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CPLR 3101(d): Conflict Between Departments Over Burden of Proof Relating to Material Prepared for Litigation

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that there is reason to allow a party to reap the fruits of its *subsequent* investigation.[28] This, of course, is subject to the proviso in CPLR 3101(d) that the identification is immune from disclosure unless it cannot be duplicated and withholding it will result in undue hardship. *Hartley* recognizes and perpetuates this dichotomy.

To reduce costly court battles and lengthy delays it would appear that even this last vestige should also disappear. The advantages to be gained by the policy of liberal disclosure far outweigh any contingent detriment that might be experienced by allowing one party to profit from the results of a subsequent investigation by his adversary. If the end to be sought by the judicial process is justice in the abstract, then complete disclosure is a means to that end. A self-serving refusal to disclose the identity of hostile witnesses does not serve justice.

CPLR 3101(d): Conflict between departments over burden of proof relating to material prepared for litigation.

In *Dikun v. New York Central Railroad*,[29] a wrongful death action, plaintiff's motion to examine defendant's employee, a crew member of a train involved in an accident which gave rise to the cause of action, was granted. Defendant sought to prevent the examination of its employee by invoking CPLR 3101(d)(2) which provides that "any writing or anything created by or for a party or his agent in preparation of litigation" shall not be obtainable by the other party.[30] In the application of this section the courts are in general accord that "employee statements made in the regular course of business stating what they observed and did are not material prepared for litigation protected from discovery by CPLR 3101(d)."[31]

The party seeking to avoid disclosure has the burden of proving that the material was prepared *solely* for litigation and not in the regular course of business — and that burden is *not* met by merely routing all material through an attorney. Divergent conclusions have been drawn by the several departments as to how this burden may be met.

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[28] *See, e.g.*, Rios v. Donovan, 21 App. Div. 2d 409, 413, 250 N.Y.S.2d 818, 822 (1st Dep't 1964): "While the policy of the CPLR is to broaden disclosure procedures, discovery should not be permitted to substitute for independent investigation of facts which are *equally available to both parties.*" (Emphasis added.)

[29] 58 Misc. 2d 439, 295 N.Y.S.2d 830 (Sup. Ct. Jefferson County 1968).

[30] This prohibition against disclosure may only be invoked in the absence of the court's finding that, because of a change in conditions, the material can no longer be duplicated and to withhold it will result in injustice or undue hardship. CPLR 3101(d).

[31] 58 Misc. 2d at 440, 295 N.Y.S.2d at 832, and cases cited therein. *See also* 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.50 (1968).

In *O'Neill v. Manhattan & Bronx Surface Transit Operating Authority*,[32] an accident report filled out by the defendant's employee-bus driver, and mailed directly to defendant's attorney without ever having been seen by any supervisory personnel of defendant, was held by the first department to be a writing created in preparation for litigation, and hence not subject to disclosure under CPLR 3101(d)(2).

The fourth department, in *Brunswick Corp. v. Aetna Casualty & Surety Co.*,[33] cited the *O'Neill* lower court decision with approval. However, since *O'Neill* was later reversed, the fourth department is seemingly in conflict with the first department. *Brunswick* held that examinations with respect to observations made by defendant's agents, before they consulted defendant's attorneys, should be disclosed, and the attorneys by retroactive adoption of such observations and reports cannot convert them into their own work product. *Dikun* cites *Brunswick* as being the law in the fourth department.

The net result is that in both departments the party resisting disclosure has the burden of proving that the material is immune. But in the first department, under *O'Neill*, an accident report drafted by defendant's attorney, to be completed by defendant's employee and returned directly to the attorney, meets this burden; whereas, in the fourth department, it would not.[34]

The rule in the first department would seem to be in derogation of the ideal of complete disclosure espoused by the CPLR. Any observations made by defendant's employee at the scene of the accident should properly be obtainable by the plaintiff at a pre-trial examination. Such observations as are customarily included in an accident report are not truly created for litigation, but are advantageous testimony obtained and protected by one party solely because of its relation to the witness.

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32 27 App. Div. 2d 185, 277 N.Y.S.2d 771 (1st Dep't 1967), *rev'g* 47 Misc. 2d 765, 263 N.Y.S.2d 187 (Civil Ct. Bronx County 1965). *See also The Quarterly Survey of New York Practice*, 42 St. John's L. Rev. 283, 299 (1967).

33 27 App. Div. 2d 182, 183, 278 N.Y.S.2d 459, 460 (4th Dep't 1967).

34 For a comprehensive study of this dichotomy see 7B McKinney's CPLR 3101, supp. commentary 15-16 (1967).

In Weisgold v. Kiamesha Concord, Inc., 51 Misc. 2d 456, 273 N.Y.S.2d 279 (Special T. Albany County 1966) the court held that a report made for defendant by one of its employees, and routed directly to the defendant's attorney, did not establish it as an item prepared for litigation. The court stressed that the defendant had to prove that the report was prepared *specifically and solely* in contemplation of litigation and not in the regular course of business. This case is the latest and most definitive statement from the third department on where it stands on disclosure of accident reports. *Weisgold* can, of course, be distinguished from *O'Neill*, in that in *O'Neill* it is more obvious that the report was prepared solely and specifically in contemplation of litigation.