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Article 31

CPLR 3101(a): Full Pretrial Examination of Codefendants Inter Sese Despite Absence of Cross-Claims

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is the law in this area completely settled. The decision in *Master,* however, points the way for further appellate clarification.

CPLR 3101(a): Full pretrial examination of codefendants inter sese despite absence of cross-claims.

Recently, the second department, in *Lombardo v. Pecora,*[131] unified the law (at least in its own department)[132] with respect to the examination of codefendants. The case involved a personal injury action arising out of a two-car automobile accident. Plaintiff was a passenger in car 1; defendants were the owner of car 1, the owner of car 2 and the driver of car 2 respectively. Defendant Pecora (the owner of car 1) sought to examine the two co-defendants (the owner and driver of car 2). Special term denied the request. The second department reversed, overruling a prior case to the contrary.[133] It stated that the CPLR provision which provides for full disclosure without regard to the burden of proof[134] rendered obsolete the decision in *Johansen v. Gray*[135] and that the interest of achieving uniformity of practice within the several judicial departments also supported its holding. "[F]ull pretrial examinations of codefendants *inter sese* should be allowed with respect to all evidence which is material and necessary, even in the absence of a cross-claim by the moving codefendant against the codefendant sought to be examined."[136]

It should be noted that this decision has significant impact in the area of third-party practice. For example, in *Ciaffone v. Manhattantown, Inc.,*[137] it was held that a third-party (impleaded) defendant could not examine a defendant other than the one who impleaded him (third-party plaintiff). In an earlier installment of the *Survey,* it was argued that the court had not decided the case within the spirit of the CPLR,[138] and the instant case would seem to indicate an overruling of the doctrine of the *Ciaffone* case.

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[131] 23 App. Div. 2d 460, 262 N.Y.S.2d 201 (2d Dep't 1965).

[132] The first and third departments have already arrived at the result achieved in the instant case. Henshel v. Held, 17 App. Div. 2d 806, 233 N.Y.S.2d 14 (1st Dep't 1962); Frost v. Walsh, 195 Misc. 391, 90 N.Y.S.2d 174 (Sup. Ct. Rensselaer County), *aff'd,* 275 App. Div. 1017, 91 N.Y.S.2d 689 (3d Dep't 1949).

[133] Johansen v. Gray, 279 App. Div. 108, 108 N.Y.S.2d 35 (2d Dep't 1951).

[134] CPLR 3101(a).

[135] *Supra* note 133.

[136] Lombardo v. Pecora, 23 App. Div. 2d 460, 462, 262 N.Y.S.2d 201, 202 (2d Dep't 1965).

[137] 20 App. Div. 2d 641, 246 N.Y.S.2d 298 (2d Dep't 1964) (memorandum decision).

[138] *The Biannual Survey of New York Practice,* 38 ST. JOHN'S L. REV. 406, 432-33 (1964).

Unfortunately, however, the court made no mention of that case despite the fact that it had been decided by a lower court in its own department. Therefore, it cannot be unequivocally stated that *Ciaffone* has been overruled.

CPLR 3101(c) and (d): Defendant's expert may not be called by plaintiff, nor are his reports subject to disclosure.

Gugliano v. Levy[139] involved a malpractice action against a hospital and two of its doctors. Defendants' attorneys procured the services of an expert to investigate and determine whether their clients were in fact guilty of malpractice. In his report to the attorneys the expert stated that in his opinion malpractice *had* occurred. Plaintiff called the expert in order to introduce the report in rebuttal to defendants' denial of malpractice. The appellate division held that it was error for the trial court to have allowed such action stating:

> it permitted plaintiff indirectly to contravene the interdictions contained in the present practice code covering discovery procedurs, which absolutely prohibit the utilization of an *attorney's work product* by his adversary and which conditionally bar his use, without prior leave of the court, of the opinion of an expert who had been retained by an opposing party. . . .[140]

In the last installment of the *Survey,* reference was made to the need for amending CPLR 3101(c) to remove the absolute protection accorded to an attorney's work product.[141] That subdivision stands as a potential threat to the success of any attorney seeking disclosure of an item, because of the possibility, however remote, of a court declaring the item to be an attorney's work product and thereby barring *any* chance of disclosure. The possibility of such a holding would be especially vexing to the practitioner in a situation where an item could just as easily be classified as material prepared for litigation which is only qualifiedly protected. This point was raised in conjunction with a discussion of the *Kandel* [142] case wherein the court used very loose language in delineating which provision of CPLR 3101, *i.e.,* either (c) or (d), precluded disclosure of insured-to-insurer statements. It would seem that the opinion of the expert falls clearly within the purview of subdivision (d).

It is submitted that the court should have stated definitively whether subdivision (c) or (d) of CPLR 3101 precluded disclosure

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[139] 24 App. Div. 2d 591, 262 N.Y.S.2d 372 (2d Dep't 1965).

[140] *Id.* at 591, 262 N.Y.S.2d at 374. (Emphasis added.)

[141] *The Biannual Survey of New York Practice,* 40 ST. JOHN'S L. REV. 122, 157 (1965).

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