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CPLR 3122: Affadavits Necessary in Opposition to a Notice to Produce to Negate Any Presumption of Possession, Custody, or Control

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of disclosure, has not been discussed by the courts. Under *Kandel*'s rationale, reports prepared *solely* "for litigation purposes" are exempt. This interpretation appears to be unjustified due to the absence of any exclusive or singular purpose in CPLR 3101(d).

Finally, there is the argument that if the county is acting in the capacity of an insurer, albeit a self-insurer, it seems only just that it receive all the privileges which are accorded to any other insurer.[148]

The foregoing demonstrates the difficulties which the courts may be faced with in applying *Finegold* and *Kandel*—difficulties which, it seems, the court in the instant case did not treat. And from an examination of both arguments, it is submitted that the case was incorrectly decided, for the considerations which led to the holdings in *Finegold* and *Kandel* were not present in the instant case.

CPLR 3122: Affidavits necessary in opposition to a notice to produce to negate any presumption of possession, custody or control.

In *Fugazy v. Time, Inc.*,[149] a libel action, defendant moved for disclosure of various items under CPLR 3120. In opposition thereto, the sole objection of plaintiff, a corporate officer, was that he did not have possession of the items in question (corporate and personal records). However, no affidavit was submitted by plaintiff in support thereof, and no objection was made with respect to the relevancy or materiality of the materials sought. The court deemed the objection invalid and allowed disclosure.

It would appear, therefore, that it is incumbent upon a party who is served with a notice to produce to negate and support by affidavit any presumption of possession, custody or control. It seems only logical to presume that a corporate officer would have one of the three, *i.e.*, possession, custody, or control (of the corporate records), and, if he is seeking to avoid the provisions of CPLR 3120, he should negate any such presumption. The burden should be upon such a party, not upon his adversary who in all likelihood has less knowledge concerning the whereabouts of the corporate records.

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[148] This position finds support in the treatise of Professor Weinstein wherein, commenting on *Donnelly*, he states: "Certainly, a self-insurer should be given no advantage over an entity that buys insurance. If the court believes that substantially the same kind of report would have been made for internal purposes of the municipality, whether or not it was self-insured, the document should be treated as an accident report and disclosure should be required." 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.50b (1965). Ironically, he was the very person who, as county attorney, successfully argued for exactly the opposite result.

[149] 24 App. Div. 2d 443, 260 N.Y.S.2d 853 (1st Dep't 1965).