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CONFIDENTIALITY OF CHANCERY DOCUMENTS

PATRICK F. GEARY

At the outset we must answer some preliminary questions. What is civil discovery? Why do we choose to examine the confidentiality of church documents in light of discovery, and why do we choose the Federal Rules of Civil Procedure as the model for discovery rules? The discovery rules are trial preparation procedures which have been developed during the last 70 years. They are designed to eliminate the element of surprise during trial. There is a distinction between the taking of testimony at trial and the taking of testimony in discovery. Perhaps the most important distinction between the two, for our purposes here, lies in the fact that discovery can be obtained respecting matters which would be inadmissible at trial. Under the Federal Rules the scope of discovery is broad enough to permit the taking of evidence which is inadmissible at trial with the object of trying to use such evidence to find additional evidence which is admissible. Thus, the reason we choose to examine civil discovery procedures is that the scope of disclosure is greater than that of trial testimony and to that extent includes problems which exist relevant to the admission of evidence during trial. We choose to examine the federal rules of discovery not only because we are addressing a national body, but because the Federal Rules of Civil Procedure have been adopted by many states as their own.

What are the discovery rules? The Federal Rules of Civil Procedure provide for the taking of evidence for discovery purposes by oral deposition, by the compelled production of documents, and by the taking of written depositions by use of interrogatories. These procedures are available against both parties and witnesses, with either party being entitled to discovery. One of the most important facts to keep in mind is that the scope of discovery is a matter within the discretion of the trial judge. Conflicts over the propriety of discovery are usually decided by the trial judge, whose decision is generally not reviewable.

As we indicated earlier, discovery may be sought with respect to matters which are not admissible at trial. When faced with an instance where an opponent seeks discovery on such a matter, the usual practice for most civil attorneys is to object to the discovery. When the party seeking discovery has moved the court to compel the discovery sought, battle lines become drawn. The routine defense tactic in the face of such a motion is to base objection to discovery on some substantive aspect of the law. It is, however, crucial to understand that whether or not the discovery is to be allowed is a matter within the discretion of the trial judge and that that decision is usually not subject to review. Thus, successful defense to a

motion to compel discovery is fundamentally a matter of persuasion.

Now, most jurisdictions recognize a limited number of immunities from judicial inquiry, and these are often referred to as privileges. The husband/wife privilege, the attorney/client privilege, the physician/patient privilege, and the priest/penitent privilege are recognized in most states of the union. Typically, these privileges were not recognized at common law and have come into being by way of statute. Of particular concern to us at this point is, of course, the priest/penitent privilege, which is the jumping off point in our discussion here.

Wigmore, the great legal scholar noted for his treatise on evidence, found four reasons for recognizing the priest/penitent privilege as legitimate: (1) the communications originate in a confidence that they will not be disclosed; (2) the element of confidentiality must be essential to the maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) any injury which would inure to the relation by disclosure of the communication would be greater than the benefit which would be gained by requiring it to be revealed. These general principles have been taken up by the clear majority of the states and typically the statutory formulation goes as follows:

[P]riest or clergyman shall not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the Church to which he belongs.

It should be obvious that this formulation is fairly restrictive, and while there have not been a great many cases dealing with the subject, many of those which have dealt with the matter have construed this statute very narrowly. Let us review for a minute the kinds of restrictions which have been upheld. Where the communication was not made in confidence to the clergyman, there is no privilege. Where the communication is not penitential in nature, it has been held to be outside the privilege. Where the communication has been made outside of the course of discipline of the church to which the clergyman belonged, there are cases which have held that, even though they be penitential in nature, such communications are not within the privilege. Where the church to which the clergyman belongs does not have a course of discipline involving penitential confession, the privilege has been held inapplicable. Where the penitent was not a member of the same communion as the clergyman, the privilege has been ruled out.

Now, there are cases which hold the opposite views with respect to these various elements. There are cases which require simply that the confession be penitential in nature and made to a clergyman in the course of seeking spiritual advice. In any event, I think the point for us to understand here is that the typical statute is restrictive and the case law is varied enough to have left us with a definite uncertainty with respect to any given instance. In short, the restrictiveness of the typical statute, coupled with

the variety of judicial opinion, makes prediction of the outcome of any given case a perilous matter.

What is the relationship between the priest/penitent privilege and tribunal documents? Understandably, there have not been many decisions in this area. Perhaps, the most famous is *Cimijotti v. Paulsen*, 230 F. Supp. 39 (N.D. Iowa 1964), in which it was held that tribunal records were not admissible as they are protected by the priest/penitent privilege. Furthermore, the court held that third party testimony taken in corroboration of the penitent's testimony was within the purview of the priest/penitent privilege.

I think it is fair to say that in any case involving tribunal documents, some of the tribunal documents will always be covered by the priest/penitent privilege. This is particularly the case with respect to those matters coming directly from the "penitent." However, it is my view that the priest/penitent privilege cannot be exclusively relied upon to protect tribunal documents. The privilege is normally strictly construed by the courts. The evidence taken by the Tribunal often includes that of third parties who are not penitents and who may not even be Christian. While *Cimijotti* held that such third-party testimony was within the priest/penitent privilege, I believe that such a view does violence to the generally accepted view of the privilege. To date, there has been no judicial consensus reached with respect to such third-party testimony. The uncertainty of protection of such testimony is further heightened by the fact that the matter is essentially within the discretion of the trial judge.

I suggest that priest/penitent privilege can be buttressed by the addition of a first amendment argument which has its source in the *Watson-Gonzalez* line of cases which was recently affirmed by the United States Supreme Court in *Serbian Orthodox Diocese v. Miliwojevich*, which was decided in June 1976. In *Serbian Orthodox*, the Supreme Court stated "that the First and Fourteenth Amendments permit the hierarchial religious organizations to establish their own rules and regulations for internal discipline and government and to create tribunals for adjudicating disputes over these matters." On its face, the *Serbian Orthodox* case and its predecessors do not protect tribunal documents. These cases do, however, in my opinion, offer some hope that tribunal proceedings can merit protection. The tribunal system has a long standing history as an integral part of the ecclesiastical discipline of the Roman Catholic Church. The adjudication of marital status is not only penitential in nature but also reaches church discipline of third parties who may be involved with the penitent in the future. It is, I believe, arguable that if, as the Supreme Court has said, civil courts lack jurisdiction to inquire into the adjudication of an ecclesiastical matter, then perhaps they also necessarily lack jurisdiction to investigate the deliberations leading to that adjudication. Since the law is not already fixed in favor of full disclosure of testimony not exclusively priest/penitent in nature, there remains the distinct possibility that the tribunals may effect a procedure which would make this first amendment

rationale acceptable to the courts.

In his concurrence with the decision in the *Serbian Orthodox* case, Mr. Justice White noted that he did so on the understanding that civil authorities do have jurisdiction to determine that the church in question is hierarchical and that the dispute involves part of that church. His remarks underscore the fact that a major predicate of the *Watson/Gonzalez/Serbian Orthodox* line of cases is that the civil authorities be able to discern that an exercise in ecclesiastical authority has taken place; that is, there must be some identifiable characteristics to indicate that such proceedings have gone forward. Thus, the proposal that we make here is essentially a line drawing exercise, in which we would hope that the courts would take cognizance of the fact that one cannot reasonably hope to protect the decisions of ecclesiastical bodies without protecting the confidentiality of the deliberations leading to that decision. It seems to me that in order to be successful in this line drawing, we must draw very bold, bright lines around the proceedings which we intend to be protected. If we wish the Court to accept extension of the *Serbian Orthodox* doctrine proposed here, then I suggest that it would be wise to adopt tribunal procedures which harmonize with that conception.

If we are to ask the courts to protect ecclesiastical deliberations, then it seems clear that the tribunal procedures should be easily recognizable as judicial in nature. I suggest that the more tribunal proceedings smack of administrative activity, the less likely they are to be protected. With respect to third-party testimony in particular, I believe pains should be taken to obtain such testimony directly and, wherever possible, to do so in surroundings with the full trappings of an ecclesiastical court.

Methods of adducing evidence which rely upon the witnesses' performance tend to resemble administrative procedures. The mailing of questionnaires to witnesses, for example, requires, in effect, that the witness produce a document. This is the same kind of procedure which is used in insurance matters and in gathering of information for social services, and I think most would characterize such procedures as principally administrative in character. When testimony is taken directly during a trial proceeding, there is interplay between trial officers and the witness which becomes part of the record and must certainly be described as judicial in nature.

Thus, these two examples form a spectrum of administrative oriented activity versus judicial activity. In my judgment, the only possibility of convincing a court to accept the extension of the *Serbian Orthodox* doctrine, which we have proposed here, is through the adoption of uniform national procedures which mark off tribunal procedures as essentially judicial in nature. As has been noted above, tribunal documents are currently susceptible to civil discovery, especially third-party testimony. An alternative to the method of dealing with that susceptibility other than the one which we have proposed above is the enactment of statutes specifically drafted to protect tribunal documents. There are two problems here: first,

the Herculean task which would be required to effect such legislation; second, the delicate task of drafting legislation which would prove workable.

The Federal Rules of Evidence, which were signed into law by President Ford in 1974, do not contain a priest/penitent privilege. Such a privilege was included in the original draft of the proposed rules, but was stricken from the version finally adopted. Thus, at least on the federal level, it would seem that there would be some very serious difficulty in seeking to have Congress broaden the priest/penitent privilege when Congress has so recently rejected that privilege in the Federal Rules of Evidence.

CONCLUSION

Mindful of the broad discretion afforded the trial judge with respect to the scope of discovery, we are confident that some tribunal documents will always be protected. Third-party testimony, however, seems to be vulnerable, as it is probably not covered by the priest/penitent privilege. The first amendment may provide protection for the entire proceedings of the tribunal under the *Serbian Orthodox* line of cases. Specifically, it may be possible to extend the jurisdictional bar which now prevents civil courts from dealing with ecclesiastical decisions to include the deliberations which lead to those decisions. In order to accomplish this, it would seem advisable to fashion methods of obtaining evidence which harmonize with the conceptual premise which it is hoped will create the jurisdictional bar. Thus, tribunal testimony, particularly that of third parties, should be taken in an essentially judicial proceeding. Procedures which smack of administrative practice should be avoided whenever possible.