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THOUGHTS ON PRETRIAL DISCOVERY

By Nicholas J. Bua*

INTRODUCTION

As a part of the judicial process, pretrial discovery must serve the ultimate purposes of justice. Whatever makes the process more just ought to be fostered; whatever reduces the quality of the justice must be eliminated. Whatever rightfully serves those who advocate and administer justice serves justice. These statements are clichés. But they are clichés because they are fundamental precepts. How fundamental precepts are adapted to practice, and how practice gives rise to problems is the life of the law. It is with one aspect of the practice of law, problems of pretrial discovery, that this paper is concerned. It states some questions which concern the practitioner in pretrial discovery. There is no attempt herein to resolve all of the problems implicit in the practical exigencies of pretrial discovery.¹ But there are some suggestions of ways by which the practitioner may find solutions. Ultimately, of course, the answers will come from the Illinois courts of review. This article is not directed to the practitioner who regularly appears before a pretrial motion court. It is too fundamental for him. The article is offered to and intended for the practitioner who has occasion to practice before a pretrial motion court.

The fact that there are so many unanswered questions in the area of pretrial discovery is an annoyance to a practicing bar nurtured on the common law tradition of case law precedent. It is simultaneously, however, an acknowledgment of the Illinois Supreme Court's fulfillment of the constitutional mandate given it in 1962 to formulate rules for modern practice. Insofar as discovery procedures are concerned, the goal of the court is simplification: i.e., the number of instances in which justice demands appeal, the court has sought to simplify pretrial procedure. Delay is a regrettable by-product of appeal, for it may deprive a party of some of the benefits of justice. On the other hand, quick determination of appeals is not an aid to justice if speed

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† Judge Bua wishes to thank senior student Thomas Hunter for his assistance in the research, preparation and development of this article.

¹ One of the practical aids to the practitioner in Illinois in the application of the pre-trial rules of discovery is INSTITUTE ON CONTINUING EDUCATION OF THE ILLINOIS BAR, ILLINOIS CIVIL PRACTICE BEFORE TRIAL (1967).
in the determination results in increased appellate errors. Simplification in the furtherance of justice, insofar as simplification reduces the number of cases which must be appealed, is highly desirable. The economic feasibility of appeal is itself a factor that weighs strongly on the side of simplification. The officers of the court must be most vigilant to see justice done when the chances of appeal are slight.

The goal of the new discovery rules is to further perfect the judicial process as a truth-seeking process. Justice is often effectively denied by those who act honestly but without full knowledge of relevant facts. Justice can be denied either by refusing a litigant the chance to discover relevant facts or by permitting a litigant to embarrass or harass his opponent through unnecessary discovery.

The question of the scope of discovery requires discussion of several derivative issues. It must include the factors which limit its scope. The limitations of work product, attorney-client privilege, and unfairness (a limitation evolving in Illinois) must be included. Discussion of the attorney-client privilege must include questions attendant to defining the scope of the attorney-corporate client privilege. In this area recent federal cases offer a somewhat persuasive rationale by which the practitioner may determine whether the privilege is applicable to the facts of his particular case. Another problem area, experts' reports, is a topic open to speculation. Recent Illinois decisions force even the most conservative forecaster to assert that significant changes will occur when the questions come properly before the Illinois courts of review.

Appending this article are interrogatory and production order forms that have been approved by the Law Motion Judges for use by attorneys involved in personal injury actions in the Circuit Court of Cook County. Proper use of the forms materially aids in the efficient and effective use of pretrial discovery. If used correctly, the forms increase the probability that all relevant facts will be presented to the court. Certainly they increase the efficiency of the court. The questions have been carefully drafted to both enable their use in diverse factual situations and to avoid the common pitfalls of form interrogatories.

THE SCOPE OF DISCOVERY

In order for information to be subject to discovery it must be relevant in an evidentiary sense\(^2\) or lead to information which

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\(^2\) Stimpert v. Abdnour, 24 Ill. 2d 26, 179 N.E.2d 602 (1962). The thrust of the court's holding was that if the material sought for discovery was independently admissible at trial, such material was discoverable.
The rule is easily stated; but it is not easy to apply. It is extremely difficult to delineate the scope of relevancy in a discovery sense. For example, delineation begins with Illinois Supreme Court Rule 201:

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. But this rule reflects the latest case law on the scope of pretrial discovery; and an understanding of that case law is necessary to an understanding of the rule.

Procedurally, the movant has the burden of showing that the material sought to be discovered is relevant in a discovery sense. His opponent has the burden of showing that a privilege or exemption applies to the material sought for discovery. Of course, the relevancy may be apparent from the face of the pleadings. Such would be the case when the material sought to be discovered is relevant in an evidentiary sense. However, when the matter sought to be discovered only leads to matter admissible at trial, the Illinois Supreme Court has indicated that (at the trial judge's discretion) relevancy for discovery purposes can "be determined by a judicious use of interrogatories." A significant aid in determining what is properly discovera-

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3 See Krupp v. Chicago Transit Authority, 8 Ill. 2d 37, 41, 132 N.E.2d 532, 535 (1956), where the court said, "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 at the trial."


5 In Reske v. Klein, 33 Ill. App. 2d 302, 179 N.E.2d 415 (1961), the appellate court held that the party seeking discovery through interrogatories could not shift his burden of showing relevancy by asking the questions in such form as to require the interrogated party to make a conclusion as to what was relevant.


7 People ex rel. Gen. Motors v. Bua, 37 Ill. 2d 180, 194, 226 N.E.2d 6, 14 (1967). The proper form of interrogatories to effect discovery of those who know relevant facts has been the subject of several recent Illinois decisions. While Ill. Rev. Stat. ch. 110A, §213(e) (1969) provides: "Upon request made at any time before the trial, a party must furnish the identity and location of persons, in addition to those previously disclosed, having knowledge of relevant facts." (emphasis added). Such language may have been misleading to the litigant in Reske v. Klein, 33 Ill. App. 2d 302, 179 N.E.2d 415 (1961). The appellate court affirmed the trial court's order excusing the defendant from answering plaintiff's interrogatory No. 5 which read: "State the names and addresses of all persons who have knowledge of the relevant facts involving the occurrence narrated in plaintiffs' complaint." Id. at 305,
ble is an accurate view of the purposes supporting discovery. The Illinois Supreme Court has pointed out that unsuccessful arguments as to the limitations on discovery indicate a failure to understand the purposes of discovery. In *People ex rel. Terry v. Fisher*,¹ the court held that the plaintiff in a personal injury case was entitled to discover the amount of liability insurance which the defendant had at the time of the accident. The court rejected the defendant-appellant’s argument based upon

¹ 12 Ill. 2d 231, 237, 145 N.E.2d 588, 592 (1957).
Illinois Supreme Court Rule 19-4\(^\text{9}\) that what was discoverable must be relevant, and that what was relevant referred only to "'isolated legal concepts such as negligence, proximate cause, and damages, divorced from the realities of litigation . . . ."\(^{10}\)

In *Saunders v. Schultz*,\(^{11}\) the court applied the rationale of the *Fisher* case by denying the defendant's request through interrogatories for the existence and extent of the plaintiff's hospital and medical insurance. The *distinction* between *Fisher* and *Saunders* is that in *Fisher* the defendant's insurance existed for the benefit of the public, whereas in *Saunders* the plaintiff's insurance existed for the benefit of the plaintiff. Probably the broad scope of *Monier* would require that the plaintiff's hospital and medical policy was discoverable because it could lead to discovery of impeachment evidence with respect to damages or injuries.

What constitutes relevance "to the subject matter involved in the pending action"\(^{12}\) may be said to be that which relates to the subject matter of the litigation, and also that which serves the purposes of pretrial discovery. But it is hard to conceive of this case being support for the argument that a motion which seeks pretrial discovery of material should be sustained solely because the material would aid in settlement (unless such material is relevant to the issues or leads to material that is relevant to the issues). The reader is encouraged in his conclusion that the *Terry* court was vigilant to find relevancy in a discovery sense,\(^{13}\) although the finding of relevancy was further supported by settlement argument. It has been suggested that the purposes of discovery are three:\(^{14}\) (1) to increase the probability of obtaining a fair decision on the merits of the litigation;\(^{15}\) (2) to preserve testimony which would be unavailable at the time of trial;\(^{16}\) and (3) to encourage settlements prior to trial.\(^{17}\) It is

\(^{9}\) *IL. REV. STAT.* ch. 110, §101.19.4(1) (1966), which stated:

Upon a discovery deposition, the deponent may be examined regarding any matter, not privileged, relating to the merits of the matters in litigation, whether it relates to the claim or defense of the examining party 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 material is now covered in *IL. REV. STAT.* ch. 110A, §201 (1969).

\(^{10}\) *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231, 236-37, 145 N.E.2d 588, 592 (1957).

\(^{11}\) 20 Ill. 2d 301, 170 N.E.2d 163 (1960).

\(^{12}\) See note 5 *supra*.

\(^{13}\) *People ex rel. Terry v. Fisher*, 12 Ill. 2d 231, 239, 145 N.E.2d 588, 593 (1957).


\(^{15}\) *Id.* at 26.

\(^{16}\) *Id.* at 29.

assumed that if the discovery sought is relevant in a discovery sense then it will disclose facts which will increase the probability of a fair trial. The second purpose serves the first. If the testimony of a person who has knowledge of relevant facts is preserved, then the chances of a fair determination of the controversy is increased.

The settlement by-product of broad discovery rules seems to be an important consideration taken into account by Illinois courts in determining whether a particular document or interrogatory is sufficiently "relevant to the subject matter involved in the pending action" to require the court to order discovery. The weight of the settlement theory in Illinois courts, and its persuasive effect upon the courts, can be seen in Monier v. Chamberlain. After the Illinois Supreme Court restated both the definition of discovery relevancy from Krupp v. Chicago Transit Authority and the purpose of discovery from People ex rel. Terry v. Fisher, it added:

Additionally, the increasing complexity and volume of present-day litigation involves frequent recourse to discovery procedures, and to unduly limit their scope would serve only to inhibit pretrial settlements, increase the burden of already crowded court calendars, and thwart the efficient and expeditious administration of justice.

Approximately one month after Monier Justice Underwood gave a further insight to the settlement theory in pretrial discovery:

Discovery procedures, if properly employed, ought to facilitate settlements by enabling the parties to more accurately estimate the strengths and weaknesses of their positions. Should such cases still proceed to trial, the additional knowledge afforded by adequate pretrial discovery should expedite the trial.

While no reported Illinois case has allowed discovery when such motion was supported only by a showing that the material would aid in settlement, two points should be considered. First, as was shown in Terry, even when the relation between the subject matter of the pending action and the material sought to be discovered is remote, the court is inclined to grant the discovery motion when the information will increase the probability of pretrial settlement within the spirit of the rules. Secondly, although the issue is still in grave doubt, strong arguments can

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18 See note 5 supra.
20 8 Ill. 2d 37, 132 N.E.2d 582 (1956).
be made supporting a right to discovery based upon the settlement theory alone.\textsuperscript{24}

Not all the commentators agree that the settlement theory fulfills the purposes of pretrial discovery.\textsuperscript{25} One commentator proposed:

\[\text{[N]otwithstanding the court's claim to the contrary it seems inescapable that the broad discovery suggested in the Monier opinion will impede rather than promote “the ultimate ascertainment of the truth.”}\textsuperscript{26}\]

The argument made is that an unscrupulous attorney can compensate for the impeaching effect of testimony and evidence held by his adversary after discovery of such testimony and evidence. As to the settlement theory expressed in Monier the commentator accepts its rationale with some reservation. He finally argues that:

\[\text{[t]he most important factor in the making of settlements is the fear of unknown evidence in the possession of one's opponent. If plaintiff's counsel does not know whether or not the defense has knowledge of prior injuries or surveillance moving pictures or if either side does not know the contents of statements given to the opponent by his own witnesses, the mutual fear of these unknown factors creates a greater desire to settle than is present if each party already knows exactly what the other side's evidence will be and has had the opportunity to prepare his case accordingly.}\textsuperscript{27}\]

It is doubtful that a settlement based upon fear was the type of settlement which prompted the Illinois courts to espouse the

\textsuperscript{24}Comment, \textit{Developments in the Law — Discovery}, 74 \textit{Harv. L. Rev.} 940 (1961). Note that when this comment is referring to “Work Product” it is obviously using such term in a pre-Monier definition.


\textsuperscript{26}Id. at 487.

\textsuperscript{27}Id. at 489-90.
settlement theory. A strong argument could be made that the purpose of the discovery rules as expressed in the settlement theory does not attempt to effectuate a settlement in every case, or at any price to justice. The cases support the argument that the discovery rules should be used to effectuate a just settlement; as a consequence, the rules should be used to discourage unjust settlements based upon ignorance of the facts.

We are mindful of the obligations of this court to give these discovery rules an interpretation consistent with their avowed purpose. They were adopted as procedural tools to effectuate the prompt and just disposition of litigation, by educating the parties in advance of trial as to the real value of their claims and defenses...  

Another facet of the argument holding that broad discovery into matters which leads to evidence admissible at trial, and in particular impeachment evidence, frustrates the ultimate purpose of pretrial discovery is that discovery of such evidence permits the opponent to reshape his argument to mollify the value of the impeaching evidence.

The assumption here is that the reshaping process results from facts previously outside of the attorney's knowledge, or worse, the so-called manufacturing of evidence. When such unscrupulous reshaping does occur it must be severely condemned. However, when the reshaping process by counsel is within the scope of the facts as the attorney knows those facts, and in a manner most favorable to his client, the attorney is doing nothing more than fulfilling his obligations both to his client and to the court.

Commentators favoring a more complete pretrial disclosure argue:

While conceding that promoting settlements is desirable because it helps to effectuate the dispatch of court business, the main thrust of the argument from Monier critics is aimed at pretrial discovery of alleged impeachment evidence concerning other injuries and surveillance movies. The critics contend that by broadening the scope of discovery in Illinois, Monier approves techniques which have the effect of frustrating the ultimate ascertainment of the truth. They fail to understand that Monier intends to expose grossly prejudicial impeaching evidence before it is injected into a trial, rather than after its introduction, when courts are unable to eradicate its ill effect on juries and are forced to grant new trials.

This argument rejects the historical “sporting theory” of litiga-

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29 Id.
30 ABA CANONS OF PROFESSIONAL ETHICS No. 7. This Canon is entitled, A Lawyer Should Represent a Client Zealously Within the Bounds of the Law, and deals with the ethical considerations and sanctions in this area.
The system of discovery which provides for the disclosure of impeaching evidence decreases the backlog by preventing mistrials and retrials when such highly prejudicial matter is improperly injected into the trial for the first time.32

A closely related problem to relevancy in pretrial discovery is that of specificity in the discovery of documents.33 Rule 214 provides in part:

At any time after the commencement of an action any party may move for an order directing any other party or person to produce for inspection, copying, reproduction, and photographing specified documents, objects, or tangible things . . . . On the hearing the court may make any order that may be just.34

While the degree of specificity is not defined in the rules, the Illinois Supreme Court in Monier v. Chamberlain35 held that the specificity requirement was one of a reasonable description. The court added:

What will suffice as a reasonable description may well vary from case to case depending on the circumstances of each, but we believe that designation by category ordinarily is sufficient for these purposes.36

This rule was apparently modified the next year in General Motors v. Bua.37 The Illinois Supreme Court in the General Motors case held that there must be a showing of relevancy in a discovery sense when relevancy is not apparent from the face of the pleadings. The case also showed, however, that pretrial interrogatories may be used to make the discovery more specific38 when the materials sought to be discovered are voluminous, and there is a danger of revealing trade secrets, and the relevancy does not appear from the pleadings.

The Monier court gave two guidelines for specificity. A reasonable description is necessary: (1) to allow the party from whom discovery is sought to know what is demanded; and (2) to aid the court in determining whether the requested material is exempt from discovery.39 The latter purpose may be an aid to the court in determining whether the party against whom the discovery is sought is in contempt of court for failure to obey a court order.

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32 Id.
33 See Annot., 8 A.L.R. 2d 1134 (1949).
36 Id. at 356, 221 N.E.2d at 414 (1966) (emphasis added).
38 See also, Bourne v. Seal, 83 Ill. App. 2d 155, 203 N.E.2d 12 (1964), where the court held that a motion to produce from an insurer of all insured persons, all disbursements, and all premium payments for several years was too broad.
Not all material which is relevant to the subject matter of the litigation and specified sufficiently in the production order is discoverable. The supreme court rules provide for full disclosure "[e]xcept as provided in these rules."

Within that caveat there are three areas of excluded material:

1. the work-product of the attorney;
2. the privileged communication;
3. such attempted discovery which would give rise to a "protective order of court."

In Illinois the work-product of an attorney was defined in Monier v. Chamberlain:

We believe that only 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 and experience," may properly be said to be "made in preparation for trial . . . . "

The court exemplified the general rule:

Thus, memoranda made by counsel of his impression of a prospective witness, as distinguished from verbatim statements of such witness, trial brief, documents revealing a particular marshalling of the evidentiary facts for presentment at the trial, and similar documents which reveal the attorney's "mental processes" in shaping his theory of his client's cause, are documents "made in preparation for a trial . . . . ."

While the Illinois Supreme Court in Monier was following the lead provided by the federal court in Hickman v. Taylor, the Illinois court narrowed the definition from the federal court and effectively eliminated the "good cause" requirement allowing the discoverer the right to invade the work-product exemption.

40 ILL. REV. STAT. ch. 110A, §201(b) (1) (1969).
41 See, ILL. REV. STAT. ch. 110A, §214 (1969), wherein the statute provides, "On the hearing the court may make any order that may be just." (emphasis added).
42 ILL. REV. STAT. ch. 110A, §201(b) (1) (1969).
43 Id.
44 Id. at §§201(e) (1), 214.
46 Id. at 359-60, 221 N.E.2d at 416.
47 Id. at 360, 221 N.E.2d at 416.
49 Prior to the express denial of the good cause requirement in Monier, a commentator had concluded that the Illinois Appellate Court in Day v. Illinois Power Co., 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964), had included good-cause in Illinois discovery procedure. "[T]he Appellate Court appeared to be taking judicial notice of a 'good cause' factor . . . despite the fact that [the rules] contained no such 'good cause' provision." Watson, The Settlement Theory of Discovery, 55 ILL. B. J. 480, 484 (1967).

Further comment on the good cause element in the Day case can be found in Kaye, Discovery Brought Up To Date, 54 ILL. B. J. 396, 398-99 (1966), where the author comments that three months after the appellate court filed their opinion in the Day case the same court held almost precisely to the contrary in Jost v. Hill, 51 Ill. App. 2d 430, 201 N.E.2d 468 (1964). There had been an express rejection of the good cause requirement in the First District Appellate Court since 1956 in the decision of Eizerman v. Behn, 9 Ill. App. 2d 263, 132 N.E.2d 788 (1956).
Comparison of Monier with Hickman reveals similarity. Both courts drew three concentric circles of discoverability. Within the outer circle is all relevant material pertaining to the subject matter of the pending action. Both Illinois and federal courts provide for discovery of this material. Within the middle circle would be matter prepared by the attorney in preparation for trial, but not matter disclosing the mental impressions of the attorneys or their trial strategy. The latter would be subject to discovery because of the work-product definition in Monier. Although such material would be subject to a work-product defense in the federal courts it could be discovered upon the showing of necessity or "good cause." Finally, within the inner circle would be the opinions and mental impressions of the attorney. In both the federal and Illinois courts such material would be absolutely exempt.

The second limitation upon full discovery is the attorney-client privilege. It will be discussed below.

The third area which gives rise to a limitation upon discovery involves the concept of fairness. Because it has been defined inconsistently, this concept is difficult to work with. It has been construed to mean the inequity of allowing one party to bear the burden of the expense of the initial discovery while his opponent secures the same information by discovery for free. If this situation seems unfair the resolution of it may be contained in the rules. "The court may apportion the cost involved in originally securing and in furnishing the discoverable material, including when appropriate a reasonable attorney's fee, in such manner as is just." 

Fairness can be used in a larger sense. For example, it has been asserted that:

[the broad scope of discovery gives rise to the possibility that its erroneous employment may result in substantial harm.]

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51 "[I]n Hickman the court has established an absolute exemption for all such 'work product' that would reveal the opinions or mental impressions of adversary's counsel." Id. at 43. But see, 43 F.R.D. 221, 225 which Mr. Johnston says would seem to eliminate the absolute exemption.
In Monier the court directly rejected the good cause requirement:
We have considered the propriety of requiring under the Illinois discovery practice... that "good cause" be shown before otherwise properly discoverable material, or material ordinarily protected from discovery under a broader "work product" doctrine than the one adopted here, need be disclosed. We have concluded that the attendant problems which arise under the "good cause" doctrine render adoption of that theory undesirable. 35 Ill. 2d 351, 360, 221 N.E. 2d 410, 417 (1966).
52 See text at note 66 infra.
53 See note 43 supra.
55 ILL. REV. STAT. ch. 110A, §201(b) (1) (1969).
Moreover in some situations, the ordinary process of appeal from a judgment finally disposing of an action is an inadequate redress. Thus reversal will not restore the secrecy of a trade secret or process once disclosed, and in many instances the fruits of discovery will not enter into the trial at all and will not inject error into the final judgment. It is at this point that a sense of fairness invokes the power of the court to enter a protective order.

If an attorney feels that the court wrongfully refused to enter a protective order limiting or denying a motion for an order of discovery against his client, his redress is probably appeal from the order finding him in contempt for failure to comply with the discovery order.

The only certain method of obtaining review of interlocutory orders concerning discovery by refusing to obey the order and appealing a judgment of contempt; the propriety of the order is open to question on appeal.

Absent a contempt order Illinois case law holds that interlocutory orders directing or denying discovery are not generally appealable. There is one alternative procedure. A petition in mandamus may be filed in the supreme court. Review of the discovery order is discretionary. While the court in General Motors said that the “extraordinary writ of mandamus is a valuable judicial tool which must be considered even though some of the normal criteria for its use are absent,” the court warned that “ordinarily original mandamus or prohibition is an inappropriate remedy to regulate discovery in the trial court.”

Significantly, the court added, “we wish to give no encouragement to the litigant who would have us review normal pretrial discovery procedure by original mandamus.”

56 E. Cleary, HANDBOOK OF ILLINOIS EVIDENCE, §1.22 (2d ed. 1963).
57 ILL. REV. STAT. ch. 110A, §201(c) (1) (1969).
60 People ex rel. Noren v. Dempsey, 10 Ill. 2d 288, 139 N.E.2d 780 (1957). This use of the mandamus writ was also used in People ex rel. Terry v. Fisher. The question of the discoverability of liability insurance in personal injury cases was decided by a writ of mandamus, People ex rel. Terry v. Fisher, 12 Ill. 2d 231, 145 N.E.2d 656 (1957). In People ex rel. Prince v. Graber, 397 Ill. 522, 74 N.E.2d 865 (1942) the question of whether a nonresident is required to answer oral interrogatories in Illinois was brought by a writ of mandamus. In People ex rel. Noren v. Dempsey, 10 Ill. 2d 288, 139 N.E.2d 788 (1957), the right of a defendant to compel a physical examination of the plaintiff in a personal injury action was established by an original writ of mandamus.
63 Id. at 191-92, 226 N.E.2d at 13 (1967).
64 Id. at 193, 226 N.E.2d at 14 (1967).
Perhaps there is a fourth area of limitation upon the production of relevant documents. This would be the specificity requirement discussed above. The court should properly deny a motion for production of documents when the motion seeks matter which is too broad in scope.

**THE ATTORNEY-CORPORATE CLIENT PRIVILEGE**

There are several traditional categories of privilege. By construction each may be shown to comply with:

*four fundamental conditions . . . recognized as necessary to the establishment of a privilege against the disclosure of communications:

1. The communications must originate in a *confidence* that they will not be disclosed.
2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relations between the parties.
3. The *relation* must be one which in the opinion of the community ought to be sedulously fostered.
4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

These conditions have been acknowledged by the Illinois courts of review.

In *United States v. United Shoe Machinery Corp.*, Judge Wyzanski used a particular set of criteria to establish the attorney-corporate client privilege for the corporation:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or

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65 See text at notes 26-30 supra.
66 Id.
67 It is axiomatic that what is protected is not the relevant fact but its communication. The party seeking discovery will be unable to take depositions from either the attorney or the client as to what the client told the attorney. However, if the client in the civil action knows relevant facts to the action he can be ordered by court to subject himself to any of the truth-seeking processes of discovery.
68 Wigmore lists and divides privilege into three major categories: (1) privilege from attending, (2) privilege from testifying, and (3) sundry rules. Privilege from testifying is divided into three subdivisions: (a) in general, (b) privileged topics, (c) privileged communications. Privileged communications is divided into among other things the major privileges, which are: attorney-client, marital relationship, physician, patient, priest and penitent. 8 J. Wigmore, Evidence §§2190-224, 2290-329, and 2332-340, 2880-291, 2994-396 (McNaughton rev. 1961). [hereinafter cited as Wigmore]. S. Gard, Illinois Evidence Manual, Rule 440 (1963), lists in addition to the above categories the accountant-client privilege. See Ill. Rev. Stat. ch. 51, §§5, 5.1, 5.2 (1969).
69 8 Wigmore, §2285. For a detailed analysis see §§2294-2329.
his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal service or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.\textsuperscript{1}

The rationale supporting the privilege is simple. An attorney could not adequately give advice to his client, nor properly prepare cases for trial if he could not know whether he possessed the full and complete facts. Unless the privilege extended, clients would be hesitant to give their attorneys any facts that did not present their case favorably. If they were to make a complete disclosure the attorney could be compelled to disclose the communication.\textsuperscript{73} In short the system of justice would be destroyed and people would be forced to their own resources before the bench. In order to avoid the potential danger of the failure to disclose relevant facts while hiding them under the protection of the attorney-client privilege, "[c]ourts and commentators have sought to draw a line which would permit protection only when it accords with the rationale of the privilege."\textsuperscript{74}

What the court is doing when it decides the breadth of the attorney-corporate client privilege is quoted by the Illinois court in Day v. Illinois Power Co.:

[B]alancing the competing goals of the free and unobstructed search for the truth with the right and absolute necessity for confidential disclosure of information by the client to its attorney to gain the legal advice sought thereby, the courts will realize that they are not dealing with a blanket privilege . . . .\textsuperscript{75}

This should be kept in mind by the practitioner who finds himself in a new factual situation in the area of a corporate client privilege which has not come before the Illinois courts for review.

In 1964 the Illinois Appellate Court answered for state purposes a question which had been raised two years earlier. In 1962 Judge Campbell announced in Radiant Burners, Inc. v. American Gas Association,\textsuperscript{76} that there was no precedent hold-


\textsuperscript{73} See generally, 3 B. Jones, Commentaries on Evidence §1345 (2d ed. 1944); C. McCormick, Evidence §181 (1954); 8 Wigmore §§2290-91.


\textsuperscript{75} 50 Ill. App. 2d 52, 57, 199 N.E.2d 802, 805 (1964); quoting from Radiant Burners v. American Gas Ass'n, 320 F.2d 324 (1963).

\textsuperscript{76} 207 F. Supp. 771 (N.D. Ill. 1962).
ing that the attorney-client privilege applied to the corporate client. He accordingly held that the corporation was not entitled to the privilege. This decision was ultimately reversed. In the words of one commentator:

"[T]he attorney-client privilege in its broad sense is available to corporations." The court of appeals thus resolved the doubts raised a few months earlier by Judge Campbell's District Court decision in the same case — doubts which prior to Judge Campbell's opinion had occurred to almost no one.7

In 1964 the question came before the Illinois Appellate Court. In *Day v. Illinois Power Co.*78 the defendant-utility company's gas pipe exploded damaging the property and person of the plaintiff. The company had retained the attorney on a permanent basis. At the attorney's direction and supervision, the employees of the defendant corporation examined the scene of the accident and made a direct report to the corporate attorney. The plaintiff sought discovery of the reports. To the argument that the reports were privileged the court noted: "The fact that the Illinois Power Co. is a corporation is immaterial for it is entitled to the same treatment under the law as any other 'client' — no more and no less."79 "No more" looks to the control-group limitation placed upon corporations, "no less" looks to the district court decision of Judge Campbell in the *Radiant Burners* case. The court stated, "[i]t is our considered judgment that based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporations, and we so hold."80 The court's use of the phrase "in its broad sense"81 signaled the qualification most commonly referred to as the control-group limitation which was expressly adopted in Illinois in *Golminas v. Fred Teitelbaum Construction Co.*82 In defining just which employees of the corporation are within this group the court drew heavily on *City of Philadelphia v. Westinghouse Electric Corp.*:84

If an employee or investigator making reports to an attorney for the corporation is in a position to control or take a part in a decision about any action the corporation might take upon the advice of its attorney, he personifies the corporation and when he

78 50 Ill. App. 2d 52, 199 N.E.2d 802 (1964).
79 Id. at 55, 199 N.E.2d 802, 804 (1964).
81 Id. at 56, 199 N.E.2d at 805 (1964).
82 Id. But see, Burnham, *Confidentiality and the Corporate Lawyer*, 56 ILL. B. J. 542 (1968).
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makes reports or gives information to the attorney, the attorney-client privilege applies. Such employee must have actual authority, not apparent authority, to participate in a contemplated decision.85

The court held that if nothing in the record showed that the employees were members of the control-group as defined by the court, it would deny the privilege.86 Once the court could say that the privilege did not exist, then it could find that the material sought should be discovered.

In Day the defendant-appellant (corporation) argued both work-product and the attorney-client privilege. While the appellant's argument is labeled as a work-product argument, the court refers at times to communications between the "source agents"87 of the corporation and the attorney. These communications were made while the attorney was retained by the corporation and pursuant to his direction and supervision. The reports were made directly to him, and not to any other member of the corporation. The appellants had argued that:

All reports with regard to same and investigations of said claim were made to the affiant as attorney for said defendant and that the same are privileged as part of the work product between attorney and client and are not subject to discovery.88

The court resolved the problem by invoking a rule broad enough to cover both work-product and the attorney-client privilege.

The Day court adopted the policy of the Seventh Circuit Court of Appeals in the Radiant Burners case. The Illinois Appellate Court declined to give a guideline opinion on the question of breadth of the privilege.89 There is one exception. The court adopted the Radiant Burners' warning that the privilege would not be extended so as to allow a corporation to "funnel" its papers into the files of their corporate counsel and thereby avoid all disclosure.90

The question of the attorney-corporate client in the federal courts may soon be tested in the United States Supreme Court. A recent decision of the Seventh Circuit Court of Appeals, Harper & Row v. Decker Publishers, Inc.,91 is being appealed by the plaintiff/co-respondent.92 The decision of the court of appeals is

86 See In re Estate of Wahl, 218 Ill. App. 295 (1920), which establishes that the burden of proving the privilege is on the party asserting the privilege.
87 See generally Simon, The Attorney-Client Privilege, 65 Yale L. Rev. 953 (1956). A "source agent" is defined as "one who is himself the source of the information being disclosed or forwarded." Id. at 956.
89 Id. at 57, 199 N.E.2d 802, 805 (1964).
90 Id.
91 425 F.2d 487 (7th Cir. 1970).
92 United States Supreme Court docket No. 1337.
significant for our purpose for it creates a broader privilege for the corporate client than that created by the "control group" test. The corporate employees had testified before a federal grand jury investigating the publishing industry. After their testimony was taken by the grand jury the employees were "debriefed" by the corporate counsel. The plaintiffs in the case sought to discover the memoranda made as a record of the debriefing sessions. The court held that while the employees were not within the "control group" as defined by Judge Kirkpatrick in *City of Philadelphia v. Westinghouse* and followed in other cases, their statements would be held privileged. The court in *Decker* stated:

[t]hat the control group test is not wholly adequate, that the corporation's attorney-client privilege protects communications of some corporate agents who are not within the control group, and that in those instances where the order here under attack must rest entirely upon the control group test, the order is unlawful.

. . . . .

[A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

The court distinguished the employees in this case from the type of employee whose communication is indistinguishable from that of a bystander, and expressly declined to express an opinion on the privileged character of the communication of a bystanding corporate employee.

The test used by the court has two requirements: (1) the communication made by the employee apparently must be made at the direction of employee's supervisor; and, (2) the subject matter of the communication made by the employee is within the realm of the duties of employment for the employee. The immediate effect of this test which becomes apparent is that it includes within the shelter of the attorney-client privilege many more corporate employees than the "control group" test includes, as heretofore applied in either the federal courts or the Illinois courts. If the new test becomes the law in the federal courts then the future cases might probably have to decide how express must the supervisor's direction be.

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95 423 F.2d 487, 491-92 (7th Cir. 1970).
96 See text at notes 78-86 supra.
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The problems of the attorney-corporate client privilege does not end with the definition of the group. The profession was put on notice of other problems which would arise in the area when the Illinois Appellate Court followed the lead of Radiant Burners in declining to give a guideline opinion. One question arises from the practice of a corporation employing attorneys as “house counsel.” Bryson P. Burnham comments:

[A] lawyer in the law department of a large corporation may, in fact, do more strictly legal work than a partner in a big-city law firm; but located at the corporation's office and paid directly by the corporation, the inside counsel starts looking more like a businessman and, as a result, finds it harder to convince a court that in particular instances he was acting as a lawyer.97

The problem looks to the factual aspect of requirement “(2) (b)”98 in Judge Wyzanski's opinion in the United case;99 that is, for the privilege to apply, the communication has to be made to him while he was acting as an attorney.100 While the exact issue has not been presented to the Illinois courts for consideration, Judge Wyzanski's analysis, reported in the United case101 was:

[The apparent factual differences between these house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings, and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege.]102

Apparently, the problem in the “house counsel” situation is how to delineate the appropriate facts to which the law is to be applied. The distinction between when the attorney is functioning as an attorney and when he is functioning as a businessman is difficult to determine even when the occurrence facts are squarely before the court.

The problem invoked by the presence of “house counsel” on the case requires consideration of two questions: (1) whether the privilege can be invoked to protect counsel’s opinion of mixed business and legal advice; and (2) whether it is significant in the application of the privilege to “house counsel” that the counsel be admitted to practice before the local bar.

The modern “house counsel” is “more than a predictor of

97 Burnham, Confidentiality and the Corporate Lawyer, 56 Ill. B. J. 542, 543 (1968).
98 See text at note 72 supra.
99 See note 71 supra.
100 Illinois cases support the requirement that the communication to be privileged must be made to the attorney while the attorney was acting in his professional capacity. See In re Estate of Wahl, 218 Ill. App. 295 (1920); McCloud v. Hogle, 200 Ill. App. 483 (1916); Potter v. Harringer, 236 Ill. 224, 86 N.E. 223 (1908); Goltra v. Wolcott, 14 Ill. 89 (1862).
101 See note 71 supra.
legal consequences,"¹⁰³ but perhaps less than what David Simon has suggested, "[y]our modern corporate lawyer is a member of the command staff of a corporation . . . It's like the organization of an army. We like to think of the legal division as G-2."¹⁰⁴ Where the line should be drawn has not been determined in the federal court; nor has the question been resolved in the Illinois courts. Judge Wyzanski has commented:

[I]t is in the public interest that the lawyer should regard himself as more than a predictor of legal consequences. His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations.¹⁰⁵ This is a reasonable statement of the duty of an attorney. But it does not necessarily follow that all that is within the scope of his duty is privileged against disclosure. In general, the communication in question should be tested against the guidelines set forth in the earlier part of this section. Consider together: Judge Wyzanski's analysis of "house counsel,"¹⁰⁶ his statement of the lawyer's duty,¹⁰⁷ and couple it with the general rule that totally non-legal advice is not privileged.¹⁰⁸ Then consider Judge Wyzanski's statement that, "[t]he privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice."¹¹⁰ The practitioner will deduce that a balance must be made between pure legal opinions and pure business opinions. Precise weights for decisions have not been determined.

Commentators have offered several suggestions for how a "house counsel" should be maintained in order to keep the privilege.¹¹⁰ Included in the suggestions are: (1) separate stationery with the legal title of the attorney signing the letter; (2) legal files separate from corporate records; and (3) a specific indication in the letter or memorandum that the signator is rendering a legal opinion. While application of these suggestions would be helpful to a judge, the admonition of the Day court must be kept in mind. "Certainly, the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of its lawyers for custodial purposes and thereby avoid

¹⁰⁶ See text at notes 80, 82 supra.
¹⁰⁷ See note 84 supra.
¹⁰⁸ See generally S. GARD, ILLINOIS EVIDENCE MANUAL, Rule 434 (1963).
¹¹⁰ Burnham, Confidentiality and the Corporate Lawyer, 56 ILL. B. J. 542, 543-44 (1968).
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disclosure . . . ." It appears obvious that the same thinking would apply where the court was faced with non-legal opinions tendered by counsel to the corporation under the guise of a legal opinion.

The second question raised is whether the "house counsel's" admission to the local bar is a dominant factor in deciding if the privilege exists. The problem illustrated by United was:

Thirteen other persons in the [patent] department are not members of the bar of this Court or of the courts of this Commonwealth but are members of other judicial bars. The fact that they, though resident in Massachusetts and regularly working here, have never received a license to practice law here shows that these regular employees are not acting as attorneys for United. (The situation would be different with regard to a visiting attorney from another state, for whom the privilege might well be invoked.)

Two commentators have felt that this statement in the opinion was make-weight. There exists enough concern about the problem to raise comment among the authorities. Wigmore's comment is:

There is no ground for encouraging the relation of client and legal adviser except when the adviser is one who has been formally admitted to the office of attorney or counselor as duly qualified to give legal advice.

That the person consulted is in fact practicing without formal sanction of the court, is certainly not sufficient.

In the Model Code of Evidence the definition of "lawyer" in the privilege is:

[a] person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer . . . .

If the United court had adopted this definition, the result of the ruling as to the thirteen attorneys licensed in another state

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113 Heininger, The Attorney-Client Privilege as It Relates to Corporations, 53 Ill. B. J. 376, 379 (1955), where the quotation is made, Judge Wyzanski in United Shoe excluded from the privilege all correspondence to and from persons in the patent department who were graduate lawyers but who were not admitted to the practice of law in the state where they were employed. However, I believe that the recital of this fact was a mere make-weight in the decision, since lawyers in the patent department supposedly would give legal advice on the United States patent law, not on local Massachusetts law. Simon, The Attorney-Client Privilege as Applied to Corporations, 65 Yale L. Rev. 953 (1956), wherein the author states: "Judge Wyzanski was probably using the lack of local admission as little more than a make-weight." Id. at 972.

114 8 Wigmore, §2300.

115 Model Code of Evidence (1942).

116 Id. rule 209.
might well have been different. Perhaps the concern does not come from United but from the language used in American Cyanamid v. Hercules Powder Company. After noting that the attorney in question was admitted into practice in the District of Columbia, but not in the state in which he was practicing, the court said: "This fact alone does not conclusively demonstrate that Peverill was not acting as an attorney, but it is highly probative of the fact."

One proposed solution to the difficulties of applying the attorney-corporate client privilege involves the classification of corporate employees into three groups of agents: managing agents, communicating agents, and source agents. A managing agent is defined as "one who has authority to undertake action or make decisions in regard to dealings with corporate counsel." This classification is not unlike the control-group theory announced in the Day case. "A communicating agent is one who simply forwards information." "A source agent is one who is himself the source of the information being disclosed or forwarded." This is similar to what has actually occurred in the courts.

For example, consider the following situations: the corporation, through one of its employees, may relate to the corporate attorney facts giving rise to or directly relating to litigation. The corporation through one of its officers, directors, or managers may seek advice as to pending or future litigation. The corporation through any employee may seek non-legal advice from the corporate attorney. A communication may be transmitted through the agent of either the corporation's employee or the attorney's employee. Information may be transmitted through the insurer of the corporation to the attorney selected by the insurer to represent the corporation. Or, information may be transmitted to the corporate attorney by an employee, not a member of the "control-group," who is or may be a defendant in the case.

In the first and second situations the use of the attorney-client privilege would be appropriate. In the third situation the privilege would not apply. In the last situation the privilege would apply to the information transmitted by the insurer to the attorney. The corporation is the source of the information and the insurer is acting as an agent of the corporation.

117 See text at 84 supra.
119 American Cyanamid Co. v. Hercules Powder Co., 211 F. Supp. 85, 89 (D. Del. 1962). This court declined to use the approach of Judge Wyzanski in the United case wherein the court adopts a test for extending the privilege to "house counsel" determine upon the percentage of time which the attorney spends upon legal activities.
121 Id. at 963.
124 See note 70 supra.
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Client privilege is contingent upon whether the corporate employee is a member of the control-group of the corporation.

If an employee or investigator making reports to an attorney for the corporation is in a position to control or take a part in a decision about any action the corporation might take upon the advice of its attorney, he personifies the corporation and when he makes reports or gives information to the attorney, the attorney-client privilege applies. Such employee must have actual authority, not apparent authority, to participate in the contemplated decision.125

A communication to an attorney which otherwise would be privileged is not so privileged if made in the presence of a third person, or if communicated to a third person. Once the privilege is waived, it is waived forever. There are exceptions to this general rule. When the communication is made through what David Simon would call a "communication agent" (a secretary or messenger),226 the privilege is not destroyed.127

In applying the privilege to a communication between the attorney and his client in which the attorney gives non-legal advice, courts are attempting to define a balance which will protect the legal opinion even though there is some non-legal advice in the communication.

In Illinois there is solid authority in People v. Ryan128 for asserting that the communication is not lost when retained within the privileged group. Ryan and Day effect a quantity of rules which provide helpful guidelines to attorneys in this area. Read in conjunction, Ryan and Day would support the rule that an attorney-corporate client privilege is not lost if the corporation which had communicated with its attorney were to acquiesce in a transmission of the communication from the corporate insurer to an attorney selected by the insurer to defend the corporation. Further, the privilege is not lost if the corporation through its "house counsel" or other counsel were to request a copy of the communication to be retransmitted to another counsel in order to prepare for litigation. In Ryan the second litigation arose from the same set of facts as the first.129 Whether the second transmission must be to an attorney who is defending an action arising out of the same facts has not been

127 Wigmore says: "It has never been questioned that the privilege protects communication to the attorney's clerks and his other agents (including stenographers) for rendering his services." 8 Wigmore, §2301.
129 In the Ryan case the client was defended in the civil action arising out of an automobile accident by an attorney selected by her insurer. The second transmission of the communication was to a different attorney by the insurer. The second attorney was by her own choosing for her defense in a criminal action arising out of the same occurrence.
presented to the courts in Illinois. There is, however, indication that the privilege would apply regardless of that fact. In *Ryan* the supreme court, after holding that the privileged relationship existed between the client and both attorneys, stated: "We can see no logical reason for a different result when a transcription of the first confidential communication is transmitted with the consent of the insured to the second attorney."130 There is no reason for arguing that the corporate client would not be entitled to invoke the privilege as was invoked in *Ryan* by an individual client. In *Golminas v. Fred Teitelbaum Construction Co.*131 the Illinois Appellate Court clearly indicated that when the employer who is not a member of the "control-group" makes a communication to the attorney for the corporation such communication may be privileged from disclosure to the opposing counsel when the employer is a defendant or may be a defendant in the action.132 This exception to the general rule withholding the privilege from non-control control-group employees will have extended application in a great number of personal injury cases where the only witness for the corporation is an employee who may well be or become a defendant. This rule apparently would not have changed the result of the *Day* case for there the occurrence witness was presumably not the employee who could have defectively installed the gas pipe. The employees were after-the-fact occurrence witnesses.

If however, the employee occurrence witness could not be made a defendant in the action an argument could be made that his statements made to counsel are protected against discovery. If at the time the statements were made the attorney-client privilege existed between the employee as an individual the

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130 People v. Ryan, 30 Ill. 2d 456, 461, 197 N.E.2d 15, 18 (1964). This application of the privilege is consistent with the stated rationale for affording the privilege. See notes 68 and 69 supra. In People v. Ryan the Supreme Court of Illinois reversed the appellate court which had assumed that there was a privilege when there was a communication between a client and the client's insurer, but had gone on to decide that privilege had been waived by the retransmission to a third party. The Supreme Court in reversing the appellate court held specifically that there was a privilege and that such privilege was not waived. The Supreme Court noted that several other states had held in accord with the appellate court's determination of the privilege. *Id.* at 460, 197 N.E.2d at 17.


132 The court said:

We do not mean to imply that communications by an employee of a corporation who does not come within the "control group" definition may never be privileged. For example, the principle underlying the attorney-client privilege would demand that an employee's communication should be privileged when the employee of the defendant corporation is also a defendant or is a person who may be charged with liability and makes statements regarding facts with which he or his employer may be charged, which statements are given or delivered to the attorney who represents either or both of them.

*Id.* at 449-50, 251 N.E.2d at 318.
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privilege would protect the statements even though the employee client were no longer subject to being made a defendant. The privilege does not end with the termination of the action or the relationship.¹³³

EXPERT'S REPORTS¹³⁴

Two problems are inherent in the discovery of the expert's reports: the question of whether such are discoverable, and the question of the procedure necessary to effectively promote justice when discovery of expert's reports are sought. The solutions have not been determined by Illinois law. Federal cases give insight to the practitioner who must make an argument for his client's position. The federal decisions are helpful even though in cases such as *Monier v. Chamberlain*¹³⁵ the Illinois courts have expressed independence when they found the federal rule disadvantageous.

Expert's reports must be subjected to the same analysis as any other matter which is sought to be discovered. The expert's report must be "relevant to the subject matter involved in the pending action."¹³⁶ In order to be relevant such material must either be admissible into the trial as evidence or lead to matter which is admissible into evidence. When the relevancy is so remote that the practitioner fears that it might not be discoverable; then perhaps, a strong argument that such discovery would serve another purpose of discovery will aid him.¹³⁷

It is impractical to categorize all expert's reports and then to determine their discoverability as a group. Like any other matter sought for discovery, they may be excluded if such reports are entitled to either a privilege or an exemption. As

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¹³³ Wigmore says:
The subjective freedom of the client, which it is the purpose of the privilege to secure, could not be attained if the client understood that, when the relation ended or even after the client's death, the attorney could be compelled to disclose the confidences, for there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate. It has therefore never been questioned, since the domination of the modern theory, that the privilege continues even after the end of the litigation or other occasion for legal advice and even after the death of the client.

¹³⁴ If the expert has relevant facts within his knowledge whether or not such could be discovered might well turn upon how he acquired the relevant facts. As to those facts which the expert acquires through his observation he is an occurrence witness. As to the ultimate facts formed by his expertise then this section will help the practitioner determine whether the report is discoverable.

¹³⁵ 35 Ill. 2d 351, 221 N.E.2d 410 (1966), where the court adopted the federal rule for the definition of work-product but rejected the requirement of good-cause making all that which did not involve the legal theory of the litigation discoverable.


noted earlier, matters excludible from discovery are generally grouped into three categories: work-product, attorney-client privilege, and that excluded by the doctrine of unfairness. The report of an expert may be relevant in a discovery sense, but part or all of it may be non-discoverable for any one of the mentioned reasons.

One commentator notes that the attorney-client privilege can be applied to protect the expert's report only when such expert is either a client or his necessary agent. If, however, a broader approach were taken, an argument could be made for the application of the attorney-client privilege to other situations. One such approach relies upon the rationale supporting the attorney-client privilege:

If the expert's reports to the attorney are not privileged, clients will be less likely to hire the specialists and the latter will be less likely to make full disclosure; rather they would tend to communicate only those facts and opinions which would be favorable to their client's case.

Other writers have felt that the probability of this occurrence is small.

Other considerations must be made before it can be said if the expert's report is discoverable. There are privileges other than the attorney-client privilege. In 1959 Illinois created a physician-patient privilege where none had existed at common law. The provisions of the act expressly exclude the invoca-

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139 Such occurs in the attorney-corporate client situation. See text at note 63 supra.
141 Comment, Developments in the Law—Discovery, 74 HARV. L. REV. 940, 1032 (1961), where it is said, "Nevertheless, if permitting discovery of expert conclusions would discourage both parties from seeking them, it might be appropriate to grant work-product protection in order to assure that the litigants would not be deprived of expert assistance." It should be noted here that this author feels that the protection afforded the expert's reports should flow from the concepts normally called "work-product." Such "work-product" considerations are different from attorney-client privilege considerations and if the two are confused different and incorrect results might well occur. Of course, there is enough similarity between the two sets of concepts that there is both some overlapping and general confusion in the area.
142 ILL. REV. STAT. ch. 51, §5.1. (1969). The provisions are:

[No] physician or surgeon shall be permitted to disclose any informa-
tation of the privilege in a civil action wherein the mental or physical condition of the patient is in issue. In 1963 the Illinois General Assembly extended the medical privilege to the psychiatrist-patient relationship. This privilege was similarly qualified to provide for the use of the psychiatrist as an expert. When a spiritual advisor qualifies as an expert, consideration must be given to the scope of the spiritual advisor-communicant privilege. Finally, there exists in Illinois a privilege which can be invoked by an accountant.

Another significant factor is the purpose of the expert. The work-product exemption should be applied to protect a communication with an expert where the attorney is arranging available evidence and which reflects the attorney's legal expertise. However, if the expert's report is to be used as evidence, then such would fall outside the Monier definition of work-product. The federal courts show a divergence of view in different districts.

The third approach for analysis is the doctrine of unfairness. Discovery of an expert's report could be denied if the exception which he may have acquired in attending any patient in a professional character, necessary to enable him professionally to serve such patient, except only (1) in trials for homicide when the disclosure relates directly to the fact or immediate circumstances of the homicide, (2) in actions, civil or criminal, against the physician for malpractice, (3) with the expressed consent of the patient, or in case of his death or disability, of his personal representative or other person authorized to sue for personal injury or of the beneficiary of an insurance policy on his life, health, or physical condition, (4) in all civil suits brought by or against the patient, his personal representative, a beneficiary under a policy of insurance, or the executor or administrator of his estate wherein the patient's physical or mental condition is an issue, (5) upon an issue as to the validity of a document as a will of the patient, (6) in any criminal action where the charge is either murder by abortion, attempted abortion or abortion or (7) in actions, civil or criminal, arising from the filing of a report in compliance with “An Act for the reporting of certain cases of physical abuse, neglect or injury to children,” enacted by the Seventy-fourth General Assembly. (emphasis added).

There is no privilege under this Section for any relevant communications . . . (c) in a civil or administrative proceeding in which the patient introduced his mental condition as an element of his claim or defense or, after the patient's death, when his mental condition is introduced by any party claiming or defending through or as a beneficiary of the patient.

Monier v. Chamberlain, 35 Ill. 2d 351, 359-60, 221 N.E.2d 410, 416 (1966). One commentator has noted that language in Monier suggests that experts' reports which are used to shape the mental processes of the attorney are discoverable. See Note, Discovery of Expert Information After Monier v. Chamberlain, 62 NW. U.L. REV. 624, 632 (1967).


See text at notes 44-47 supra.
order providing for discovery was conditioned upon an appor-
tionment of the cost of the discovery, and the party seeking
discovery fails to remit an amount equal to his aliquot share
ordered by the court. There are further areas where the
Illinois trial courts under the authority granted by the supreme
court rules would have power to act. In addition to dividing
the costs of discovery of the expert's report, protective orders
could be entered to exclude those parts of the expert's reports
which would be subject to exemption or privilege and allow
discovery for the remaining relevant material.

The analysis of expert's reports thus completed does not
account for the problem that arises when the expert has not
written a report or when the written report consists of notes
taken by the attorney while in conference with the expert. If
the expert has observed facts which are relevant in a discovery
sense, he is subject to divulge such facts by deposition. His
existence is discoverable by interrogatory. If the expert has
been consulted by the attorney and the expert has not made
independent observations, it may be argued that he is being
used to shape the mental processes of the attorney. If the
expert's written reports consist of notes taken by the attorney
during a conference, these notes might well contain such mental
impressions of the attorney which would be within the Monier
definition of work-product. If such mental impressions of the
attorney can be separated from the remarks of the expert, a
protective order can be utilized to provide for the separation.
If separation is impossible, the notes should be exempt from
discovery (under the theory that once the material falls within
the work-product exemption the protection is absolute). There
is at least one other fact which is employed in the pretrial
motion court to determine whether the expert's report is ex-
empt. If the expert is going to testify, his report is probably
discoverable.

After a determination that an expert's reports are subject to

151 "A number of courts have questioned the wisdom of adopting a rule
which would permit one party to utilize the adverse party's expert merely
upon agreeing to some fee-splitting arrangement." Friedenthal, Discovery
and Use of an Adverse Party's Expert Information, 14 STAN. L. REV. 455,
483 (1962).

152 ILL. REV. STAT. ch. 110A, §201 (c) (1), 214 (1969).

153 If an expert is a physician or surgeon an order of court is necessary
before he is subjected to a deposition. ILL. REV. STAT. ch. 110A, §204(a) (1)

154 See Appendix for form orders and interrogatories.

155 See von Kalinowski, Use of Discovery Against the Expert Witness,
40 F.R.D. 43 (1967), wherein the commentator says:

There is a related area which seems to properly be a limitation on
the discovery of experts. This is a valid claim of a recognized privi-
lege such as the attorney-client and the physician-patient privilege . . . .
Suffice it to say for this purpose that if the privilege is a bar to dis-
the rules applying to other discoverable material, the practical problem of what procedure to follow arises. If counsel against whom discovery is sought is required to produce the material in court for a determination by the court as to whether it is privileged or exempt as he has urged, then the privilege or exemption is effectively destroyed. While in matters such as trade-secrets the court can enter a protective order directing the moving party not to use the subject matter of the material sought for discovery, when the matter is allegedly exempt because it divulges the opponent’s trial plans, a protective order could neither follow nor be enforced. The judge, of course, may decide the question in camera.\(^{156}\) If the moving party disagrees with the judge’s ruling, appeal can be had from it, also in camera.

The post-Monier case of City of Chicago v. Albert J. Schorsch Realty Co.\(^ {157}\) should give the practitioner an indication of the direction that the Illinois courts are inclined to follow as a result of the limitation on the work-product exemption. The case involved a condemnation proceeding of a vacant piece of real estate. The defendant property owner sought by interrogatory the list of all persons who were directed by the board to inspect the property. A full answer to such would, necessarily, include all those which the petitioner would employ as expert appraisers. The trial court sustained the petitioner’s objection to the question. Petitioner’s support was City of

\(^{156}\) Apparently this procedure is followed in some federal district courts, see: von Kalinowski, Use of Discovery Against the Expert Witness, 40 F.R.D. 43 (1967), wherein the commentator remarks: “However, in some districts the reports are first examined in camera to separate factual matters from opinions.” Id. at 44. A point is raised in the comments of the Model Code of Evidence as adopted by the American Law Institute, which is pertinent to a discussion of the dissection between fact and opinion.

\(^{157}\) Where a witness is attempting to communicate the impressions made upon his senses by what he has perceived, any attempt to distinguish between so-called fact and opinion is likely to result in profitless quibbling. Analytically no such distinction is possible.” MODEL CODE OF EVIDENCE rule 401, Comment (1942).

With regard to the observation of fact the analytical distinction between fact and opinion is a question of the universality of the major premise. When the observer received a retinal impression he applies such impression to a pre-conceived standard. He may say, “I saw a book.” He may say, “I saw a drunk.” Each of these is an impression applied to what a “book” or a “drunk” is. If the standard is commonly accepted by men, then such observation is characterized in common language as a “fact.” If the standard is not commonly accepted by men, then such observation is likely to be characterized as an “opinion.” The problem arises in application of the concepts. When the intellectual sophistication increases there is a greater likelihood that the listener will better understand the fact or opinion of the witness.

\(^ {157}\) 95 Ill. App. 2d 264, 238 N.E.2d 426 (1968).
Chicago v. Harrison-Halsted Building Corporation. The court held, "that under the broad discovery principles of Monier v. Chamberlain the names of appraisers are not privileged." The Schorsch court added that under the circumstances of the case the error of the trial court was a harmless one.

The Schorsch case resolves only part of the questions involving the applicability of discovery to expert's reports. The thrust of the Monier decision was against the prior rule defining work-product. The attorney-client privilege could not be fully explored by the court because of the unusual circumstance that both parties to the accident had the same insurer. The effect of these facts raises the question as to whether the Schorsch decision should be interpreted to be a limitation of only the work-product doctrine on expert's reports. Probably Monier should not be so tightly construed as to be limited to a holding regarding work-product. Monier expressed a new judicial posture which the Illinois Supreme Court was taking. The Illinois Appellate Court so recognized that posture in the Schorsch case by referring to the "broad discovery principles of Monier v. Chamberlain."

CONCLUSION

For the practitioner who is attempting to resolve a problem in pretrial discovery a further direction will be offered as a last word. The issue to which a resolution is sought may be outside the scope of this article or may be, when crystallized, a detail which brevity required this article to exclude. If the practitioner is able to find precedent on point he may quickly resolve his problem. However, as mentioned earlier in this article, the number of cases reviewing the rules are few, thus raising the possibility, often encountered, that there are no cases resolving his problem.

The practitioner might resolve his problem by an analysis in light of the spirit of the rules. A statement of a spirit of a law requires a verbalization of an almost visceral understanding of the law reflective of the common consensus of justice. The

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158 11 Ill. 2d 431, 143 N.E.2d 40 (1957).
161 While citing the Schorsch case in attempting to analyze the problem, and to come to a determination of whether experts' reports are discoverable, one commentator has concluded: "At the moment neither conclusion can be reached with any great degree of certainty, pending appeal and review," Johnston, Discovery in Illinois and Federal Courts, 2 JOHN MAR. J. PRAC. & PROC. 22, 51 (1968).
162 Work product as defined by Monier is discussed in more detail in the section of this article titled "Relevancy."
practitioner must be cognizant of the effect of the developments in that common consensus of justice upon the application of the spirit of the law. The rules of pretrial discovery seek to permit as free a disclosure of the facts pertinent to the case at bar as can be reconciled with the competing rights and privileges recognized in law and possessed by the parties.

The practitioner must be aware of the fact that the theaters of argument will develop around the balances of competing rights and privileges of the parties. The degree of freedom of the discovery allowable is limited only by the relevancy of the material and the competing claims of right or privilege of others. There seems to be little basis for an argument that the breadth of discovery should be limited without reference to a counter-balancing right or privilege.

The practitioner may well serve his cause if in preparing his argument in an area in which case law has not provided precedent, if he reconciles his argument with both the wording of the rules and the spirit which that wording reflects.

APPENDIX

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

------------------------ v. ------------------------ General No. _____ L ___

STANDARD APPROVED INTERROGATORIES
TO EACH PLAINTIFF IN PERSONAL INJURY ACTION

1. State your full name; age, and address.
2. State the full name and address of each person who witnessed or claims to have witnessed the occurrence alleged in your complaint.
3. State the full name and address of each person not named (in 2) above who was present or claims to have been present at the scene immediately before, at the time of or immediately after the occurrence.
4. Describe in general the personal injuries sustained by you as a result of said occurrence.
5. With regard to said injuries, state:
   a. The name and address of each attending physician,
   b. The name and address of each consulting physician,
   c. The name and address of each person or laboratory taking an X-ray of you,
   d. The date or inclusive dates on which each of them rendered you service,
   e. The amounts to date of their respective bills for services,
   f. From which of them do you have written reports?
6. As the result of said personal injuries, were you a patient or an out-patient in any hospital or clinic? If so, state the names and addresses of each such hospital or clinic, the amounts of their
7. As the result of said personal injuries, were you unable to work? If so, state (a) the name and address of your employer, if any, at said time, (b) the date or inclusive dates on which you were unable to work, (c) the amount of wage or income loss claimed by you, and (d) the name and address of your present employer if any.

8. Were you the owner of any vehicle involved in said occurrence? If so, was said vehicle repaired and, if so, when, where and by whom and what was the cost of said repairs.

9. State any and all other expenses or losses you claim as the result of said occurrence.

10. As a result of said occurrence were you made a defendant in any criminal or traffic case? If so, state the court, the case number, the charge or charges placed against you and whether you pleaded guilty thereto.

11. During the five years immediately prior to the date of said occurrence had you been confined in a hospital, treated by a physician or X-rayed for any reason other than personal injury? If so, give the name and address of each such hospital, physician, technician or clinic, the approximate date of such confinement or service and state, in general, the reason for such confinement or service.

12. Had you suffered any serious personal injury prior to the date of said occurrence? If so, state when, where and in general how you were so injured and describe in general the injuries suffered.

13. Have you suffered either (a) any personal injuries or (b) serious illness, since the date of said occurrence? If so, for (a) state when, where and in general the injuries suffered; and, for (b) state when you were ill and describe in general the illness.

14. Have you ever filed any other suit for your own personal injuries? If so, state the court in which filed, the year filed and the title and docket number of said case.

15. Were the photographs taken of the scene of the occurrence or of the persons or vehicles involved? If so, state the date or dates on which such photographs were taken, the subjects thereof and who now has custody of them.

16. Do you have statements from any witness other than yourself? If so, give the name and address of each such witness, the date of said statement and state whether such statement was written or oral.

17. List the names and addresses of all other persons (other than yourself and persons heretofore listed or specifically excluded) who have knowledge of the facts of said occurrence or of the injuries and damages following therefrom.

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Attorneys for
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

------------- v. General No. L

STANDARD APPROVED INTERROGATORIES
TO EACH DEFENDANT IN PERSONAL
INJURY ACTION

1. State the name of the defendant answering and, if different, give the full name and address of the individual signing the answers.

2. State the full name and address of each person who witnessed the occurrence alleged in the complaint.

3. State the full name and address of each person not named (in 2) above who was present or claims to have been present at the scene immediately before, at the time of or immediately after said occurrence.

4. Were you the owner or driver of any vehicle involved in said occurrence? If so, were you named or covered under any policy of liability insurance effective on the date of said occurrence and, if so, state the name of each such company, the policy number, the effective period and the maximum liability limits for each person and each occurrence.

5. Were you the owner of any vehicle involved in said occurrence? If so, was said vehicle repaired and, if so, when, and by whom and what was the cost of said repairs?

6. As a result of said occurrence were you made a defendant in any criminal or traffic case? If so, state the court, the case number, the charge or charges placed against you and whether you pleaded guilty thereto.

7. Do you have any information tending to indicate:
   
   (a) That any plaintiff was, within the five years immediately prior to said occurrence, confined in a hospital, treated by a physician or X-rayed for any reason other than personal injury? If so, state each plaintiff so involved and give the name and address of each such hospital, physician, technician or clinic, the approximate date of such confinement or service and state, in general, the reason for such confinement or service.

   (b) That any plaintiff had suffered serious personal injury prior to the date of said occurrence? If so, state each plaintiff so involved and state when, where and in general how he or she was injured and describe in general the injuries suffered.

   (c) That any plaintiff has suffered either (a) any personal injury or (b) serious illness, since the date of the occurrence? If so, state each plaintiff so involved and, for (a), state when, where and in general how he or she was injured and describe in general the injuries suffered; and for (b), state
when he or she was ill and describe in general the illness.

(d) That any plaintiff has ever filed any other suit for his or her own personal injuries? If so, state each plaintiff so involved and give the court in which filed, the year filed and the title and docket number of said case.

8. Were any photographs taken of the scene of the occurrence or of the persons or vehicles involved? If so, state the date or dates on which such photographs were taken, the subjects thereof and who now has custody of them.

9. List the names and addresses of all other persons (other than yourself and persons heretofore listed or specifically excluded) who have knowledge of the facts of said occurrence or of the injuries and damages following therefrom.

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Attorneys for
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTRY DEPARTMENT, LAW DIVISION

_________________________ v. _____________ General No. ______ L _______

SUPPLEMENTAL INTERROGATORIES
TO PLAINTIFF TO BRING DISCOVERY
UP TO DATE PRIOR TO TRIAL

1. State the names and addresses of all persons, of whom you, your agents or attorney, have learned since _____________, who, according to their statements at least:
   a. Witness the occurrence specified in the complaint.
   b. Were present at the scene immediately before or immediately after the occurrence specified in the complaint.

2. State time off and earnings lost since said date due to the injuries specified in the complaint.

3. State the names and addresses of doctors who have, since said date, treated you for injuries sustained in the occurrence specified in the complaint and the amounts of their respective bills.

4. State whether you have been personally injured in any accident since said date; and, if so, give the approximate date and place of said accident and describe, in general terms, the nature of the injuries you sustained therein.

5. Have you, since said date, been hospitalized; and, if so, give the approximate dates of the same, the name and address of the hospital, and describe, in general terms, the reason for said hospitalization.

6. State whether you, your agents or attorneys have, since said date, taken or obtained (other than from another party under an order of court) any photographs of the scene of occurrence or of the instrumentality involved or any statement of the defendant on whose behalf these interrogatories are propounded.

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Attorneys for Defendant
IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

----------------- v. ----------------- General No. ______ L ________

ORDER FOR PRODUCTION

This cause coming on to be heard, upon due notice, on a motion to produce documents, the court being full advised in the premises,

IT IS HEREBY ORDERED that, on a date and at a time to be agreed upon but in any event within ___ days from today, the parties shall mutually produce, at the offices of the attorney _______ for the _________ for inspection and copying, the following (together with any transcripts, reports, memoranda or recordings purporting to reflect but not to evaluate the same):

(a) Where a party has given a statement to some person or entity other than his attorney or insurer, said statement shall be produced by the person or entity to whom it was given or transferred.

(b) The statement of any other witness, except parties to this action, non-treating experts and divers or other participants who may yet be sued because of the occurrence alleged.

(c) All photographs, slides or motion pictures taken subsequent to the alleged occurrence of the plaintiff ___________, the vehicles or other physical objects involved or the scene of the alleged occurrence.

(d) All data as to the physical or mental condition of the plaintiff prior and subsequent to the alleged occurrence, including, inter alia, injuries sustained in other accidents.

(e) A list giving the names, addresses and specialties of all expert witnesses (other than non-treating, purely consultant experts who are not to testify at the trial), omitting all persons already listed above.

The word “party” shall, if an individual, also include members of his immediate family, and shall, if a corporation, include its officers, directors, managing agents and foreman. No party is, by this order, required to disclose which witnesses (other than non-treating experts who are not merely consultants) his attorney intends to use upon the trial or the order or intended examination of such witnesses or his attorney’s communications with such consultants.

This order assumes that the parties affected will ascertain and allocate amongst themselves the expenses involved in initially securing and reproducing the items to be produced. If such is not effectuated amicably, this order contemplates further proceedings, as is also to be the case if either party seeks to require the production of the report of or to depose another’s non-treating expert witness (not a mere consultant).

ENTER:

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JUDGE