*,[25] and there the Supreme Court held that a New York statute providing for the release of public school pupils from classes to attend religious classes was constitutional. In this case, unlike *McCollum*, the students were released from classes and sent to religious centers while the remaining students stayed in their public school classrooms. The court decided that this "released time" program is not a law respecting the establishment of religion. The majority concluded that the separation of church and state and not the individual preferences of the Supreme Court Justices is the constitutional standard to be applied in determining where secular ends and sectarian begins in education, and the "problem, like many problems in constitutional law, is one of degree."[26] The Supreme Court employed the theory of a valid secular purpose in *McGowan v. Maryland*,[27] by sustaining a statute making Sunday a day of rest. This decision was based upon the ground that, although the statute originally had a religious purpose, the present secular purpose of provid-

[23] *Id.* at 15–16.

[24] Illinois *ex rel.* McCollum v. Board of Educ. 333 U.S. 203 (1948).

[25] 343 U.S. 306 (1952). [26] *Id.* at 314. [27] 366 U.S. 420 (1961).

ing a day of rest in the interest of health justified the incidental benefit of religious activity.

The famous Pennsylvania school prayer case of *School District of Abington Twp. v. Schempp*,[28] was decided in 1963 when Schempp brought a suit to enjoin enforcement of a state statute requiring Bible reading at the opening of each school day. The Supreme Court looked at the purposes and the primary effect of the statute to see if there was an establishment of religion. If the statute has a secular legislative purpose and a primary effect that neither advances nor inhibits religion then the establishment clause is not breached. The Court held that the Bible reading was prohibited by the establishment clause. Mr. Justice Douglas in his concurring opinion expressed the view that the financing of a church in its religious or related activities with public funds may not be accomplished without violating the first amendment: "It is not the amount of public funds expended; as this case illustrates, it is the use to which public funds are put that is controlling."[29]

In the circles of legal thinking, two schools of thought have emerged with respect to the interpretation of the establishment clause. One line maintains that Madison and others responsible for the wording of the first amendment desired to erect an insurmountable wall of separation between church and state.[30] Followers of this doctrine would be opposed to any form of single or multiple establishment and to all forms of governmental aid. The other main school of thought holds that the men responsible for the first amendment did not expect the state to be wholly neutral in matters of religion, and that the amendment was enacted to prevent the establishment of a single state church and not as an injunction against incidental aid to all religions.[31] One professor of law states that, "the wall of separation is permeable. . . . Time, place, circumstances and subject matter determine what degree of separation there shall be."[32] There also exists intermediate philosophies that would look at the particular grant in question to see if there are any of the particular dangers that the first amendment is intended to prevent.

The history of colonial church-state relations, the Supreme Court's interpretation of the establishment clause, and the legal scholars' views on separation of church and state, present the necessary background to facilitate analyzing the question of whether governmental aid to church related colleges is constitutional.

[28] 374 U.S. 203 (1963).

[29] *Id.* at 230.

[30] See generally, BUTTS, AMERICAN TRADITION IN RELIGION AND EDUCATION (1950). See also, Mr. Justice Rutledge's dissenting opinion in *Everson v. Board of Educ.*, *supra* note 22, at 28.

[31] See generally, O'NEIL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949).

[32] Weclew, *Church and State: How Much Separation*, 10 DE PAUL L. REV. 1, 26 (1960).

AID AT THE FEDERAL LEVEL

The recent, large Congressional grants to colleges, including church related colleges, have caused many to raise the challenge of the first amendment. During the 1800's, the drive to enact federal financial aid to education legislation elicited a thousand bills and was the subject of many committee hearings and long floor debates.[33] But Congress was only able to pass a very few acts of major significance.[34] In 1945, Senator Aiken of Vermont proposed a bill for federal aid to public schools and included an unprecedented provision which gave equal rights and privileges to private schools.[35] There was much opposition to the bill, and it was never passed.

Prior to 1963, the federal government had given assistance to private primary and secondary school children in just two major federal programs; the National School Lunch Act of 1946[36] and the National Defense Education Act of 1958.[37] Then in 1963, the Higher Education Facilities Act was passed,[38] which provided for the disbursements of federal funds for academic facilities to public and private institutions of higher learning, including church related colleges.[39] Two years later, the Higher Education Act[40] and the Elementary and Secondary Education Acts[41] were passed.

The Higher Education Act provides funds for library resources, student assistance, teacher programs and improvement of undergraduate instruction; and, the grant extends to both public and private schools.[42] It also contains specific provisions to prohibit its unconstitutional application; it is stated that none of the grants should be made for any educational program, activity, service, equipment or materials to be used for sectarian instruction or religious worship.[43] By including this provision, it appears that the drafters of the act attempted to prevent its application from vio-

[33] Drinan, *op. cit. supra* note 1.

[34] Costanzo, *supra* note 13, at 4, 15, 16. Professor Costanzo presents a comprehensive history of federal aid to education.

[35] S. REP. No. 717, 79th CONG., 1st Sess. (1945).

[36] 60 Stat. 230 (1946), 42 U.S.C. §§ 1751–60 (1964). The Act allowed parochial school children to participate.

[37] 72 Stat. 1580 (1958), 20 U.S.C. §§ 401–589 (Supp. 1966). The Act authorized low-interest loans to schools including parochial schools for acquisition of new equipment for the study of science, mathematics and foreign languages.

[38] 77 Stat. 363, 20 U.S.C. §§ 701–757 (Supp. 1966).

[39] 20 U.S.C. § 701, 716 (Supp. 1966).

[40] 79 Stat. 1219, 20 U.S.C. §§ 1001–1144 (Supp. 1966).

[41] 79 Stat. 27, 20 U.S.C. §§ 236–244, 331–332 (Supp. 1966).

[42] 20 U.S.C. §§ 1021, 1051, 1061, 1071, 1121 (Supp. 1966).

[43] 20 U.S.C. §§ 1011, 1027, 1092, 1129 (Supp. 1966).

lating the establishment clause.[44] Though this Act has yet to be tested by the Supreme Court, the question of whether the grant is an establishment of religion will no doubt be raised some time in the future.

Mr. Justice Frankfurter in his opinion in the *McGowan* case,[45] indicated that if the primary purpose (as distinguished from an incidental one) of the state action is to promote religion, that action would violate the first amendment; but, if a statute furthers both secular and religious ends, and the secular purpose could be attained by means which would not further the promotion of religion, then the statute would be constitutional.[46] By analogy, it would seem that financial aid to a church related school which would improve its secular facilities would serve a valid secular purpose, and the benefit to religion which might accrue would be only incidental. In the *Everson*[47] decision, the statute authorizing reimbursements for bus fares was upheld because the law benefited the health and safety of the children—a legitimate public concern. Is not aid to colleges to help improve its educational standards, a legitimate public concern? If so, it would seem that a program which would serve that purpose, even if it was aid to secular facilities of a sectarian school, would be constitutional.[48] The opinions of Justices Clark and Brennan in the Pennsylvania school prayer case[49] appear to articulate that federal aid to education would be constitutional. Mr. Justice Clark denounced the test of constitutionality to be "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[50] Mr. Justice Brennan believed that governmental assistance to religion would become impermissible at a point where legislation employs the organs of government for essentially religious purposes or uses religious means to serve governmental ends where secular means would suffice.[51]

In addition to the above tests, the Supreme Court may also apply the test of neutrality in determining the constitutionality of the Higher Education Act. The "neutrality theory," which maintains that the government should remain neutral as between religion and nonreligion, would seem to pose no barrier to the Act, which is directed toward educating the public.[52] This objective is fulfilled through grants to both nondenominational and sectarian schools.

[44] See S. REP. No. 146, 89th CONG., 1st Sess. (1965).

[45] McGowan v. Maryland, 366 U.S. 420 (1961).

[46] *Id.* at 466–67.

[47] *Supra* note 22.

[48] See generally, HEW, MEMORANDUM ON THE IMPACT OF THE FIRST AMENDMENT TO THE CONSTITUTION UPON FEDERAL AID TO EDUCATION, reprinted 50 GEO. L.J. 349, 365–67 (1961).

[49] School District of Abington Twp. v. Schempp, 374 U.S. 203 (1963).

[50] *Id.* at 222.

[51] *Id.* at 294–95.

[52] Mr. Justice Clark discusses the Supreme Court theory of "neutrality" in the *Schempp* decision, *supra* note 49, at 222–23.

It thus appears that federal grants to church related colleges which would further a secular purpose of the college would be constitutional. Such a secular purpose could consist of secular buildings, laboratories, textbooks and student aid, as opposed to a sectarian purpose such as church structures and divinity schools. This secular financial aid would not be an establishment of religion; and, if there were any benefit to religion, it would be slight and incidental. Also, such grants would enable the student to receive an improved quality of education—a legitimate public concern. To date, the Supreme Court has not decided directly the constitutional question of federal aid to church related colleges. The constitutionality of such grants will have to be decided on a case by case basis to determine whether the federal aid in question violates the establishment clause of the first amendment.

AID AT THE STATE LEVEL

Establishment of religion at the state level presents problems similar to those of the federal government; in particular, are state financial grants to church related colleges unconstitutional? Prior to the passage of the fourteenth amendment,[53] the states were not subject to the constitutional limitations of the first amendment; and, it was not until 1940 in *Cantwell v. Connecticut*,[54] that the Supreme Court made the establishment clause of the first amendment applicable to the states. In order to determine the legality of aid to church related schools, the states must therefore apply their laws as well as the first amendment. Today, all states, with the possible exception of Vermont, prescribe, either by statute or state constitution, that no state financial aid may go to a sectarian school.[55] Because of these state provisions, it would seem that the only question confronting the states is whether or not a school is sectarian.

There have been only a few state court decisions rendered which have touched upon the issue of financial aid to church related institutions.[56] In one of these cases, a Virginia court held that a statute providing for the payment of tuition for orphans of war veterans at state approved colleges, some of which were church related, was violative of a state constitutional prohibition against appropriation of money to schools which are sec-

[53] U.S. CONST. amend. XIV § 1, "All persons born or naturalized in the United States, . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . deprive any person of life, liberty or property, without due process of law nor deny . . . equal protection of the laws."

[54] 310 U.S. 296, 303 (1940).

[55] Costanzo, *supra* note 13, at 19.

[56] See, Schade v. Allegheny County Instit. Dist., 386 Pa. 507, 126 A.2d 911 (1956); 64th St. Residences Inc. v. City of New York, 10 Misc. 2d 841, 173 N.Y.S.2d 700 (1958); Swart v. South Burlington Town School Dist., 122 Vt. 177, 167 A.2d 514 (1961).

tarian.[57] In another case, a New Hampshire decision upheld a proposed bill granting state aid to hospitals, including sectarian hospitals, provided the hospitals had an approved nurses training program, because the training program served a public purpose, and any resulting benefit to religion would be incidental.[58]

A 1966 decision by the Maryland Court of Appeals in *Horace Mann League v. Board of Public Works of Maryland*[59] has attempted to establish guidelines in the area of governmental aid to secular colleges; and, this case may have a substantial effect upon future state court decisions as well as upon the individual sectarian institutions. Four Maryland statutes granting aid to four separate church related colleges for the construction of secular facilities were involved in this case, and they were challenged as to their constitutionality. It was claimed that the grants violated the establishment of religion clauses of the first amendment. The court handled this question by determining whether or not the colleges were in fact sectarian. If a college was found to be sectarian, then the state grant would be a benefit to the religion, and the grant could no longer be considered incidental to lawful general welfare legislation.[60] Six standards were set by the court in order to determine whether a college was sectarian: 1) the stated purpose of the college; 2) the college personnel; 3) the college's relationship with religious organizations, *e.g.* extent of ownership, financial assistance and religious affiliation of members; 4) the place of religion in the college's program; 5) the result of the college program; and 6) the work and image of the college in the community.[61] These standards were applied to the four colleges in question and by a four to three decision, three of the colleges were held to be sectarian and unable to constitutionally receive the grant, even though the grant was used for secular purposes.[62]

One of the colleges involved in this case was Hood College, an independent liberal arts college affiliated with a Protestant sect. By applying its promulgated standards, the court found that the sect contributed only two and two tenths percent of the college's budget, that there were no sectarian student entrance requirements, and that the sect did not select the school's textbooks. Based upon these findings, the court held that Hood College was not sectarian and was thus entitled to receive the state grant

[57] Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955).

[58] Opinion of the Justices, 99 N.H. 519, 113 A.2d 114 (1955).

[59] 242 Md. 645, 220 A.2d 51 (1966), *cert. denied*, 87 Sup. Ct. 317 (1966). Justices Harlan and Stewart were of the opinion that certiorari should have been granted.

[60] *Id.* at 671, 220 A.2d at 65.

[61] *Id.* at 672, 220 A.2d at 65–66.

[62] Hood College received the grant. Western Maryland, Notre Dame, and St. Joseph Colleges were denied the financial aid.

without violating the establishment clause of the first amendment.[63] Western Maryland College, which characterized itself as religiously oriented, was another of the colleges to which these standards were applied. The court found that more than one third of the college's governing board were ministers of a particular sect, and that forty percent of the college's student body belonged to this sect. This college was thus found to be sectarian and unable to receive state aid without violating the first amendment.[64]

This Maryland decision has set forth the guidelines which other states might choose to follow. The State of Illinois in its constitution specifically prohibits the use of public funds to help or sustain any school or college controlled by any church or sectarian denomination.[65] The Illinois courts may use the standards applied in the *Horace Mann* case to determine whether a school is sectarian and therefore prohibited from receiving aid. If other states do follow the guidelines set forth in this decision, a large number of church related colleges would be affected. Certain church related colleges, if desirous of state financial aid, would have to free themselves of much of their religious control, add lay members to the board of directors, and de-emphasize religion in the curriculum so that they would not be considered "sectarian" within the purview of the *Horace Mann* case.

The holding in the *Horace Mann* case, in effect, says that a grant to a college that is determined to be sectarian would be invalid because it would violate the establishment clause. The court's analysis raises an interesting question; just because a college is considered "sectarian" does that mean that aid to it will be an establishment of religion?[66] Where a state expressly prohibits aid to a sectarian school, there is a reason to apply the test set down in the *Horace Mann* case. However, on the basis of the Supreme Court's interpretations of the establishment clause, there seems no reason for such a test.

Under the establishment clause, the most importantant criterion should be the purposes for which the financial aid is to be used, and thereafter, the school's relation with a church should be inquired into only to make sure that the school is not church dominated. It also seems that if a student can receive an accredited degree at a church related college which accepts all

[63] *Supra* note 59, at 672–76, 220 A.2d at 66–68.

[64] *Id.* at 676–79, 220 A.2d at 68–70.

[65] ILL. CONST. art. 8, § 3 (1870). See also, Latimer v. Board of Educ. of the City of Chicago, 394 Ill. 228, 68 N.E.2d 305 (1946).

[66] In the *Swart* case, *supra* note 56, it was held that the mere fact that public funds are expended on an institution operated by a religious enterprise does not establish that the proceeds are used to support the religion professed by the recipient.

students and has no mandatory religious instruction, and if the particular financial grant benefits the secular facilities of the college, then the college could validly receive this aid as a benefit to the public and not be in violation of the establishment clause. Justice Hammond's dissent in the *Horace Mann* case pointed out that all four of the donee colleges involved, furnished a secular liberal arts education, that no religious doctrines entered into the teaching of secular subjects, and that there were no religious requirements for admission of any student. Therefore, he believed that the grants would benefit secular training and were thus constitutional and not an establishment of religion.[67]

CONCLUSION

Whenever governmental aid to a church related college can be found to directly benefit the public, with religion only being benefited incidentally, the courts will uphold the constitutionality of the grant on the basis of not being an establishment of religion. However, based upon an argument of practicality and moral justification, the courts should be liberal in their interpretation of "establishment" and in their findings of a valid secular purpose. This approach is necessary because of the need of our private colleges for financial aid. Our population is experiencing a rapid growth and there is an increasing proportion of college age persons attending college. Our society requires more highly developed skills and people in the professions, and private schools furnish significant help in higher education.[68] At the current rate of college building construction, there will be insufficient college facilities to meet the expected enrollment in 1970.[69] To retain a high standard of education at each college, there should be a size limitation upon the expansion of state facilities; therefore, private colleges should also be aided.[70] Many private schools cannot afford to expand their facilities without public monies. As a result, all colleges, including church related schools, will require governmental aid to keep up with the increased enrollment and education costs, otherwise the quality and availability of higher education will no doubt be adversely affected.

Barry Schmarak

[67] *Supra* note 59, at 694–95, 220 A.2d at 78–79.

[68] See 109 CONG. REC. 18406 (daily ed. Oct. 11, 1963).

[69] ENCYC. BRITANNICA, BOOK OF THE YEAR 305 (1965).

[70] *Supra* note 48, at 380.

TRUTH IN TRIAL–DISCOVERY IN ILLINOIS UNDER THE NEW SUPREME COURT RULES

The new Illinois Supreme Court Rules which became effective on January first of this year included a complete revision of the rules of dis-

covery.[1] The new rules, numbered 201 through 215, have been reorganized so that the four discovery devices and their related provisions appear in a more logical order.[2] A single general provision, 201, now contains the rules on the scope of discovery, the attorney-client privilege, the work-product exemption, and protective orders. This comment will look at the development of these rules from the iron curtain policy of the ancient adversary system to today's open door policy of full and frank pretrial disclosure, and from this draw some conclusions as to what the Illinois Supreme Court's objectives are and as to how good a solution they have achieved.

Litigation at common law was in its purest sense an adversary proceeding. The parties had an absolute right to conceal their evidential resources, and surprise was a part of ordinary trial strategy. The objective of the contest was to see that only favorable evidence was presented and all else remained hidden. Reliance was placed on long involved and complicated pleadings to narrow the issues before the trial, and many cases were lost simply because of defects of form at this pretrial stage. Only in litigation involving sealed instruments was examination of items in the possession of the opponent allowed. There, by a device called "profert" the plaintiff could be required to produce a document in court; the defendant could then demand "oyer" which allowed an inspection of the document.[3] This rule was later extended to cover all instruments "declared on"; but in controversies other than those arising out of writings the common law had no means of discovery, inspection, or examination of items in the possession of another person, regardless of their importance.

To correct this deficiency equity established an auxiliary jurisdiction appropriately entitled "discovery." Either party to the action could file a bill in chancery with a series of interrogatories designed to elicit information. To this his adversary had to answer by affidavit, stating the requested facts if such were within his knowledge, and listing the deeds, writings, and other things in his custody or power. There were two limitations on the scope of this permissible inquiry. The seeker could only acquire information which would be of assistance in proving his own case; and, the evidence his adversary was to use was not discoverable. Professor Pomeroy stated the rule to be:

> The fundamental rule on this subject is, that the plaintiff's right to a discovery does not extend to all facts which may be material to the issue, but is confined

[1] ILL. SUP. CT. RULES, §§ 201–215; 36 Ill. 2d 54, adopted Nov. 28, 1966, effective Jan. 1, 1967; hereafter cited as ILL. SUP. CT. R.

[2] § 201—scope of discovery; § 202 through § 212—depositions; § 213—interrogatories; § 214—discovery of documents and tangible thing; § 215—physical and mental examinations.

[3] 1 POMEROY, EQUITY JURISPRUDENCE §§ 190–200 (3rd ed. 1950).

to facts which are material to his own title or cause of action; it does not enable him to pry into the defendant's case, or find out the evidence by which the case will be supported.[4]

Obviously the idea of the adversary proceeding as a contest had changed very little by this first discovery extension. The English courts also recognized the professional privilege, and gave it broad scope. This privilege was claimed by setting out in the answering affidavit, facts showing that the requested material (1) was obtained for the purposes of litigation, or (2) was communicated for the purposes of obtaining professional legal advice. If the court found the affidavit to be sufficient, discovery was foreclosed. Not until the adoption of the Federal Judiciary Act of 1789[5] was there any provision in the United States for pretrial discovery by taking the statements of parties and witnesses. Provision was made for depositions *de bene esse* (recording testimony of witnesses who might not be available at trial), *dedimus potestatem* (discovery necessary to prevent a failure or delay of justice) and *in perpetuam rei memoriam* (perpetuation of testimony which might be lost before the litigation was presented). This Act was applicable to both law and chancery.

There was little further pretrial discovery development for some time except in a few of the state courts. New York, for example, adopted rules allowing the parties to litigation to examine each other as witnesses before or at the trial, either by a deposition or before a judge.[6] A refusing party would have his complaint or answer rejected.

Under the first Illinois Practice Act,[7] passed in 1907, discovery practices remained basically those which obtained at common law. But the Practice Act of 1933,[8] in its section 58, marked a significant break with the old idea of limiting discovery to that strictly essential for use at trial. The first of its two paragraphs dealt with the discovery formerly available in equity by bill for discovery. Though preserving all the relief previously obtainable, it did away with the requirement of a separate suit and provided instead that the "same discovery may hereafter be had by motion filed in the cause wherein the matters sought to be discovered would be used."[9] The second paragraph dealt with discovery not previously available.

Discovery of documents which are or have been in the possession of any other party to the action may be had, admissions as to any fact may be requested, and answers to written interrogations may be required of any other party and

[4] 1 POMEROY, EQUITY JURISPRUDENCE 270 (3rd ed. 1950).

[5] 1 Stat. 73 (1845).

[6] MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE (1952).

[7] Ill. Laws 45th Gen. Ass., 1907, at 443.

[8] Ill. Laws 58th Gen. Ass., 1933, at 784.

[9] Ill. Laws 58th Gen. Ass., § 58(1) (1933).

the deposition of any other party or of any person may be taken at such times and under such terms and conditions as may be prescribed by rules.[10]

The scope of this provision far transcended that allowed by bills in equity. The Illinois Supreme Court said in a case questioning whether this section should be controlled by historical limitations in the absence of a provision to the contrary:

> [T]he General Assembly showed its purpose [was] to broaden substantially the scope of available discovery. It acted in response to prevailing dissatisfaction with procedural doctrines which had exalted the role of a trial as a battle of wits and subordinated its function as a means of ascertaining the truth.[11]

Inability to discover that which the opponent intended to use at the trial had been the most serious deficiency of the early equitable bills of discovery. But under the 1934 Supreme Court Rules,[12] discovery was no longer limited to that which had a bearing on the seeker's case. Production could even be had of the evidence which was to be used against him. Henceforth, "the fullest possible discovery consistent with individual rights and privileges"[13] was allowed, and unless a positive rule of law forbade a particular discovery, it was granted.[14]

The experience gained from these early rules, and the lessons learned from the Rules of Civil Procedure for the United States District Courts,[15] passed in 1933, have been incorporated in two subsequent revisions of the Illinois Civil Practice Act. The first, in 1956, ended all reference to the equitable bill of discovery; all discovery was now to be in accordance with the rules of the Supreme Court.[16]

These new rules, not only simplified the procedures for the particular methods of pretrial discovery, but also allowed for a much wider scope in their use. Discovery now contemplated the acquisition of information calculated to lead to evidentiary material. The Rules used the phrase "relating to the merits of the matter in litigation."[17] The "fishing expeditions" which have since taken place or been attempted have been the subject of considerable litigation. The result was a second rewriting of the Supreme Court Rules on Discovery. The Rules Committee took into account both the case law as it has developed in the past ten years and the comments of

[10] Ill. Laws 58th Gen. Ass., § 58(2) (1933).

[11] Krupp v. Chicago Transit Authority, 8 Ill. 2d 37, 41, 132 N.E.2d 532, 534 (1956).

[12] ILL. REV. STAT. ch. 110, § 259.17–.19 (1935).

[13] Shaw v. Weisz, 339 Ill. App. 630, 644, 91 N.E.2d 81, 88 (1950).

[14] Corboy, *Discovery Practice–Documents, Tangible Articles, Real Estate,* 1959 U. ILL. L. F. 773, 784 (1959).

[15] FED. R. CIV. P. 23–26.

[16] ILL. REV. STAT. ch. 110, § 58 (1965).

[17] ILL. REV. STAT. ch. 110, § 101.19-4 (1965).

a concerned bench and bar. Their decision as to what is the proper scope of discovery is the particular concern of this comment.

The new Supreme Court Rules devote a single section to general discovery provisions, Rule 201.[18] Its first paragraph simply lists the four generally recognized discovery methods: oral or written depositions, interrogatories to parties, discovery of documents or property, and physical and mental examinations. There is no commandment against duplication, *i.e.* seeking by one method what has been obtained through another. Instead a sentence was included which provided that duplication "should be avoided."[19] The Committee, in its comments, noted that there would be situations where the same information could justifiably be requested under different types of discovery procedures, but, they also made pointed reference to the language of paragraph (C) (1) of the same rule, "Prevention of abuse."[20] This would be a logical point to note the discretion granted the courts to make protective orders. According to the language of the new rule:

> The court may at any time on its own initiative, or on motion of any party or witness, make a protective order as justice requires, denying, limiting, conditioning, or regulating discovery to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or oppression.[21]

Former Rule 19-5(2) conditioned authority to deny or limit discovery upon "good cause shown." The substitution of the words "as justice requires" serves to emphasize the fact that though discovery is now to be extremely liberal, the courts will prevent its use as a dilatory tactic or to harass the other party.

The single case *Stowers v. Carp*[22] is referred to in the Committee Comments, a case in which "good cause" was found to deny defendant access to valuable information. In *Stowers* the plaintiff was six years old. He had fallen under the rear wheels of a truck traveling at slow speed down a narrow alley. None of the three persons in the cab of the truck saw the child before the accident. The truck was stopped by a neighbor who saw the child lying, severely injured, in the alley. In spite of the importance of the child's testimony in establishing how the accident did happen, the court refused to allow his deposition to be taken. The court emphasized that "it was extremely dubious whether the plaintiff knew the relationship and significance of the facts concerning which he was to be examined or could accurately describe those facts." But no single test, such as the

[18] ILL. SUP. CT. R. 201.

[19] ILL. SUP. CT. R. 201(a).

[20] ILL. SUP. CT. R. 201(c), Joint Committee Comments.

[21] ILL. SUP. CT. R. 201(c)(1).

[22] 29 Ill. App. 2d 52, 172 N.E.2d 370 (1961).

[23] *Id.* at 69, 172 N.E.2d at 378.

incompetency of the plaintiff to testify at trial, was referred to as controlling their decision. The case thus emphasizes the trial court's power to tailor discovery to individual cases on an equitable *ad hoc* basis.

SCOPE OF DISCOVERY

The rules on discovery as they now stand provide a permanent "open season on facts." The restricted discovery of the common law adversary contest has been abandoned. The modern trend is towards a search for the truth based on full disclosure by both parties. In fact paragraph (1) of the section on Scope of Discovery begins simply: "Full Disclosure Required."[24] The remainder of the paragraph puts few qualifications on this command. It reads:

> Except as provided in these rules, a party may obtain by discovery full disclosure regarding *any matter relevant to the subject matter involved in the pending action,* whether it relates to the claim or defense of the party seeking disclosure or of any other party, including the existence, description, nature, custody, condition, and location of any documents or tangible things, and the identity and location of *persons having knowledge of relevant facts.* The word "documents," as used in these rules, includes but is not limited to, papers, photographs, films, recordings, memoranda, books, records, accounts, and communications.[25]

The exceptions enunciated refer to matters privileged against disclosure at trial, privileged communications between a client and his attorney, and the work product of the attorney. They are mentioned specifically in paragraph 11 of this section.

The italicized phrase "any matter relevant to the subject matter involved in the pending action" is the language used in Federal Rule 26.[26] Its adoption permits examination into matters themselves inadmissible as evidence but which may lead to the discovery of admissible evidence. Discovery of this scope was recently challenged in *Monier v. Chamberlain,*[27] as being an unreasonable search and seizure and a violation of due process under both the state and federal constitutions. The Illinois Su-

[24] ILL. SUP. CT. R. 201(b)(1).

[25] ILL. SUP. CT. R. 201(b)(1), (emphasis added).

[26] FED. R. CIV. P. 26.

[27] 31 Ill. 2d 400, 202 N.E.2d 15 (1964). The Illinois Supreme Court ruled at this time only on the constitutionality of an order entered by the Circuit Court of Marshall County requiring defendant to produce: 1. All medical reports, hospital records, and correspondence with the attending doctors concerning plaintiff's physical condition after the accident; 2. All statements made by plaintiff or members of his family; 3. All memoranda of such statements; 4. All reports, photographs, and statements obtained by defendant's agents concerning the accident; 5. All medical reports on the condition of the plaintiff prior to the accident. Other questions on the validity of the scope of the order were remanded to the Appellate Court of the Third District for consideration. 66 Ill. App. 2d 472, 213 N.E.2d 425 (1966). *aff'd* 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

preme Court rejected this contention, stating that the "boundaries of the area constitutionally protected . . . were fixed at the limits of relevance."[28] The court went on to hold that a constitutional issue would arise only if the documents were not material and pertinent to the issue, or the conditions were unduly burdensome.

The Rules Committee of 1955 had attempted to restrict the scope of available discovery by using the language "relating to the merits of the matter in litigation."[29] They stated in the Joint Committee Comments that while the idea of allowing discovery to go beyond admissible evidence was laudable in theory, in practice under the Federal Rules it was too often used to harass and oppress the opposite party. The Illinois Supreme Court, however, was of another opinion. In *People ex rel. Terry v. Fisher*[30] the plaintiff submitted interrogatories asking for the existence and amount of any liability insurance the defendant possessed. The court ruled that the defendant must answer. As their reason for this liberal interpretation the court said:

> They [the new rules on discovery] were adopted as procedural tools to effectuate the prompt and just disposition of litigation, by educating the parties in advance of the trial as to the real value of their claims and defenses. . .. Thus, to construe the language of Rule 19-4 [related] 'to the merits of the matter in litigation' to refer only to isolated legal concepts such as negligence, proximate cause, and damages, divorced from the realities of litigation, would not be using this new tool with an understanding of its purpose.[31]

The court went on to point out that the plaintiff would now be appraised of the full extent of his rights as well as to the identity of his adversary, and that both sides would now have a sound basis for reaching settlement. This last point has been one of continuing concern for the courts of this area, as evidenced by its frequent mention in their printed decisions.

The policy of encouraging early settlements is certainly one of the strong forces behind liberal discovery. The courts have also sought to discourage any tactic resulting in unnecessary delay. In *Monier*,[32] a request for discovery was attacked for failure to specify the documents desired. The defendant contended that first interrogatories must be employed to find what documents defendant held, and then a discovery order would issue. The court disagreed, ruling that it is sufficient to ask production of relevant material by groups or categories of similar items. Such description would be sufficient for the opposite party to know what is desired, and for the court to rule as to whether the material is exempt

[28] 31 Ill. 2d 400, 402, 202 N.E.2d 15, 16–17 (1966).

[29] ILL. REV. STAT. ch. 110, § 101.19-4 (1965).

[30] 12 Ill. 2d 231, 145 N.E.2d 588 (1957).

[31] *Id.* at 236–37, 145 N.E.2d at 592.

[32] 35 Ill. 2d 351, 213 N.E.2d 410 (1966).

or privileged. The specificity which the defendant sought was no more than a dilatory tactic.

The phrase "identity and location of persons having knowledge of relevant facts"[33] has been retained from the former Rule 19-4.[34] But requests in the interrogatories may not be framed in the general language of the Rule. The interrogating party may not put the burden of determining what are "relevant facts" on the answering party; he must instead frame his request in terms of some stated fact. Requesting "the names and addresses of all persons in the possession of defendant who were occurrence witnesses" has been held to have sufficient particularity.[35] Interrogatories such as this are not continuing; but under new Rule 213(e),[36] at any time before trial a party can be required to provide a list of persons having knowledge of relevant facts whose names were not known to him at the time he answered the other parties' interrogatories.

It is obvious from the above discussion that in all contested discovery motions the attorney seeking discovery will have the benefit of a strong policy in favor of allowing the motion. The courts have already ruled that a person asserting any privilege or exemption has the burden of proving it; his mere assertion that the matter is privileged will not suffice.[37] The new rules recognize the same privileges which existed under the prior rules; the section has been reworded to reflect the developments in the case law over the past decade:

Privilege and Work Product. All matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure. Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans or the party's attorney.[38]

The first sentence of the section recognizes the attorney-client privilege. Its application is basically governed by well developed principles of the law of evidence.[39] But there have been two recent cases defining who has the status of "agent" in making privileged communications.

In *Day v. Illinois Power Co.*[40] the plaintiff was severely injured by an

[33] ILL. SUP. CT. R. 201(b)(1). [34] ILL. REV. STAT. ch. 110, § 101.19-4 (1965).

[35] Krupp v. Chicago Transit Authority, 8 Ill. 2d 37, 132 N.E.2d 532 (1956); "Witnesses" is here used in the primary sense of those who have personal knowledge of the event, and not in the technical sense of those who are to be called to testify at the trial. The latter is expressly protected from discovery by ILL. REV. STAT. ch. 110, § 58 (1965).

[36] ILL. SUP. CT. R. 213(e).

[37] Krupp v. Chicago Transit Authority, *supra* note 11.

[38] ILL. SUP. CT. R. 201(b)(2). [39] See 97 C.J.S. *Witnesses* § 276–292 (1957).

[40] 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964).

explosion at defendant's power plant. The defendant's employees, under the direction of the attorney retained by the company, inspected the site and made their reports directly to him. The Illinois Appellate Court held that these reports were discoverable. The court agreed that a corporation could claim the attorney-client privilege; but they went on to say that the privilege only applies where the person reporting to the attorney "personifies the corporation,"[41] *i.e.* has actual authority to control or take part in a decision about any action the corporation might take on the advice of its attorneys. The employees here were only passing on information to the attorney to enable him to advise those in the corporation who had the authority. Certainly this ruling leaves little room for the privilege to apply to communications between a corporation and its "house counsel."

There has also been recent interpretation of the role of an insurance company as the agent of its insured. In *People v. Ryan*[42] a contempt citation arose out of a failure to produce a statement given by the defendant to her insurance company following an accident in which she was involved.[43] When criminal charges were also brought she retained independent defense counsel. This attorney asked for and, with the insured's permission, was given a copy of the statement previously given the insurer. The state contended that the attorney-client privilege was waived when, with the insured's consent, the statement was delivered to her own attorney for use in another connection. The Illinois Supreme Court ruled that the statement was given to the insurer as an agent "for the dominant purpose of transmitting it to an attorney for the protection of the interests of the insured."[44] The statement was thus clothed with the attorney-client privilege while in the control of the insurer. Nor was the effect of this rule changed by the fact that no attorney had yet been retained by the insurance company, since they had a contractual obligation to provide one. The court went on to conclude that the transmittal of a copy of the statement to the independent attorney to defend an action arising out of the same transaction did not constitute disclosure to a person not in the attorney-client relationship. This general rule as to the status of an insurer as an agent for transmittal was reaffirmed by the court in the *Monier*[45] case, but in that case the statement of the defendant was given

[41] *Id.* at 54, 199 N.E.2d at 804.

[42] 30 Ill. 2d 456, 197 N.E.2d 15 (1964).

[43] If a party against whom a pretrial discovery order is made wishes to contest the validity of the order, he may refuse to obey and in a prosecution for contempt show in defense that the court had no authority to make the order, and in such a case an appeal is allowed from the contempt order. Kemeny v. Skorch, 22 Ill. App. 2d 160, 159 N.E.2d 489 (1959).

[44] *Supra* note 42, at 461, 197 N.E.2d at 17.

[45] Monier v. Chamberlain, 35 Ill. 2d 351, 221 N.E.2d 410 (1966).

to a company which was the liability insurer for both parties to the accident. The court ruled that since neither side had yet retained independent counsel, the insurance company remained an agent for both parties, and the statement was not within the privilege.

While the status of the attorney-client privilege is fairly well defined, the exemption from discovery claimed by an attorney for his "work product"[46] continues to be a consistent source of litigation. The 'work product' doctrine had its inception in the United States Supreme Court case of *Hickman v. Taylor*,[47] where the widow of a seaman killed when a tug capsized sought production of statements taken by the defense counsel from witnesses in preparation for litigation of the case. The Court recognized that in spite of the strong policy favoring liberal discovery, it was essential that a lawyer be allowed "a certain degree of privacy, free from unneceessary intrusion by opposing parties and their counsel."[48] The Court ruled that the statements were exempt from discovery, and rendered this famous statement of the work product doctrine:

> In our opinion, neither Rule 26 nor any other rule dealing with discovery contemplates production under such circumstances. That is not because the subject matter is privileged or irrelevant, as those concepts are used in the rules. Here is simply an attempt, without purported necessity and justification, to secure written statements, private memoranda, and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties. As such, it falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims. Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and mental impressions of an attorney.[49]

Unfortunately, as is usually the case with decisions stated in such general terms, this statement has received differing interpretations from the day it was handed down; decisions have been made in the different circuits and districts on an *ad hoc* basis. Courts have seized on dictum in the decision to the effect that even an attorney's work product is subject to discovery where production is "essential to the preparation of one's case"[50] to develop the "good cause" exception to the general exemption, and the result is an inconsistent line of rulings even on items of basic evidentiary value.[51] The Illinois Supreme Court has taken the stand that it is preferable to narrow the scope of the "work product" doctrine, and render material encompassed thereby absolutely exempt from discovery, at the same time

[46] ILL. SUP. CT. R. 201(b)(2).

[47] 329 U.S. 495 (1947).

[48] *Id.* at 510–11.

[49] *Supra* note 47, at 509–10.

[50] *Supra* note 47, at 514.

[51] See Kennelly, *The Work Product Doctrine in Illinois*, 1963 NEGLIGENCE LAW FORUM 129 (1963).

freeing relevant and material evidentiary matter. Their most recent opinion on the subject limited "work product" to:

> [O]nly those memoranda, reports, or documents which reflect the employment of the attorney's legal expertise, those which reveal the shaping process by which the attorney has arranged the available evidence for use in trial as dictated by his training or experience. . . .[52]

The general tenor of the cases decided in the last few years give a preview of just how restrictive this definition is. To categorize a few of them:

Statement of Adverse Party:

In *Stimpert v. Abdnour*,[53] plaintiff's intestate had lost his life while riding as a guest passenger in the car driven by the defendant. One week after the inquest at which the defendant, on the advice of counsel, had declined to testify, the plaintiff and his attorney went to the high school where the defendant and young Abdnour had been students. The attorney took a question and answer statement from the defendant in the presence of a court reporter; and the defendant's attorney sought discovery of this statement. The court, after reviewing all past Illinois cases on the subject, held that the statement was not within the work product exemption, concluding that "as properly understood . . . this rule does not protect material and relevant evidentiary facts from the truth seeking process of discovery."[54] Here the defendant's statement, when properly authenticated, might be "independently admissible" as an admission by a party opponent and introduced as a part of the plaintiff's case.

The same factual situation arose in *Oberkircher v. Chicago Transit Authority*.[55] But in this case an ingenious defense counsel submitted an affidavit to the court stating that he did not intend to use the statement as an admission, but only to impeach plaintiff if the occasion should arise. The court held, however, that the "independent admissibility" test could not be so easily avoided. The problem lay in the fact that where a party's testimony is being impeached by his own prior inconsistent statement, the statement so offered has a twofold value: not only does it raise doubts as to the credibility of the party's testimony, but it also is in the nature of affirmative testimony for the party offering it.

Statements of Witnesses:

In *Day v. Illinois Power Company*[56] the court ruled that where one party had exclusive or superior opportunity to know or ascertain the facts

[52] Monier v. Chamberlain, *supra* note 45, at 359, 221 N.E.2d at 416.

[53] 24 Ill. 2d 26, 179 N.E.2d 602 (1962).

[54] *Id.* at 31, 179 N.E.2d at 605.

[55] 41 Ill. App. 2d 68, 190 N.E.2d 170 (1963).

[56] *Supra* note 40.

surrounding an event, all reports regarding the event made to his attorney must be disclosed. Then in *Monier v. Chamberlain*,[57] the plaintiff's attorney sought discovery of "all reports, photographs, and statements" obtained by agents and investigators of the defendant's insurance company. This unqualified request for the other attorney's investigative file was allowed, even though the statements of nonparty witnesses would almost certainly not be independently admissible, as required by *Stimpert*;[58] nor did defendant have exclusive access to the facts with the exception of medical reports as required by *Day*. The court referred to the rule in *Stimpert*, that material and relevant evidentiary facts were not protected from discovery, and went on to say that: "Discovery before trial presupposes a range of relevance and materiality which includes not only what is admissible at the trial but also that which leads to what is admissible."[59]

The Adversary's Expert:

In *City of Chicago v. Harrison-Halsted Bldg. Corp.*,[60] an eminent domain proceeding, defendant sought discovery of the appraisals made by plaintiff's experts which had formed the basis of the offer made to him before trial. The Illinois Supreme Court ruled against him, noting that since evidence of this previous offer was inadmissible, the expert reports on which is was based were beyond discovery—a decision which would probably be followed today under the reasoning of *Monier*, which requires that discovery at least lead to admissible evidence. A later case, *Kemeny v. Skorch*,[61] held that a medical expert's report was beyond discovery as a "report made for a party in preparation for trial"[62] and thus was exempt from discovery by the express words of Rule 19-5(1).[63] Since this part of the old section on privilege was essentially retained, it is likely that its interpretation will also be retained, and expert reports will remain exempt from discovery.

CONCLUSION

The goal of Illinois civil practice, according to Section 4 of the amended Act, is "that controversies may be speedily and finally determined according to the substantive rights of the parties."[64] But how often today is an adequate settlement forced upon an injured plaintiff who faces a five year wait in court, but whose creditors are not so patient? And how often is an

[57] *Supra* note 45.

[58] *Supra* note 53.

[59] *Supra* note 45, at 353–54, 221 N.E.2d at 413.

[60] 11 Ill. 2d 431, 143 N.E.2d 40 (1957).

[61] 22 Ill. App. 2d 160, 159 N.E.2d 489 (1959).

[62] *Id.* at 169, 159 N.E.2d at 493.

[63] ILL. REV. STAT. ch. 110, § 101.19-5(1) (1965).

[64] ILL. REV. STAT. ch. 110, § 4 (1965).