of statutory duties, state and municipal, would provide a fertile field for non-union employers seeking immunization against the effects of anti-injunction statutes.

Finally it is important to note that the majority and concurring opinions carefully skirted the question of peaceful picketing as constituting an expression of constitutionally guaranteed free speech. If the doctrine enunciated by the United States Supreme Court in *Thornhill v. Alabama*[26] had been applied, the court could have reached its ultimate decision with a minimum of effort. The failure of the New York court to apply the *Thornhill* rationale is indicative of the doubt cast upon that case by the Supreme Court's subsequent decisions[27] which have attempted to mark out an area of economic conflict within which states can determine their internal labor policy.[28]

Procedure—Discovery of Witnesses' Statements to Adversary Attorney Not Allowed as Matter of Right under Federal Rules—[United States].—Four days after the sinking of a tugboat the owners of the tug and their insurer retained an attorney to represent them in anticipated litigation arising out of the accident. The United States Steamboat Inspectors held a public examination of surviving crew members and immediately thereafter the attorney for the tugboat owners obtained written statements from the men who had testified. The plaintiff, widow of a crew member who had been drowned in the accident, sought to discover the contents of these statements by an interrogatory directed to the defendants under the deposition-discovery provisions of the Federal Rules of Civil Procedure.[1] The interrogatory read as follows: "State whether any statements of the members of the crews of the Tugs 'J. M. Taylor' and 'Philadelphia' or of any other vessel were taken in connection with the towing of the car float and the sinking of the Tug 'John M. Taylor.' Attach hereto exact copies of all such statements if in writing, and if oral, set forth in detail the exact provisions of any such oral statements or reports."[2] While admitting that the statements had been taken, the defendants and their attorney refused to set forth the con-

[26] 310 U.S. 88 (1940).

[27] Milk Wagon Drivers' Union v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941); American Federation of Labor v. Swing, 312 U.S. 321 (1941); Carpenters and Joiners Union of America, Local No. 213 v. Ritters Cafe, 315 U.S. 722 (1942).

[28] "But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing." Carpenters and Joiners Union of America, Local No. 213 v. Ritters Cafe, 315 U.S. 722, 727–28 (1942). See also Gregory, Labor and the Law 350–69 (1946).

[1] Rules 26–37, 28 U.S.C.A. following § 723c (1940).

[2] Hickman v. Taylor, 4 F.R.D. 479, 480 (Pa., 1945).

tents thereof on the ground that such matter was privileged. The court found that the accident was so unusual that the most searching investigation for the facts was justified, and it therefore held that the material sought was not privileged and that it should be subject to discovery unless the defendants could show that disclosure would impede the administration of justice. The court thereupon ordered the defendants and their attorney to produce the witnesses' statements and the attorney's memoranda for inspection by the plaintiff or the court.[3] On refusal to comply with the district court's order the defendants and their attorney were adjudged in contempt. This judgment was reversed by the circuit court of appeals which feared that the attorney might well become a witness against his own client if discovery were allowed.[4] In arriving at its decision the circuit court recognized the inadequacy of the usual concept of professional privilege to include statements of witnesses to an attorney, and expanded the privilege concept to include the "work product of the lawyer." On appeal to the Supreme Court, *held*, although statements of witnesses to an attorney in preparation for litigation are not "privileged," neither are they subject to discovery *as a matter of right* under the Federal Rules of Civil Procedure; rather they are subject to discovery only when the party seeking disclosure can show that denial of discovery will unduly prejudice the preparation of his case or cause him any hardship or injustice. *Hickman v. Taylor*.[5]

The Supreme Court opinion refers in terms to the problem of whether any of the discovery devices[6] may be used to inquire into materials collected in antic-

[3] Ibid. The text of the order reads, ". . . . it is hereby Ordered, Adjudged and Decreed that Defendants, John M. Taylor and George H. Anderson . . . . and Samuel B. Fortenbaugh, Jr., Esq., as counsel and agent for those Defendants, shall forthwith answer Plaintiff's 38th interrogatory and supplementary interrogatories; produce all written statements of witnesses obtained by Mr. Fortenbaugh, as counsel and agent for Defendants; state in substance any fact concerning this case which Defendants learned through oral statements made by witnesses to Mr. Fortenbaugh whether or not included in his private memoranda and produce Mr. Fortenbaugh's memoranda containing statements of fact by witnesses or to submit this memoranda to the Court for determination of those portions which should be revealed to Plaintiff." Respondents' Brief, p. 5.

[4] To cite an example used by the court, suppose a witness called by a lawyer for his client makes a statement, under cross-examination, inconsistent with a former statement made to the lawyer and put into the possession of his adversary by discovery procedure. In such a situation the lawyer could be called to verify the terms of the original statement and so impeach his own witness. Hickman v. Taylor, 153 F. 2d 212, 219–20 (C.C.A. 3d, 1945).

[5] 67 S. Ct. 385 (1947).

[6] Depositions, interrogatories, production and inspection of documents, admissions, and physical and mental examinations are allowed under Federal Rules 26–37. Such devices were an important innovation in federal procedure, filling an acute need to supplement the pleadings which had proved their ineffectiveness in disclosing the real points at issue and in giving an adequate factual basis for trial preparation. Before the adoption of the Rules, the use of interrogatories had developed in equity, but the Supreme Court forbade their use at law. Although depositions could be taken, their taking was so restricted by federal statute and decision that they were of little help in developing the facts of a case before trial. The policy supporting these restrictions on discovery had its roots in the feeling that a trial should be a battle of wits in which the parties cheered their legal champions to greater effort in the lists and victory went to the most ingenious. Such a philosophy, though it may have served to keep

ipation of litigation by an attorney. But the problem as viewed by the district courts has been the more general one of whether discovery may be had of materials collected by anyone—lawyer or layman—in preparation for trial. One reason for the broader question before the lower courts seems to be the attempt by non-lawyers to make their preparation appear to be the work of attorneys in the hope that the district courts will be biased against allowing any invasion of the privacy of an attorney's work.[7] On the broader question the district court opinions have been in confusion,[8] partly as a result of the generally non-appealable character of interlocutory rulings on discovery.[9] Thus *McCarthy v. Palmer*[10] denied discovery of witnesses' statements gathered by supervisory officials and claim agents of the defendant railroad in the course of preparation for trial, while *Bough v. Lee*[11] allowed discovery of similar statements which had been collected by investigators of the defendant's insurer.[12] The district court in the

lawyers employed, could hardly survive the public interest in more efficient administration of justice. By the time procedural reform was under contemplation, experience in several of the states and in England and Ontario had demonstrated that the most effective legal machinery for reducing and clarifying the issues in any case was a preliminary examination of all the evidence of both parties. Liberal mutual discovery, although resisted in some quarters on the ground that it would encourage perjury and the manufacture of evidence to meet the evidence disclosed by an adversary's witness before trial, was strongly approved by the judiciary. One of the major aims of the new Federal Rules relating to discovery was an elimination of the "sporting theory" of justice in favor of the theory that justice and the public interest would best be served by early publicity for the facts in every case. Realizing the practical advantages to be gained from such a change, the courts interpreted the new Rules liberally within a few weeks of their adoption. Discovery under the Rules, however, is not unlimited. Rule 26(b) allows discovery of relevant, non-privileged matter only, while Rules 30(b), 30(d) and 31(d) may be invoked by a deponent to protect himself from examinations calculated to "annoy, embarrass, or oppress" him. Interrogatories under Rule 33 may be objected to on all these grounds, since the scope of interrogatories has been held to be coextensive with that on depositions. And under Rule 34 the moving party must show "good cause" for the production and inspection of documents. For excellent discussions of these matters see Ragland, Discovery before Trial (1932); 2 Moore's Federal Practice §§26.01–26.02 (1938); Holtzoff, Instruments of Discovery under Federal Rules of Civil Procedure, 41 Mich. L. Rev. 205 (1942); Pike and Willis, Federal Discovery in Operation, 7 Univ. Chi. L. Rev. 297 (1940); Fisher, The Persistence of Chitty, 6 Univ. Chi. L. Rev. 359 (1939); Sunderland, The Theory and Practice of Pre-Trial Procedure, 36 Mich. L. Rev. 215 (1937).

[7] Dugger v. Baltimore & O. R. Co., 5 F.R.D. 334 (N.Y., 1946).

[8] Advisory Committee, Report of Proposed Amendments, 5 F.R.D. 433, 457–60 (1946); Holtzoff, Instruments of Discovery under Federal Rules of Civil Procedure, 41 Mich. L. Rev. Rev. 205, 211 (1942).

[9] Apex Hosiery Co. v. Leader, 102 F. 2d 702 (C.C.A. 3d, 1939). Note that the attorney from whom discovery was sought in the principal case had to face imprisonment for contempt in order to test his theory as to the scope of discovery.

[10] 29 F. Supp. 585 (N.Y., 1939), aff'd 113 F. 2d 721 (C.C.A. 2d, 1940).

[11] 28 F. Supp. 673 (N.Y., 1939); 29 F. Supp. 498 (N.Y., 1939).

[12] That the course of discovery does not always run smooth is indicated strikingly by the case of Bough v. Lee. In that case the defendant's insurer obtained statements from the plaintiff and the defendant following an auto collision. Unable to obtain those statements from the defendant, who did not have them in his possession, Bough v. Lee, 26 F. Supp. 1000 (N.Y., 1939), the plaintiff served notice to take deposition of the insurance company. The defendant's

McCarthy case based its decision on the desire to avoid penalizing the diligent in favor of the lazy. Although this reasoning was questioned by its own circuit court of appeals in a later case,[13] and is now generally discredited,[14] three cases cited in argument by respondent in the *Hickman* case rely on the authority of the *McCarthy* case to deny discovery of statements of witnesses.[15] An excellent example of the confusion on the general problem is furnished by the opinions of the district court which decided the *Hickman* case. In an earlier case involving an action against an employer for death damages, the court denied the plaintiff's motion for production and inspection of signed statements made by the defendant's employees to the defendant's insurer.[16] The ground for the denial was that the plaintiff made no showing of "good cause" as required by Rule 34. In its decision in the *Hickman* case the same court expressly disapproved its earlier decision insofar as that decision placed the burden of showing good cause on the one seeking discovery.[17] The test of good cause has been applied with further conflicting results where the plaintiff has sought production of statements made by himself to the defendant.[18]

On the narrower problem of the possibility of discovery of material collected by an attorney, the district court opinions appear to have been in as much confusion as they were in respect to the broader problem. Communications directly between client and attorney, of course, are protected from discovery under the usual definition of professional privilege.[19] But it has been disputed whether discovery should be allowed of statements made by agents or employees of a party to his attorney. Thus one case held that reports and statements obtained

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motion to forbid inquiry as to statements was denied, Bough v. Lee, 28 F. Supp. 673 (N.Y., 1939). A subpoena duces tecum having been issued, a motion to vacate was made, denied, and appealed, application meanwhile being made for a stay. The latter being denied, insurance company representatives testified that they did not have the statements, and that these were either at the New York office or in the possession of their New York or Washington attorneys. Deposition of a representative of the New York office was then taken without success. An attorney for the insurance company, though present at the taking of the deposition, refused to say whether he had a copy of the plaintiff's statement, remarking that he attended as an attorney and not as a witness. Thereupon his deposition was noticed for taking. He moved to vacate or limit the examination, claiming the matter to be privileged. The judge denied the motion in strong terms. Bough v. Lee, 29 F. Supp. 498 (N.Y., 1939).

[13] Hoffman v. Palmer, 129 F. 2d 976, 997 (C.C.A. 2d, 1942), aff'd on other grounds, 318 U.S. 109 (1943).

[14] 2 Moore's Federal Practice 162–65 (Supp., 1946).

[15] Courteau v. Interlake S.S. Co., 1 F.R.D. 525 (Mich., 1941); Piorkowski v. Socony Vacuum Oil Co., 1 F.R.D. 407 (Pa., 1940); Creden v. Central R. Co. of New Jersey, 1 F.R.D. 168 (N.Y., 1940).

[16] Stark v. American Dredging Co., 3 F.R.D. 300 (Pa., 1943).

[17] Hickman v. Taylor, 4 F.R.D. 479, 482 (Pa., 1945).

[18] Compare Seals v. Capital Transit Co., 1 F.R.D. 133 (D.C., 1940), with Gordon v. Pennsylvania R. Co., 5 F.R.D. 510 (Pa., 1946).

[19] Grauer v. Schenley Products Co., Inc., 26 F. Supp. 768 (N.Y., 1938); 2 Moore's Federal Practice § 26.13 (1938).

by the defendant's insurer and transmitted to its attorney were fully privileged,[20] while other cases have held that statements collected by an insurer are not privileged and do not become so even though turned over to an attorney.[21] There has likewise been conflict on another variant of the narrower problem, namely, whether statements become privileged from discovery when gathered "through direction" or "on behalf" of counsel.[22]

Faced with the contradictory decisions indicated, and perhaps realizing that such conflict was due in large part to the wide discretion left to the district courts to grant or deny discovery under the Federal Rules, the Supreme Court in *Hickman v. Taylor* attempted to set a standard to guide the exercise of that discretion. The standard is in line with the following amendment to Rule 30(b) which had been suggested by the Advisory Committee in its Final Draft on Proposed Amendments:

"The courts shall not order the production or inspection of any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless satisfied that denial of production or inspection will unfairly prejudice the party seeking the production or inspection in preparing his claim or defense or will cause him undue hardship or injustice. The court shall not order the production or inspection of any part of the writing that reflects an attorney's mental impressions, conclusions, opinion, or legal theories, or, except as provided in Rule 35, the conclusions of an expert."[23]

This amendment, submitted for adoption together with proposed amendments for thirty-five other rules in June 1946, was rejected by the Court when it adopted all but two of the others. One reason for its rejection may be inferred from the *Hickman* opinion, in which it is pointed out that Rule 30(b), *as presently constituted*, gives the trial judges the requisite discretion in granting or denying discovery of written statements of witnesses, and at the same time places the burden of justification properly on the one seeking discovery of the work product of a lawyer.[24] Another reason, possibly, is that the Court felt that the subject matter of the proposed amendment had been so hotly debated[25] and so strongly criticized[26] that it would be better to leave its own solution of the problem in the relatively flexible form of a decision instead of the more rigid form of

[20] New York Casualty Co. v. Superior Court, 30 Cal App. 2d 130, 85 P. 2d 965 (1939).

[21] Bough v. Lee, 28 F. Supp. 673 (N.Y., 1939), 29 F. Supp. 498 (N.Y., 1939); Price v. Levitt, 29 F. Supp. 164 (N.Y., 1939); Colpak v. Hetterick, 40 F. Supp. 350 (N.Y., 1941).

[22] Compare Farr v. Delaware, L. & W. R. Co., 8 Fed. Rules Serv. 34.35, Case 1 (S.D. N.Y., 1944), with Dugger v. Baltimore & O. R. Co., 5 R.F.D. 334 (N.Y., 1946).

[23] Advisory Committee, Report of Proposed Amendments, Rule 30(b), 5 F.R.D. 456 (1946).

[24] Hickman v. Taylor, 67 S. Ct. 385, 394 (1947).

[25] Discovery Procedure Symposium before the 1946 Conference of the Third United States Circuit Court of Appeals, 5 F.R.D. 403 (1946).

[26] Armstrong, Report of the Advisory Committee, 5 F.R.D. 339, 356 (1946).

a court rule. By rejecting the proposed amendment to the Federal Rules, however, the Court has left unanswered the problem of whether the standard is to be applied only to "the work product of the lawyer," or is to be applied also to the work product of sureties, indemnitors, and agents. The whole tenor of the *Hickman* decision, and particularly of Mr. Justice Jackson's concurring opinion, suggests that the rule applies solely to statements and memoranda collected by an attorney. One lower court case decided since the *Hickman* decision has already taken this viewpoint.[27]

A practical result of the *Hickman* decision will be to place at a disadvantage any man acting for himself in preparing for possible litigation. Thus a statement taken by such a person from a witness will not be as easily protected from discovery as the same statement taken by an attorney. By the same token any person using an attorney as a pre-litigation investigator will be in a relatively advantageous position with respect to discovery. It may be questioned whether this is a desirable development in view of the policies favoring liberal discovery and more restricted professional privilege.[28] Regardless of desirability, however, realization of this latter result by large insurance and transportation companies will encourage them to hire additional "house" attorneys for use simply as pre-litigation investigators. This device will avoid the difficulty in which the defendant found itself in *Dugger v. Baltimore & O. R. Co.*[29] In that case the defendant railroad attempted to prevent discovery of witnesses' statements made to a claim agent of the railroad. The defendant's theory was that the claim agent was acting on behalf of the law department of the railroad and that statements taken by him were therefore privileged. The court refused to accept this theory and allowed discovery. From the viewpoint of reducing the burden of work on the trial judges, the *Hickman* decision should be salutary. This may be illustrated by imagining the results of the contrary decision rendered by the district court in the instant case. There the trial court offered to assume the task of sifting the lawyer's personal impressions, opinions, and legal theories out of the material sought, before transmitting the residual fact content to the one seeking discovery—not an easy task for a busy trial judge. This would also place the court in the awkward position of acting ex parte, since by the nature of the issue it could not consult the attorney seeking discovery.

Under the Supreme Court decision the district courts will have the task of deciding when a party seeking discovery of material gathered by an adversary attorney has justified his demand for disclosure. Only two possible justifications are suggested by the Court's opinion. One is that witnesses are no longer available or can be reached only with difficulty; the other is that non-privileged, relevant facts, essential to the preparation of a case, are hidden in the adversary attorney's file and cannot be known otherwise than by discovery of the attor-

[27] DeBruce v. Pennsylvania R. Co., 15 L.W. 2504 (D.C. Pa., 1947).

[28] 8 Wigmore, Evidence § 2291 (3d ed., 1940).

[29] 5 F.R.D. 334 (N.Y., 1946).

ney's memoranda. The former is self-explanatory. The latter may be illustrated by the case of a railroad worker who is killed on the job late at night with no witnesses present and immediately thereafter the railroad company's attorneys make a complete investigation on the spot. The representative of the deceased, having few facts on which to base a case, would presumably be justified in seeking discovery of the facts contained in the memoranda and reports written by the railroad's attorneys. Since potential plaintiffs of the type described can only guess at the factual content of such material, it would be otherwise virtually impossible for them to prove hardship or injustice. Possibly a third valid justification, not mentioned by the Court, would be that the discoveree's answers to other interrogatories are evasive or dishonest. Another possible justification might be that a witness' statement taken immediately after an accident is more likely to be spontaneous and complete than one taken much later.[30] One possible justification which the Supreme Court's opinion definitely eliminates is that the attorney seeking discovery merely wants the material for a last minute check to make sure that he has overlooked nothing which may be helpful to his case. What further possible justifications may be held sufficient under the *Hickman* decision are a matter of conjecture.

Taxation—State Gross Receipts Tax—Receipts from Interstate Sale of Securities Not Taxable—[United States].—The plaintiff, an Indiana resident and trustee of a testamentary trust, instructed his Indiana broker to sell certain of the trust securities. When purchasers were found through offer of the securities on the New York Stock Exchange by the broker's New York correspondents, the latter informed the plaintiff's Indiana broker, who transmitted the securities by mail to New York. The New York brokers received the purchase price from the customers on delivery of the securities, and remitted the proceeds less their commissions and expenses to the Indiana broker, who deducted his commissions and delivered the balance to the plaintiff. The plaintiff paid the New York stock transfer tax on these transactions. On the gross receipts of these sales, amounting to $65,214.20, the plaintiff paid under protest a fiduciary gross income tax of 1 per cent under the Indiana Gross Income Tax Act of 1933.[1]

This act exempts "so much of such gross income as is derived from business conducted in commerce between this state and other states of the United States . . . . but only to the extent to which the state of Indiana is prohibited from tax-

[30] The same district court which rendered the decision in the Hickman case, in granting discovery in a later case, grounds its view ". . . . upon the proposition that the statement of a witness taken immediately after the accident, on the spot as it were, is a catalyst of unique value in the development of the truth through the judicial process. If this is so (and I believe that any experienced trial judge would agree that it is), then every consideration of the efficient working of that process, as well as fairness, requires that it be available to both parties, no matter which one obtained it." DeBruce v. Pennsylvania R. Co., 15 L.W. 2504 (D.C. Pa., 1947).

[1] Ind. Stat. Ann. (Burns, 1943 Replacement) §§ 64-2601—64-2632.