St. John's Law Review

Volume 39
Issue 2 *Volume 39, May 1965, Number 2*

Article 52

May 2013

CPLR 3117(a)(1): Prior Deposition Not Admissable to Contradict Testimony

St. John's Law Review

by an attorney may only be subject to disclosure where special circumstances exist. Since there would be no constitutional prohibition against affording an attorney's work product the *qualified,* as opposed to the absolute privilege, there should be no objection to resolving the close cases in favor of allowing the court the broadest possible discretion.

CPLR 3101(d) affords a privilege to any "material prepared for litigation" [196] thus allowing a broad spectrum for judicial interpretation. The Revisers concluded that "whether an internal business report . . . is designed for use in litigation . . . may be a close question best left to the courts." [197] It would appear appropriate for the courts to decide each issue on an *ad hoc* basis due to the infinite purposes for which such reports may be used.

An amendment to CPLR 3101 seems desirable. Elimination of the absolute privilege of 3101(c) and inclusion of the attorney's work product under the qualified privilege of 3101(d) would more accurately adhere to the *Hickman* doctrine, and correspondingly, would eliminate the problem of determining whether a particular item is an attorney's work product. The only question would then be whether the material was primarily for use in litigation, and if so, whether special circumstances existed. This would allow judicial discretion in accord with the liberal philosophy of disclosure and yet retain ample protection under CPLR 3101.[198]

CPLR 3117(a)(1): Prior deposition of party not admissible to contradict his own testimony.

CPLR 3117(a)(1) provides that "any deposition may be used by *any party* for the purpose of contradicting or impeaching the testimony of the deponent as a witness. . . ." [199] The query is

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[196] It should be noted that the word "material" contemplates not only writings, but photographs as well. This is illustrated by the recent case of Murdick v. Bush, 44 Misc. 2d 527, 254 N.Y.S.2d 54 (Sup. Ct. 1964), where the court decided that photographs of the scene of an accident taken on the day of the accident were subject to disclosure. Since the photographs merely showed the scene as it existed, they were not the product of an attorney's mind and hence, were not privileged under CPLR 3101(c). However, the photographs were "material prepared for litigation" under 3101(d). Thus, they became the proper subject for disclosure since a special circumstance was shown.

The federal courts are in accord with this position. Nickels v. United States, 25 F.R.D. 210 (N.D. Ohio 1960).

[197] FIRST REP. 120.

[198] "The court may at any time . . . make a protective order denying . . . the use of any disclosure device." CPLR 3103(a). For a recent case in accord with the position taken by *The Biannual Survey* see Montgomery Ward Co. v. City of Lockport, 44 Misc. 2d 923, 255 N.Y.S.2d 433 (Sup. Ct. 1964).

[199] This section should be read in conjunction with CPLR 4514. (Emphasis added.)

whether the term, *any party,* is broad enough to allow a defendant to use his prior deposition to contradict his present testimony, *i.e.,* can a prior deposition be used as evidence in chief.

In *Mravlja v. Hoke,*[200] the court held that it was error to permit the defendant to contradict his own testimony by his prior deposition. However, since the defendant had corrected his testimony to conform to the deposition the error was not prejudicial. Thus the term, *any party,* was held not broad enough to allow a party to contradict his own testimony by his deposition.

Under the CPA, prior contradictory statements did not constitute affirmative evidence; they were not admissible as evidence in chief.[201] The *sole ground* upon which such deposition was admissible was to impeach the testimony of the deponent. This philosophy has been incorporated into CPLR 3117(a)(1).[202] Thus a party cannot, under the CPLR, use a deposition to "impeach" himself.

CPLR 3120: Examination before trial held prerequisite to obtaining discovery.

Under CPA § 324, where discovery could only be had upon a court order,[203] it was generally held that an examination before trial was a prerequisite to discovery.[204] Then, if the inspection permitted during the examination was inadequate, discovery would be allowed.

In disallowing discovery, the court in *Ossandon v. New York City Transit Authority,*[205] cited *Battaglia v. New York City Transit Authority,*[206] a case decided under the CPA. "[I]t was not proper to direct a discovery and inspection . . . before the conclusion of the examination before trial. . . ." [207] The court thus adhered to the doctrine established under the CPA.

The CPLR has changed the law. Discovery may now be had without motion, on notice alone. CPLR 3120 requires, however, that the objects of discovery be "specified with reasonable particularity in the notice. . . ." [208]

When the party seeking discovery under CPLR 3120 has not sufficient information to particularly specify the object of dis-

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[200] 22 App. Div. 2d 848, 254 N.Y.S.2d 162 (3d Dep't 1964).

[201] Roge v. Valentine, 280 N.Y. 268, 276, 20 N.E.2d 751, 754 (1939); *cf.* Rosati v. H.W.E. Inc., 81 N.Y.S.2d at 412 (Sup. Ct. 1948).

[202] See FINAL REP. 450.

[203] See, *e.g.,* Gross v. Price, 2 App. Div. 2d 707, 153 N.Y.S.2d 424 (2d Dep't 1956).

[204] See, *e.g.,* City Messenger Serv., Inc. v. Powers Photoengraving Co., 7 App. Div. 2d 213, 181 N.Y.S.2d 888 (1st Dep't 1959).

[205] 44 Misc. 2d 256, 253 N.Y.S.2d 442 (Sup. Ct. 1964).

[206] 2 App. Div. 2d 985, 157 N.Y.S.2d 797 (2d Dep't 1956).

[207] *Id.* at 986, 157 N.Y.S.2d at 799.

[208] CPLR 3120; see SIXTH REP. 321.