St. John's Law Review

Volume 39, December 1964, Number 1 Article 47

Statement of Defendant-Driver Given to Defendant's Insurer Held Qualifiedly Privileged Against Disclosure as "Material Prepared for Litigation"

St. John's Law Review

of express statutory authorization. This holding appears to conflict with the express intent of the Revisers and the provisions of the CPLR itself which, as already mentioned, sought to have the state treated in the same way as any other litigant, absent express provisions to the contrary. Since in the court of claims disclosure is fully applicable against the state, why deny it against the state or an agency of the state in the supreme court? If it is feared that such disclosure would unreasonably burden the state, the court could require that the disclosure may be had only on order as is the practice in the court of claims. However, there is no reason in logic or fairness to limit disclosure simply because it is sought against the state or a state agency.

An avowed purpose of the CPLR was to ease crowded and congested court calendars. The liberal use of disclosure devices not only expedites trials; in many instances, such devices are decisive in effecting a settlement of litigation out of court. It is unfortunate that a barrier to this process has been erected by the instant case. A construction of the CPLR which would have allowed the disclosure against the state agency in the supreme court would have more accurately reflected the aims of the Revisers.[167]

Statement of defendant-driver given to defendant's insurer held qualifiedly privileged against disclosure as "material prepared for litigation."

Plaintiff in a personal injury action moved for discovery of a statement made prior to the commencement of the action by the defendant truck driver to the insurance carrier covering defendants. Defendants resisted disclosure on the ground that the statement was work product and further that no special circumstances had been shown. The court held that the statement constitutes material prepared for litigation and is therefore qualifiedly privileged from disclosure under CPLR 3101(d). In order to obtain its disclosure, plaintiff must show that the report (used interchangeably with "statement") could not be duplicated and that injustice or hardship would result from its nondisclosure. The fact that plaintiff was five years of age at the time of the accident and was unable to recall how it occurred was not sufficient to compel disclosure in the absence of his showing an inability to obtain the report through other methods of disclosure, such as the taking of depositions.[168]

---

[167] See CPLR 104.

[168] Maiden v. Aid Carpet Serv., Inc., 43 Misc. 2d 660, 251 N.Y.S.2d 987 (Sup. Ct. 1964).

The difficulties in this area of disclosure stem from the confusing criteria of CPLR 3101(c) and (d).[169] While CPLR 3101 (d) gives "material prepared for litigation" a qualified privilege from disclosure, CPLR 3101(c) establishes an absolute immunity from disclosure for "attorney's work product." Recent cases have presented conflicting views of the category into which accident investigation reports fall.[170] The court's decision in the instant case may be helpful to resolve the confusion. The court took the position that: "Whether an accident investigation is made before or after litigation is begun and made by an attorney or a layman, the report of the investigation is qualifiedly privileged from disclosure as material prepared for litigation, unless prepared primarily as an internal report in the regular course of the party's business." [171]

In so holding, the court appears to have carried out the intent of the Revisers. In their discussion of accident investigations, the Revisers did not classify accident reports as attorney's work product or material prepared for litigation.[172] A specific classification here was unimportant since whichever category they fell into, the Revisers intended to give such reports a qualified privilege.[173] What the Revisers did distinguish were those accident reports which were not to be privileged from disclosure at all. Where the purpose of an accident report was to permit effective managerial knowledge and control of a business, even though the reports were also designed to provide information in case of possible litigation, they are not given any protection from disclosure.[174]

---

[169] The Advisory Committee on Practice and Procedure originally proposed a rule that would have given both attorney's work product and material prepared for litigation a privilege from disclosure unless the court found that withholding such matter would result in injustice or hardship. 1957 N.Y. LEG. DOC. No. 6(b), FIRST PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE 119 [hereinafter cited as FIRST REP.]. The intent was to adopt the rule laid down by the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947). The Court there held that the work product of an attorney shall not be disclosed unless there be adequate showing of good cause. However, when the CPLR was finally adopted, 3101(d) gave to material prepared for litigation the qualified privilege intended by the Revisers while 3101(c) made the attorney's work product absolutely privileged from disclosure. Hence the exemption afforded attorney's work product goes beyond the Supreme Court's rule in *Hickman v. Taylor* and beyond the Revisers' intent as expressed in the original draft.

[170] See *A Biannual Survey of New York Practice,* 38 ST. JOHN'S L. REV. 406, 435 (1964).

[171] Maiden v. Aid Carpet Serv., Inc., *supra* note 168, at 662, 251 N.Y.S.2d at 990.

[172] FIRST REP. 120.

[173] *Ibid*; see note 169 *supra.*

[174] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.50 (1964).

As pointed out in an earlier "Biannual Survey," [175] affording reports of accident investigations a qualified privilege from disclosure makes for a just and logical rule. Most defendants who are involved in accidents are covered by an insurance carrier. Requisite to coverage is the cooperation of the insured, which usually includes the submittal of accident reports. If the insured knows that the report he files will carry a qualified immunity from disclosure, he will not be reluctant to file a true report of the accident.

Material prepared for litigation—— test report by plaintiff's expert.

CPLR 3101(d) provides: "The following shall not be obtainable by disclosure unless the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship: 1. any opinion of an expert prepared for litigation . . . ." This section adopts a modification of the rule laid down by the United States Supreme Court in *Hickman v. Taylor*.[176] That case held that memoranda and statements compiled by counsel while preparing his case are not absolutely privileged but require a showing of special circumstances before being obtainable. CPLR 3101(d)(1) grants this qualified privilege to the reports of a party's experts because experts work so closely with attorneys that their reports often reflect the attorney's detailed tactical considerations.[177] The privilege covers work done for purposes of litigation and not routine reports made in the ordinary course of a business.[178]

Renwal Prods., Inc. v. Kleen-Stik Prods., Inc.[179] was an action based on defendant's shipment to plaintiff of allegedly defective merchandise. Plaintiff sought discovery pursuant to CPLR 3120 indicating that it desired a materials consultant to perform certain tests on goods in defendant's possession. Defendant moved for a protective order under CPLR 3103 to allow the tests only on the condition that plaintiff furnish defendant a copy of the consultant's report. Plaintiff conceded defendant's right to be present while the tests were made but refused defendant's demand for a copy of the report. The court held that the expert's report constituted "material prepared for litigation" under CPLR 3101(d)(1). The report was deemed immune from discovery because the plaintiff's testing would not have changed the condition of the goods so as to prevent defendant from conducting its own tests.

---

[175] *A Biannual Survey of New York Practice, supra* note 170, at 436.
[176] 329 U.S. 495 (1947).
[177] 7B McKINNEY'S CPLR 3101, legislative studies 8.
[178] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.52 (1964).
[179] 43 Misc. 2d 644, 251 N.Y.S.2d 776 (Sup. Ct. 1964).