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CPLR 3101(c) and (d): Defendant's Expert May Not Be Called by Plaintiff, Nor Are His Reports Subject to Disclosure

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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).

—whether this was an attorney's work product or material prepared for litigation.

CPLR 3101(d): Protection accorded to statements made to a municipality by its employees.

In *Donnelly v. County of Nassau,*[143] plaintiff and a Nassau County police officer were involved in an automobile accident. Plaintiff sought discovery of: (1) a memorandum made by the police officer; and (2) a memorandum and report of investigation of a police sergeant, which had been forwarded to the county attorney. The court held that these items were analogous to the reports made in *Finegold v. Lewis*[144] and *Kandel v. Tocher,*[145] and that they were, therefore, exempt from disclosure pursuant to CPLR 3101(d).[146]

In analogizing a municipality to an insurance carrier, the court classified the former as a self-insurer.[147] In *Kandel,* "insured to insurer" reports were distinguished from those "resulting from the regular internal operations of an enterprise," the latter being held not to fall within the purview of CPLR 3101(d).

The underlying consideration in *Kandel,* in exempting these reports from disclosure, was that liability insurance is essentially litigation insurance. The court evidently was concerned with preventing the problem of information being withheld by the insured from his liability insurer.

Certainly, in the instant case, it appears that the reports were made in the regular course of defendant's business—by police officers to their superiors—despite the fact that defendant was also a self-insurer. Furthermore, the result which the court in *Kandel* was most interested in effectuating, *i.e.,* the disclosure of all relevant and pertinent information to the liability insurer, would, in all likelihood, occur without the aid of 3101(d)'s protection. The withholding of information by the employee is not likely to occur when weighed against the possibility of consequent termination of employment.

However, it should be noted that a report made in the regular course of business might, under certain instances, also be material prepared for litigation. This dual classification of a report, as illustrated in *Donnelly,* with its consequent legal effects in the area

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143 46 Misc. 2d 895, 261 N.Y.S.2d 192 (App. Term 2d Dep't 1965).
144 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).
145 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).
146 These two cases are analyzed in *The Biannual Survey of New York Practice,* 40 ST. JOHN'S L. REV. 122, 154 (1965).
147 A self-insurer is exactly what the name imports, *i.e.,* it bears the risk of its own possible liability, rather than contracting therefor with an insurance carrier.