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Material Prepared for Litigation--Test Report by Plaintiff's Expert

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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.

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[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).

In addition, the fact that defendant was a smaller corporation than plaintiff and would have liked to avoid the expense of conducting its own tests was not considered a sufficient showing of hardship.

Where the expert's report is designed for purposes of litigation, some protection from disclosure is necessary. An examination into an adversary's case file should be permitted only on special circumstances. The qualified privilege granted by CPLR 3101(d) and applied by the court here is fair to both parties.[180] It would appear that before the court can order disclosure of the report, it must find, first, that the material is no longer duplicable, and second, that injustice or hardship will result if the report is withheld.[181] Once *both* of these conditions are met the material would be obtainable under the statute.[182]

Designation of examining physician.

CPLR 3121 provides: "After commencement of an action in which the mental or physical condition or the blood relationship of a party . . . is in controversy, any party may serve notice on another party to submit to a physical, mental or blood examination by a designated physician . . . ." This section governs medical examinations in actions in which they are relevant. In regard to medical examinations in personal injury actions, some of the departments have, additionally, their own rules which will govern to the extent that they are not inconsistent with CPLR 3121.[183]

In *Adamian v. Strandwall*,[184] a personal injury action, plaintiff moved to vacate defendant's notice designating the physician to examine plaintiff on the ground that the physician named was objectionable. The court held that under the second department rule[185] once the party to be examined objects to the physician selected by the examining party, the court must direct an examination by a physician named by it, and it is not necessary that the objecting party set forth reasons for the objection.

Under CPA § 306 the court had a statutory duty to name a disinterested physician where the parties could not agree.[186] CPLR 3121 contains no express language applicable when a physician designated by a party is objected to. In most cases the party to be examined does not object to the examining party's

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[180] See 42 Misc. 2d 770, 248 N.Y.S.2d 1000 (Sup. Ct. 1964).

[181] CPLR 3101(d); CARMODY-FORKOSCH, NEW YORK PRACTICE § 631, at 579 (8th ed. 1963).

[182] CARMODY-FORKOSCH, *op. cit. supra* note 181.

[183] See CPLR 101.

[184] 43 Misc. 2d 856, 252 N.Y.S.2d 509 (Sup. Ct. 1964).

[185] N.Y. APP. DIV. R. I., pt. 4 (2d Dep't 1964).

[186] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3121.08 (1964); see Black v. Besgier, 139 Misc. 100, 248 N.Y. Supp. 555 (Sup. Ct. 1931).