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Accident Reports Are Subject to Disclosure

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discretion of the court. That discretion will be exercised when substantial prejudice to the opposing party would result from amendment.

ARTICLE 31 — DISCLOSURE

Accident reports are subject to disclosure.

Recently the courts have been faced with the problem of reconciling the provisions for exemption from disclosure found in Sections 3101(c) and 3101(d) of the CPLR. CPLR 3101(c) grants an *absolute* immunity from disclosure to the work product of an attorney, whereas 3101(d) provides only that "any writing . . . created by or for a party . . . in preparation for litigation" shall be exempt from disclosure unless a special circumstance exists.[190]

In *Calace v. Battaglia*,[191] a personal injury action, the plaintiff sought disclosure of a statement given by the defendant to his insurance company. The court, acknowledging the irreconcilable conflict in case law in this area,[192] held the statement subject to disclosure. It reasoned that since the policy is to permit maximum disclosure, "those provisions of CPLR Rule [*sic*] 3101 which spell out the exceptions should be narrowly construed to embrace only what is explicity exempted from disclosure." [193] In accordance with this liberal policy, it appears that the court did not consider the statement as either an attorney's work product or material prepared for litigation.[194]

A report to a claims agent should not be considered the work product of an attorney within the purview of 3101(c). By narrowly construing this absolute privilege the courts could, in effect, expand the range of *discretion* under 3101(d), and thus provide a more flexible standard. It would seem advisable where ambiguity exists for the courts to apply subsection (d). The Revisers state that they have adopted the rule of *Hickman v. Taylor* [195] where the Supreme Court held that statements compiled

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[190] "The following shall not be obtainable 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." CPLR 3101(d).

[191] 44 Misc. 2d 97, 252 N.Y.S.2d 973 (Sup. Ct. 1964).

[192] *Id.* at 99, 252 N.Y.S.2d at 975. See cases cited therein.

[193] *Ibid.*

[194] *Cf.* Babcock v. Jackson, 40 Misc. 2d 757, 243 N.Y.S.2d 715 (Sup. Ct. 1963), wherein the court recognized a distinction between a statement taken by a claims adjuster and one taken by an attorney. "The attorney . . . in taking a statement, is preparing his case and is working on a legal theory. Contrary to this, claims agents are making routine investigations for the company's records and are not preparing only for trial." *Id.* at 761, 243 N.Y.S.2d at 720.

[195] 329 U.S. 495 (1947).

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.)