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Attorney's Work Product and Material Prepared for Litigation

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However, it would be helpful to have legislative resolution of this apparent ambiguity.

It should also be noted that the language used by the court in the *Lapensky* case is that the plaintiff sought to "perpetuate" her testimony. While *any* deposition is a kind of "perpetuation" of testimony, the word should be avoided on such facts as those of *Lapensky* on two grounds. First, the CPA allowed a party to take a deposition of his testimony as an absolute right and there was no requirement that the purpose be the perpetuation of testimony. Secondly, section 3102(c) is the real "perpetuation" of testimony section; it reserves the word to the endeavor of a person to take a deposition *before* an action is commenced. Note that such a deposition requires a court order; mere notice may not be used for a pre-action deposition.

*Attorney's Work Product and Material Prepared
for Litigation*

In *Babcock v. Jackson*,¹⁴⁶ the plaintiff moved to have a certain statement produced for examination. The statement had been taken from the defendant by an adjustment bureau employed by the insurance company which represented the defendant. In an affidavit, plaintiff's attorney stated that the reason for such inspection was the mislaying by the police officer of certain notes pertaining to conversations between the officer and the defendant, now deceased. Hence, the defendant's statement could not be obtained in any other manner. The court held that since the statement was taken by a claim adjuster in the course of a *routine* investigation, and not by an attorney or his agent in preparation for trial, this single circumstance rendered the statement subject to inspection. Such statements obtained by claim adjusters are not immunized by subdivisions (c) and (d) (which respectively protect an attorney's work product and material he prepares for litigation).

Section 3101(c) grants to an attorney's work product unqualified immunity from inspection. However, when that provision was originally drafted, the work product was to be protected from disclosure "*unless the court finds that withholding it will result in injustice or undue hardship. . .*"¹⁴⁷ The Revisers intended to adopt the rule laid down in *Hickman v. Taylor*, that an attorney's work product is protected from disclosure unless "good cause" for revealing it is shown.¹⁴⁸ When section 3101(c) was

under the CPLR. 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.01 (1963).

¹⁴⁶ 40 Misc. 2d 757, 243 N.Y.S.2d 715 (Sup. Ct. 1963).

¹⁴⁷ FIRST REP. 119.

¹⁴⁸ 329 U.S. 495 (1947).

finally enacted this qualified immunity was omitted. The consequent unqualified immunity that an attorney's work product now appears to enjoy extends beyond the rule of *Hickman* and the intent of the Revisers.

The pivotal question—and the one that gives trouble—is; what qualifies as an attorney's work product? The present case indicates that the court will investigate the capacity in which the person taking the statement acted.¹⁴⁹ If the statement was taken by an attorney or his agent in preparation for trial, the statement would qualify as an attorney's work product. However, if the same statement were taken from the same individual by a claims agent or adjuster it would not qualify as an attorney's work product.

The court did not discuss in any detail whether the statement sought to be inspected qualified under section 3101(d) as "material prepared for litigation." The court merely stated that it thought the statement would not be immune from inspection on that ground.

This holding does not appear to be consistent with present New York law. In one rather extreme case, it was held that statements made by a defendant to his insurer in a motor vehicle accident case should be accorded the status of privileged communication and, therefore, could not be introduced into evidence.¹⁵⁰ The basis for this holding was that such statements were intended to be used ultimately by the attorney assigned by the insurance company to defend the insured. Under the CPLR, a similar judicial determination would bring such a statement under section 3101(b) regarding "privileged matter." In other cases, such statements have been held to be work products prepared for possible use at a trial and, hence, could not be introduced into evidence unless injustice or undue hardship were shown,¹⁵¹ *i.e.*, they would now fall under section 3101(d).

Since New York is a compulsory insurance jurisdiction, every motorist is required to be insured against automobile liability and consequently, an insurance company is almost automatically involved in any ensuing litigation. When notified that one of its policy holders has been involved in an accident the insurance company normally conducts an investigation which includes the

¹⁴⁹ This distinction as to the capacity in which the person acted when he obtained the statement has been applied in the federal district courts of New York. *E.g.*, *Hughes v. Pennsylvania R.R.*, 7 F.R.D. 737 (E.D.N.Y. 1948); *Thomas v. Pennsylvania R.R.*, 7 F.R.D. 610 (E.D.N.Y. 1947).

¹⁵⁰ *Hollien v. Kaye*, 194 Misc. 821, 87 N.Y.S.2d 782 (Sup. Ct. 1949).

¹⁵¹ See *Schulgasser v. Young*, 25 Misc. 2d 788, 206 N.Y.S.2d 81 (Sup. Ct. 1960). See also *Cataldo v. County of Monroe*, 38 Misc. 2d 768, 238 N.Y.S.2d 855 (Sup. Ct. 1963).

taking of statements.¹⁵² An insured who fails to make full disclosure to his insurer runs the risk of forfeiting coverage by a breach of the policy's cooperation clause.¹⁵³ Therefore, the insured should be encouraged to make a full and complete statement to his insurer.¹⁵⁴

Yet if the position of the court in the principal case is adopted, *i.e.*, affording no immunity to a statement made by an insured to his insurer, an insured in an automobile accident would have reason to withhold data from his insurer. It would seem, therefore, that some protection from inspection by a plaintiff should be accorded to a statement made by an insured to his insurer. That is not an extreme proposition and appears to be justified.

As to whether such a statement should be treated as a privileged communication under section 3101(b): such treatment would not appear to be warranted because a privileged communication (except for such as waiver and the like) enjoys an absolute immunity; injured victims may therefore not avail themselves of the contents of such statements, even if they show that hardship would result. The best approach would seem to be to consider such statements as material prepared for litigation under section 3101(d)(2). This would encourage an insured to make full disclosure to his insurer knowing that his statement is conditionally protected. This approach also takes into account the interests of an injured victim because he would be able to inspect the statement if he could show that undue hardship would result if the statement were withheld.

In *Durdovic v. Wisoff*,¹⁵⁵ the plaintiff moved to examine certain insurance company employees with respect to conversations of a physician with plaintiff's intestate prior to their respective deaths. The plaintiff relied on *Babcock v. Jackson* as the authority for his motion. The court distinguished *Babcock* on the ground that in *Babcock* the plaintiff knew the statement was in existence when the motion for disclosure was made. In *Durdovic* the court found that there was no evidence that there were any notes in existence or that the physician, before he died, signed a statement for the insurer.

Party Obtaining a Copy of His Own Statement

In *Briggs v. Spencerport Road Plaza, Inc.*,¹⁵⁶ plaintiffs' attorney obtained a statement from an employee of defendant

¹⁵² Cataldo v. County of Monroe, *supra* note 151, at 771, 238 N.Y.S.2d at 858.

¹⁵³ Schulgasser v. Young, *supra* note 151, at 792, 206 N.Y.S.2d at 85.

¹⁵⁴ Hollien v. Kaye, *supra* note 150, at 825, 87 N.Y.S.2d at 786.

¹⁵⁵ 41 Misc. 2d 639, 246 N.Y.S.2d 374 (Sup. Ct. 1964).

¹⁵⁶ 19 App. Div. 2d 943, 244 N.Y.S.2d 17 (4th Dep't 1963).