St. John's Law Review

Volume 40, December 1965, Number 1 Article 49

CPLR 3101(c) and (d): "Material Prepared for Litigation" and "Attorney's Work Product"

St. John's Law Review

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation

St. John's Law Review (1965) "CPLR 3101(c) and (d): "Material Prepared for Litigation" and "Attorney's Work Product"," *St. John's Law Review*: Vol. 40 : No. 1 , Article 49.
Available at: https://scholarship.law.stjohns.edu/lawreview/vol40/iss1/49

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

pleading. Whether any matter is unnecessarily inserted is determined by the relevancy of the proof at trial. If the matter would be admissible at the trial, it is not unnecessarily inserted, even though it is scandalous or prejudicial. If plaintiff's assertions in the complaint would be admissible at trial, they would be relevant and therefore not subject to a motion to strike under CPLR 3024(b).

ARTICLE 31 — DISCLOSURE

CPLR 3101(c) and (d): "Material prepared for litigation" and "attorney's work product."

Subdivisions (c) and (d) of CPLR 3101 have provided the bar with an abundance of case law. Since the *Survey's* last installment,[161] there have been significant developments in the area governed by these two subdivisions.

The ground work for judicial action

Prior to *Finegold v. Lewis* [162] and *Kandel v. Tocher,*[163] there had been a decided lack of uniformity in the judicial interpretation of subdivisions (c) and (d).[164] Under these exclusionary provisions two questions of interpretation had frequently arisen before the courts, viz., whether accident reports made by an employee to his employer, and whether those made by an insured to his insurer are proper subjects for disclosure. Prior to *Finegold* and *Kandel,* the first department lower courts held statements by an insured to his insurer to be proper material for disclosure, whereas the lower courts of the second department reached conflicting decisions on the question of the discoverability of such statements.

Speight v. Allen [165] followed the holdings of prior first department cases and held these statements to be outside the purview of CPLR 3101(d). It relied heavily on the language employed by the court in *Rios v. Donovan* [166] concerning the liberality to be applied in interpreting the CPLR and more specifically Article 31.

---

[161] *The Biannual Survey of New York Practice,* 39 ST. JOHN'S L. REV. 406 (1965).

[162] 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).

[163] 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

[164] Speight v. Allen, 44 Misc. 2d 1072, 255 N.Y.S.2d 918 (Sup. Ct. Bronx County 1965), discusses this conflict.

[165] *Ibid.*

[166] 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964); discussed in *The Biannual Survey of New York Practice,* 39 ST. JOHN'S L. REV. 178, 210 (1964), and 7B MCKINNEY'S CPLR 3120, supp. commentary 58 (1965). *Rios* is a leading case delineating the scope of disclosure with which the practitioner should be well acquainted by now.

The disclosure provisions of article 31 of the CPLR were intended to enlarge the permissible use of pretrial procedure. The purpose of disclosure procedures is to advance the function of a trial, to ascertain truth and to accelerate the disposition of suits.[167]

The court indicated that these statements "are not necessarily or exclusively material prepared for litigation," [168] (and were therefore not protected by subdivision (d)). This reasoning was to be rejected by the first and second departments in *Kandel* and *Finegold* respectively.

Finegold v. Lewis: [169] *the second department's solution*

In *Finegold,* the second department unified the prior diverse holdings of its lower courts with respect to statements made by an insured to his insurer. The case involved an attempt to secure a statement made by the defendant to her insurer prior to the commencement of the action. Plaintiff sought to find therein admissions by defendant or inconsistencies with defendant's subsequent testimony. The court stated that the insurer was a defendant in a very real sense and therefore held that the statement was protected by CPLR 3101(d). It further stated that "the relative dates of the delivery of the statement and of the commencement of the action are immaterial," [170] thereby expanding the scope of subdivision (d) quite explicitly. The court distinguished these statements from reports of an employee to an employer made in the ordinary course of business, apparently implying that such reports *would* be a proper subject for disclosure.

Kandel v. Tocher: [171] *a solution and a problem*

In *Kandel,* a case factually similar to *Finegold,* plaintiff sought discovery and inspection of "the accident report and statements, photographs, diagrams, etc., relating to the accident made prior to the commencement of this action." The issue again was whether the material was "prepared for litigation" within the meaning of subdivision (d). The court stated that automobile insurance is simply litigation insurance and that virtually anything which an insurer or its employees do with respect to an accident is in preparation for litigation. It thereby held that such reports were entitled to subdivision (d) protection. The court stressed the importance of encouraging complete and candid disclosure of all

---

[167] *Id.* at 411, 250 N.Y.S.2d at 820.
[168] Speight v. Allen, *supra* note 164, at 1074, 255 N.Y.S.2d at 920.
[169] 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).
[170] *Id.* at 448, 256 N.Y.S.2d at 359.
[171] 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

salient facts by an insured to his insurer, and distinguished liability insurance from *all* other types of insurance. In addition, it stated that no special circumstances were present which would remove the protection of subdivision (d).[172]

In one part of his opinion, Justice Breitel stated that the material might even be excluded as an attorney's work product under subdivision (c) of 3101. Such language might be interpreted as a mandate to begin a broader application of subdivision (c)'s absolute protection—a protection not intended by the Advisory Committee.

Some investigation into the background of CPLR 3101 is necessary at this juncture. By now it is well known to anyone conversant with Article 31 that the Advisory Committee intended a codification of *Hickman v. Taylor*[173] in delineating the scope of disclosure in general. Toward that end it granted only a qualified protection to *both* an "attorney's work product" *and* "material prepared for litigation."[174] However, the legislature amended the original draft (without explanation) and granted absolute immunity to an "attorney's work product."[175] Since the intention of the Advisory Committee was thwarted, subdivision (c) poses a considerable threat to the success of any attorney seeking disclosure of items similar to those sought in *Kandel*. For no showing of special circumstances, however persuasive, will free such an item from subdivision (c)'s protection. And although the courts have not been prone to declare an item to be an "attorney's work product" where there is justification for finding that it is "material prepared for litigation" and thus only qualifiedly protected, this possibility nonetheless exists. Justice Breitel's aforementioned dictum emphasizes this distinct possibility.

---

[172] The protection of subdivision (d) is only *qualified* because it is not granted if "the court finds that the material [sought] can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship." CPLR 3101(d). See *The Biannual Survey of New York Practice*, 38 ST. JOHN'S L. REV. 406, 435-37 (1964), which advances the position which the first department adopted in *Kandel*.

[173] 329 U.S. 495 (1947). *Hickman* set forth the category of items which is exempt from disclosure under federal practice. It loosely described them as the "work product of the lawyer" and granted them only conditional immunity. See *The Biannual Survey of New York Practice*, 39 ST. JOHN'S L. REV. 178, 218 n.169 (1964).

[174] FIRST REP. 119.

[175] FIFTH REP. 443. It should be noted that the so-called Fifth Report was made by the Senate Finance Committee and the Assembly Ways and Means Committee—not the Advisory Committee on Practice and Procedure. These first two committees effected many changes in the Advisory Committee's Final Report, and in many cases without stating any reason for such action. The change wrought upon CPLR 3101 is a perfect example. Granting absolute as opposed to qualified protection to an attorney's work product seems to be a significant move, yet no explanation was offered therefor by the legislature.

It is submitted that a showing of the special circumstances enumerated in CPLR 3101(d) should also be a sufficient ground for allowing disclosure of what presently is absolutely immune as an "attorney's work product." [176] Therefore, it would seem appropriate that subdivision (c) be repealed and that the "attorney's work product" be included within present subdivision (d), thereby giving both items only a qualified protection. The threat of absolute exclusion and its resultant consequences seem far too great a price to pay when weighed against the intent of the Advisory Committee and the liberality which will have to be accorded to Article 31 if it is to be supported in its broad function in litigation.[177]

Finegold and Kandel in the fourth department

Gugluizza v. Gugluizza [178] involved the precise question found in *Finegold* and *Kandel.* Plaintiff sought disclosure of a signed statement which was given by defendant to his insurer before the commencement of the action. The court held the statement to be within the purview of subdivision (d) solely on the basis of *Finegold* and *Kandel.* The significance of the case is that the holdings of the first and second departments were deemed controlling by a lower court of the fourth department absent any definitive statement from its own appellate division.

Reports made in the regular course of business

Another Monroe County case [179] serves to illustrate, however, that not all accident reports receive even the qualified protection of subdivision (d). In this negligence action arising out of an automobile accident, plaintiffs sought, *inter alia,* discovery and inspection of reports made to defendant by its employee concerning the accident. The court distinguished *Finegold* and *Kandel* on the ground that there the reports were made not to a liability insurer but to the defendant corporation and were made within the scope of the operator's employment. These are precisely the type of reports which were alluded to in *Kandel* as being a proper subject for disclosure: "[their] purpose is not limited to, or even predominantly that of, preparing for a litigation risk." [180]

---

[176] Such was the intention of the Advisory Committee and in addition it appears to be a more equitable and logical rule. FIRST REP. 117.

[177] See Rios v. Donovan, 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964).

[178] 45 Misc. 2d 868, 257 N.Y.S.2d 693 (Sup. Ct. Monroe County 1965).

[179] Davis v. Eastman Kodak Co., 45 Misc. 2d 1006, 258 N.Y.S.2d 573 (Sup. Ct. Monroe County 1965).

[180] Kandel v. Tocher, 22 App. Div. 2d 513, 515-16, 256 N.Y.S.2d 898, 900 (1st Dep't 1965).

On the other hand, in *Reese v. Long Island R.R.*,[181] in an apparent effort to restrict its holding in *Finegold,* the second department reversed a lower court holding[182] which had allowed disclosure of photographs taken by defendant at the scene of the accident, and of an eye witness' statement. The lower court had held that these items were proper subjects for disclosure on the ground that they were prepared in the regular course of defendant's business. The appellate division, in denying disclosure, held that to carry such reasoning to its logical conclusion would render *any* accident reports made in the regular course of business non-discoverable whether or not made in preparation for litigation. It thereby implied that it had not intended such an illogical result to flow from its decision in the *Finegold* case. However, such a holding does not seem consonant with the court's statement in *Finegold* distinguishing insured to insurer reports from employee to employer reports. The apparent conflict between the second and fourth departments will only lead to increased litigation until the question is finally resolved.

Reports made prior to the commencement of an action

The influence of *Finegold* is also manifested in *Zavaglia v. Englert*[183] wherein the court held that reports made by defendant to his insurer and statements of witnesses, even though obtained prior to the commencement of the action, are nonetheless "material prepared for litigation" within the meaning of CPLR 3101(d)(2). Express authority for such a holding can be found in *Finegold* wherein that court stated: "The relative dates of the delivery of the statement and of the commencement of the action are immaterial."[184] It should also be noted that the instant case expands *Finegold* by explicitly affording the protection of 3101(d)(2) to statements of a witness.[185]

Unusual facts do not prevent disclosure ipso facto

In *Colbert v. Home Indemnity Co.*,[186] the action was based on defendant's alleged lack of good faith in settling a prior case.

---

[181] 24 App. Div. 2d 581, 262 N.Y.S.2d 194 (2d Dep't 1965).

[182] Reese v. Long Island R.R., 46 Misc. 2d 5, 259 N.Y.S.2d 231 (Sup. Ct. Suffolk County 1965).

[183] 23 App. Div. 2d 790, 258 N.Y.S.2d 720 (2d Dep't 1965).

[184] Finegold v. Lewis, 22 App. Div. 2d 447, 448, 256 N.Y.S.2d 358, 359 (2d Dep't 1965).

[185] A further expansion of the *Finegold* and *Kandel* doctrine can be found in Silberberg v. Hotpoint Div. of General Elec. Co., 23 App. Div. 2d 754, 259 N.Y.S.2d 60 (1st Dep't 1965), wherein the court held that the report of tests conducted by defendant's engineer on washing machines following the institution of plaintiff's personal injury action fell within the protection of CPLR 3101(d).

[186] 45 Misc. 2d 1093, 259 N.Y.S.2d 36 (Sup. Ct. Monroe County 1965).

In the prior case, Colbert was the defendant and Home Indemnity, his insurer, had secured reports of the accident which reports were in the files of a former agent at the time of the institution of the present action. The court held that the reports sought were "material and necessary in the prosecution" of plaintiff's action and therefore were a proper subject for disclosure. In distinguishing this situation from the one in *Finegold*, the court stated that in the *prior* action defendants were working primarily for plaintiff (in the instant case) when they gathered the evidence sought to be disclosed here, and that, therefore, it was immaterial where they (defendants) stood in the *present* action.

No protection for the non-liability insurer

In *Raylite Elec. Corp. v. New York Fire Ins. Co.*,[187] plaintiff-insured sought discovery of the reports prepared for the defendant-insurer by a fire adjuster and a property damage expert. The court held that such reports did not become "material prepared for litigation" merely by virtue of their being turned over to an attorney. The court distinguished this case from *Kandel* solely on the ground that no liability insurance was involved herein. Thus, it would appear that where other than liability insurance is involved, the party seeking to preclude disclosure must show that the material was in fact prepared for the express purpose of litigation and not merely in the ordinary course of business unmotivated by the thought of litigation. Situations can certainly be imagined wherein a *non-liability* insurer could be doing work which could more easily be classified as "material prepared for litigation" than that of a *liability* insurer. In such situations, the net result of these cases is that the non-liability insurer would be put to the proof on the question of whether the work is material prepared for litigation whereas the liability insurer would enjoy a presumption (if not a conclusion) that it is. Such, however, is the present state of the law.

CPLR 3103: Non-resident defendant entitled to reimbursement for EBT expenses.

The notion that protective orders are not a proper means for requiring one party to pay the other's disclosure expenses [188] seems to be losing strength. An indication of this can be found in *Buffone v. Aronson* [189] wherein defendant Aronson, a resident of

---

[187] 46 Misc. 2d 361, 259 N.Y.S.2d 641 (Sup. Ct. Bronx County 1965).

[188] Pakter v. Eli Lilly & Co., 19 App. Div. 2d 810, 243 N.Y.S.2d 425 (1st Dep't 1963), would appear to convey such a notion.

[189] 45 Misc. 2d 454, 257 N.Y.S.2d 47 (Sup. Ct. Westchester County 1965).