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Discovery of Attorney's Work Product and Other Trial Preparations in New York

COMMENT

DISCOVERY OF ATTORNEY'S WORK PRODUCT AND OTHER TRIAL PREPARATIONS IN NEW YORK

The purpose of discovery is to equalize the resources available to the opposing parties in litigation. Discovery advances the function of the trial—i.e., the ascertainment of the truth—and accelerates the disposition of the suit at bar.[1] The Civil Practice Law and Rules[2] reflects the legislature's intent to broaden and liberalize disclosure proceedings and to encourage attorneys to settle their procedural disputes informally, without the aid of the courts.[3]

Section 3101 of the CPLR provides that "there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action . . . ."[4] It then sets forth the following exceptions:

1. Rios v. Donovan, 21 App. Div. 2d 409, 411, 250 N.Y.S.2d 818, 820 (1st Dep't 1964); LaFrance, Work-Product Discovery: A Critique, 68 Dick. L. Rev. 351 (1964).

2. N.Y. C.P.L.R. 3101.

3. Chester v. Zima, 41 Misc. 2d 676, 677-78, 246 N.Y.S.2d 144, 146 (Sup. Ct. 1964); Roma v. Newspaper Consol. Corp., 40 Misc. 2d 1085, 244 N.Y.S.2d 723, 724 (Sup. Ct. 1963). The court in Montgomery Ward Co. v. City of Lockport, 44 Misc. 2d 923, 924, 255 N.Y.S.2d 433, 435 (Sup. Ct. 1964), construed the legislative intent to allow "as much information material to the issues and normally in possession or under the control of one party [to] . . . be obtained by the other in the interests of truth and justice . . . ."

4. Subsection (a) of N.Y. C.P.L.R. 3101 retains the requirement of § 288 of the Civil Practice Act, that discoverable material must be "material and necessary." The courts have taken a liberal view in defining these requirements. The term "material" has been construed to mean evidence which is competent and relevent to the legal issues, Lipin v. Salkin, 11 Misc. 2d 877, 176 N.Y.S.2d 493 (Sup. Ct. 1958), or which could become relevent, Cornell v. Eaton, 286 App. Div. 1124, 146 N.Y.S.2d 449 (3d Dep't 1955) (memorandum decision). The articles sought need not be primary evidence, admissible at trial in direct proof of a fact in issue. If the information sought could be used in rebuttal or cross-examination, it is considered "material" evidence. In the Matter of Genesee Valley Union Trust Co., 21 App. Div. 2d 843, 250 N.Y.S.2d 753 (4th Dep't 1964) (memorandum decision); Padilla v. Damascus, 16 App. Div. 2d 71, 225 N.Y.S.2d 462 (1st Dep't 1962), aff'd mem., 12 N.Y.2d 1059, 190 N.E.2d 243, 239 N.Y.S.2d 883 (1963). The possibility that evidence sought to be discovered might be held immaterial at trial is not sufficient to defeat a motion for discovery. O'Grady v. Burr, 2 App. Div. 2d 712, 153 N.Y.S.2d 412 (2d Dep't 1956) (memorandum decision); Amster v. Kahn, 61 N.Y.S.2d 561 (Sup. Ct. 1946). However, where the articles sought do not relate to any issue raised by the pleadings, they are not considered material. M B Steel Corp. v. United Steel Warehouse Corp., 23 App. Div. 2d 579, 256 N.Y.S.2d 401 (2d Dep't 1965) (memorandum decision).

The term "necessary" has been liberally interpreted to encompass evidence which is needful and pertinent. Thus, the party seeking disclosure need not show that the evidence is essential or requisite to the preparation of his case. Taylor v. L. C. Smith & Corona Typewriters, Inc., 179 Misc. 290, 38 N.Y.S.2d 864 (Sup. Ct. 1942), aff'd mem., 266 App. Div. 903, 43 N.Y.S.2d 745 (4th Dep't 1943); Parsons v. Moss, 171 Misc. 828, 13 N.Y.S.2d 865 (Sup. Ct. 1939).

(b) Privileged matter. Upon objection by a party privileged matter shall not be obtainable.

(c) Attorney's work product. The work product of an attorney shall not be obtainable.

(d) Material prepared for litigation. 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:

1. any opinion of an expert prepared for litigation; and

2. any writing or anything created by or for a party or his agent in preparation for litigation.

Section 3101 is, in part, a reenactment and simplification of scattered provisions in the Civil Practice Act, and, in part, a consolidation of many of the case law restrictions which have troubled the New York courts. Subsection (b) reiterates the well-established rule that matters which would be privileged at trial cannot be discovered prior to the trial.[5] The exception of privileged matter existed

5. The privilege encompasses material which would be self-incriminating. In Bradley v. O'Hare, 2 App. Div. 2d 436, 156 N.Y.S.2d 533 (1st Dep't 1956), an action between two labor unions involving alleged misappropriation of assets, refusal to answer questions on pre-trial examination, which might have been incriminating, was held proper. The defendant in Woolson Spice Co. v. Columbia Trust Co., 193 App. Div. 346, 183 N.Y. Supp. 400 (1st Dep't 1920), was not required to answer pre-trial questions which would tend to prove him guilty of larceny. But see Levine v. Bornstein, 7 App. Div. 2d 995, 183 N.Y.S.2d 868 (2d Dep't) (memorandum decision), aff'd mem., 6 N.Y.2d 892, 190 N.Y.S.2d 702 (1959), where the defendant's motion to dismiss the complaint due to the plaintiff's refusal to answer incriminating questions in pre-trial examination was granted.

The privilege also protects material which relates to confidential communications made between spouses during marriage, Kaplan v. Sacks, 8 App. Div. 2d 731, 187 N.Y.S.2d 304 (2d Dep't 1959) (memorandum decision), between penitents and clergymen, N.Y. C.P.L.R. 4505, between patients and doctors, Hughes v. Kackas, 3 App. Div. 2d 402, 161 N.Y.S.2d 541 (3d Dep't 1957), and clients and attorneys.

The attorney-client privilege encompasses communications made to the attorney by the client in seeking legal advice for any purpose, even though there is no pending or anticipated litigation. Root v. Wright, 84 N.Y. 72 (1881). However, the privilege is allowed only where the attorney is acting in his professional capacity as an attorney. Lifschitz v. O'Brien, 143 App. Div. 180, 127 N.Y. Supp. 1091 (2d Dep't 1911). Thus, where one consults an attorney as a friend, rather than as a lawyer, the privilege may not be invoked. Haulenbeek v. McGibbon, 60 Hun. 26, 14 N.Y. Supp. 393 (Sup. Ct. 1891). However, it should be noted that the privilege is not restricted to communications with the lawyer himself. Rather, it extends to communications made to the lawyer's agent. E.g., Sibley v. Waffle, 16 N.Y. 180 (1857). Furthermore, the communication will not be privileged unless made in confidence. Although there is no requirement that an explicit request be made by the client to keep the communication confidential, the circumstances of the case must show by implication that the communication was to be confidential. In the Matter of the Estate of Decker, 149 Misc. 364, 268 N.Y. Supp. 280 (Surr. Ct. 1933). Certainly the presence of a third party, who is neither the agent of the attorney nor the client, indicates that the communication was not made in confidence. Baumann v. Steingester, 213 N.Y. 328, 107 N.E. 578 (1915). It should be noted that although the attorney and client may invoke the privilege, it belongs solely to the client and therefore may be waived only by him. See Bloodgood v. Lynch, 293 N.Y. 308, 314, 56 N.E.2d 718, 721 (1944).

under sections 349 and 351-54 of the Civil Practice Act[6] and exists under rule 26(b) of the Federal Rules of Civil Procedure.[7]

Although the privileges granted under subsections (c) and (d) had no former statutory counterparts, they were recognized under the New York[8] and federal case law.[9] The New York courts, under the Civil Practice Act, followed the rule of *Hickman v. Taylor*,[10] wherein the term "work product" was conceived, and granted an attorney's work product only a qualified privilege.[11] Prior to the enactment of the CPLR, the New York State Advisory Committee on Practice and Procedure proposed, in essence, that the legislature adopt the *Hickman* rule and thus allow discovery of an attorney's work product upon a showing of sufficient cause.[12] The legislature, however, in enacting the CPLR, granted, without explanation, absolute immunity to an attorney's work product.[13] Since the CPLR affords other trial preparations only a qualified immunity, it becomes of great practical importance to define clearly the requisites of each privilege.

I. Attorney's Work Product

As noted, the term work product had its inception in *Hickman v. Taylor*.[14] In that case, it appeared that defendant's boat had sunk and that four of the crew had drowned. The attorney for the defendant, anticipating litigation, procured statements from the survivors. When the plaintiff brought his action, he filed interrogatories demanding the statements. Defendant refused to answer them, claiming that the statements were his work product. The United States Supreme Court ruled that the statements were privileged from disclosure. The Court defined an attorney's work product as written statements, private memoranda and trial preparations which reflect the trial strategy, opinions, or

6. N.Y. Sess. Laws 1947, ch. 593; N.Y. Sess. Laws 1939, ch. 359; N.Y. Sess. Laws 1953, ch. 124; N.Y. Sess. Laws 1959, ch. 285.

7. Fed. R. Civ. P. 26(b).

8. Fromkes v. Northeastern Life Ins. Co., 13 App. Div. 2d 477, 212 N.Y.S.2d 454 (1st Dep't 1961) (memorandum decision); DiLaura v. State, 275 App. Div. 639, 93 N.Y.S.2d 107 (4th Dep't 1949) (per curiam); Surmanek v. State, 18 Misc. 2d 343, 186 N.Y.S.2d 886 (Ct. Cl. 1959); Kantor v. Nationwide Life Ins. Co., 23 Misc. 2d 988, 204 N.Y.S.2d 320 (Sup. Ct. 1960).

9. Caruso v. Moore-McCormack Lines, Inc., 196 F. Supp. 675 (E.D.N.Y. 1961); Newell v. Capital Transit Co., 7 F.R.D. 732 (D.D.C. 1948); Thomas v. Pennsylvania R.R., 7 F.R.D. 610 (E.D.N.Y. 1947).

10. 329 U.S. 495 (1947).

11. The court in Erenberg v. Brill, 10 App. Div. 2d 769, 197 N.Y.S.2d 518 (3d Dep't 1960) (memorandum decision) (dictum), stated that work product may not be discovered absent a showing of necessity or an indication that a denial would unduly prejudice the preparation of the attorney's case or cause him any hardship or injustice. The court in Roach v. City of Albany, 282 App. Div. 807, 122 N.Y.S.2d 437 (3d Dep't 1953), stated that where disclosure of work product is essential to one's case, discovery may properly be had.

12. See 1 N.Y. Adv. Comm. Rep. 119 (1957).

13. N.Y. C.P.L.R. 3101(c).

14. 329 U.S. 495 (1947). For a constructive criticism of the rationale behind Hickman, see LaFrance, supra note 1, at 363-80.

legal skill of the attorney and which have been prepared for litigation by him in his professional capacity.[15] Although *Hickman* is not binding on the New York courts, they have accepted its work product definition in determining the scope of subsection (c).[16]

A. *Work Which Reflects Legal Skill*

If the material sought to be discovered was prepared by the attorney in a non-legal capacity and could have been prepared with equal skill by a layman, the trial preparations would not be protected under subsection (c).[17] Thus, a photograph taken by an attorney, since it allegedy does not reflect his legal skill, is not considered work product.[18] However, a different conclusion is reached with respect to the statement of a witness taken by the attorney himself in preparation for litigation.[19]

The New York courts, under the CPLR, have generally restricted the *Hickman* definition to the facts of that particular case and have not expanded the privilege to encompass material prepared for the attorney by a third party under the theory that since the lawyer was not involved in the material's

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15. 329 U.S. at 509-11.

16. Reese v. Long Island R.R., 46 Misc. 2d 5, 259 N.Y.S.2d 231 (Sup. Ct. 1965), rev'd mem. on other grounds, 24 App. Div. 2d 581, 262 N.Y.S.2d 194 (2d Dep't 1965); In the Matter of the City of New York, 43 Misc. 2d 173, 250 N.Y.S.2d 664 (Sup. Ct. 1964); Babcock v. Jackson, 40 Misc. 2d 757, 243 N.Y.S.2d 715 (Sup. Ct. 1963). "[W]hat constitutes the work product of an attorney has been touched upon by New York courts and in most, if not all cases, the case of Hickman v. Taylor . . . has been the basis of the decisions." Id. at 761, 243 N.Y.S.2d at 719.

17. O'Neill v. Manhattan & Bronx Surface Transit Operating Authority, 47 Misc. 2d 765, 263 N.Y.S.2d 187 (Civ. Ct. 1965); cf. Snyder v. United States, 20 F.R.D. 7 (E.D.N.Y. 1956); Developments in the Law—Discovery, 74 Harv. L. Rev. 940, 1027 (1961).

18. In Mudge v. Thomas J. Hughes Constr. Co., 16 App. Div. 2d 106, 108, 225 N.Y.S.2d 833, 836 (1st Dep't 1962) (dictum), post accident photographs, showing scaffolding and construction conditions, were stated to be subject to pretrial discovery. Cf. Roach v. City of Albany, 282 App. Div. 807, 122 N.Y.S.2d 437 (3d Dep't 1953) (memorandum decision); De Vito v. New York Central R.R., 32 Misc. 2d 494, 146 N.Y.S.2d 545 (Sup. Ct. 1955), aff'd mem., 3 App. Div. 2d 692, 159 N.Y.S.2d 468 (4th Dep't 1957); Similarly, in Howe v. McBride, 193 Misc. 271, 84 N.Y.S.2d 283 (Sup. Ct. 1948) photographs of the accident scene were held to be discoverable on the ground that it did not constitute the work product of the attorney.

19. In Babcock v. Jackson, 40 Misc. 2d 757, 761, 243 N.Y.S.2d 715, 720 (Sup. Ct. 1963) (dictum) the court stated that a statement taken by an attorney in preparing his case should be immune from discovery and inspection.

The rationale behind the distinction is that the attorney's legal training would be required for the creation of the statement of the witness while a photograph or a statement of a witness which was merely dictated to a stenographer would not require the attorney's legal skill and therefor would not be his work product. See 3 Weinstein, Korn & Miller, N.Y. Civ. Prac. § 3101.47 (1964).

preparation, it could not reflect his legal skill.[20] It should be noted, however, that a few New York courts have, without explanation, shielded material procured by the attorney's employee or agent.[21] These decisions are questionable. While it could be argued that the attorney's legal skill and ingenuity prompted him to direct the third party to obtain the material, such reasoning would result in all of an attorney's trial preparations being considered his work product. In that the legislature distinguished between an attorney's work product and other trial preparations, it is clear that this was not its intention. To make the *Hickman* test at all reasonable in the context of absolute privilege, it would seem that the courts should restrict their consideration to the four corners of the material being sought for discovery and, from its contents alone, determine whether it reflects the attorney's legal skill.[22]

The confusion on this point in the federal courts has been far greater than in New York. In *Alltmont v. United States*[23] the court stated that there is "no logical basis for making any distinction between statements of witnesses secured by a party's trial counsel personally . . . and those obtained by others for the use of the party's trial counsel. In each case the statements are obtained in preparation for litigation and ultimately find their way into trial counsel's files . . . ."[24]

But, the *Alltmont* decision has not been universally followed. In *United States*

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20. In Reese v. Long Island R.R., 46 Misc. 2d 5, 6, 259 N.Y.S.2d 231, 232 (Sup. Ct.), rev'd mem. on other grounds, 24 App. Div. 2d 581, 262 N.Y.S.2d 194 (2d Dep't 1965), the court stated that the protection afforded to an attorney's work product should be limited to material actually prepared by an attorney, acting as an attorney, representing the litigant. Similarly, the court in In the Matter of the City of New York, 43 Misc. 2d 173, 250 N.Y.S.2d 664 (Sup. Ct. 1964) noted that the work product privilege should permit avoidance of disclosure of material which is prepared by an attorney and contains his notes, analysis and trial strategy. In Parker v. New York Telephone Co., 47 Misc. 2d 342, 262 N.Y.S.2d 700 (Sup. Ct.) aff'd mem., 24 App. Div. 2d 1067, 265 N.Y.S.2d 740 (3d Dep't 1965) statements of witnesses taken by an agent of the attorney were not considered work product.

21. In Montgomery Ward Co. v. City of Lockport, 44 Misc. 2d 923, 255 N.Y.S.2d 433 (Sup. Ct. 1964), the court impliedly extended the privilege to material obtained by third parties under the direction of the attorney. "All that is sought here is the report of the investigator, working on his own, and not as an agent or employee of the attorney, as to what he discoverd while making that investigation." Id. at 925, 255 N.Y.S.2d at 436. In Babcock v. Jackson, 40 Misc. 2d 757, 761, 243 N.Y.S.2d 715, 720 (Sup. Ct. 1963), the court included, as work product, material obtained by the agents of an attorney. However, the court expressly distinguished the work of an agent from that of an independent insurance adjuster working on behalf of the insurance company, the latter not being work product of the attorney.

22. See text accompanying notes 59-61 infra, where it is argued that the New York Legislature should abrogate the work product concept thereby rendering it unnecessary to make an artificial distinction between legal skill reflected in the material itself and that reflected in the procurement of the material.

23. 177 F.2d 971 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950).

24. Id. at 976.

v. Kelsey-Hayes Wheel Co.,[25] the court held that statements obtained by claims agents and investigators for use by the attorney were not shielded by the work product privilege, while in *Snyder v. United States*[26] an opposite conclusion was reached with respect to statements obtained by Air Force investigators in anticipation of litigation arising from an airplane crash.

B. *Prepared for Litigation*

The work of the attorney must be prepared in anticipation of litigation before he may invoke the work product privilege.[27] Although the privilege allows materials to be acquired prior to the commencement of the action, it does not, of course, encompass materials secured before the actual accrual of the cause of action,[28] nor does it extend to materials that were prepared for previous or separate litigations.[29]

C. *Acting in His Professional Capacity*

The immunity attaches only if the material was secured by the attorney acting in his professional legal capacity.[30] Thus, if an attorney is acting in the

25. 15 F.R.D. 461 (E.D. Mich. 1954). Similarly, in United States v. Certain Parcels of Land, 15 F.R.D. 224 (S.D. Cal. 1953), the court held that material prepared by third parties should not be afforded protection even if it were prepared under the supervision or direction of the attorney.

26. 20 F.R.D. 7 (E.D.N.Y. 1956). In Hanke v. Milwaukee Elec. Ry. & Transp. Co., 7 F.R.D. 540 (E.D. Wis. 1947), the court held that preparation by third parties under the direction of counsel would be afforded protection. Accord, Scourtes v. Fred W. Albrecht Grocery Co., 15 F.R.D. 55 (N.D. Ohio 1953). There the court emphasized, however, that the agent must be acting under the direction of the attorney.

27. Montgomery Ward Co. v. City of Lockport, 44 Misc. 2d 923, 255 N.Y.S.2d 433 (Sup. Ct. 1964); Myles E. Rieser Co. v. Loew's Inc., 194 Misc. 119, 81 N.Y.S.2d 861 (Sup. Ct. 1948). In Surmanek v. State, 18 Misc. 2d 343, 186 N.Y.S.2d 886 (Ct. Cl. 1959), where a swimmer struck an underwater obstacle, the court held the swimmer was not entitled to discovery of a survey map which was prepared solely in anticipation of litigation. See Comment, Disclosure—Attorney's Work Product and Material Prepared for Litigation—Confusion Compounded, 10 N.Y.L.F. 574, 580 (1963).

28. McManus v. Harkness, 11 F.R.D. 402 (S.D.N.Y. 1951). See 3 Weinstein, Korn & Miller, op. cit. supra note 19, § 3101.49.

29. The court in Park & Tilford Distillers Corp. v. United States, 20 F.R.D. 404 (S.D.N.Y. 1957) allowed discovery of materials prepared by an agency for general purposes of litigation, rather than for one specific action. In Hanover Shoe, Inc. v. United Shoe Mach. Corp., 207 F. Supp. 407 (M.D. Pa. 1962), materials prepared by an attorney for a prior separate action were not considered shielded by the work product privilege. In the Matter of the City of New York, 43 Misc. 2d 173, 250 N.Y.S.2d 664 (Sup. Ct. 1964) was a case where a city seeking to condemn property was ordered to disclose appraisals to the real estate owners since there had been no indication that the appraisals had been prepared primarily for the litigation at bar.

30. Montgomery Ward Co. v. City of Lockport, 44 Misc. 2d 923, 255 N.Y.S.2d 433 (Sup. Ct. 1964); Babcock v. Jackson, 40 Misc. 2d 757, 762, 243 N.Y.S.2d 715, 720 (Sup. Ct. 1963). "The protection afforded by CPLR 3101(c) does not extend to material prepared by an attorney unless it involves his work as a lawyer." O'Neill v. Manhattan & Bronx Surface Transit Operating Authority, 47 Misc. 2d 765, 767, 263 N.Y.S.2d 187, 189 (Civ. Ct. 1965).

capacity of a special investigator or a claims agent, he does not have an absolute privilege under subsection (c).[31] In *Newell v. Capital Transit Co.*,[32] an attorney, as head of a claims department, obtained statements from witnesses. The court held that the attorney could not invoke the work product privilege since the statements were obtained as a function of non-legal employment, rather than in the course of professional legal duties.[33]

II. Material Prepared for Litigation

Even though an attorney is precluded from invoking the work product privilege because he is unable to satisfy its several requisites, his material is nevertheless qualifiedly privileged from disclosure under subsection (d) upon a showing that it was obtained in preparation for litigation.[34] Subsection (d) expressly encompasses material procured by third parties without the supervision or direction of the attorney.

A. *Created by or for a Party in Preparation for Litigation*

Where material is procured for a purpose other than litigation or obtained merely in the regular course of business, it is not privileged from disclosure.[35] Thus, reports of accidents made by employees to their employers in the regular course of business are not protected by subsection (d), even though the reports are later turned over to an attorney for litigation purposes.[36]

In New York there was a certain degree of confusion with respect to accident reports made by an insured to his own insurance carrier.[37] However, the

31. Virginia Metal Prods. Corp. v. Hartford Acc. & Indem. Co., 10 F.R.D. 374 (S.D.N.Y. 1950); Babcock v. Jackson, 40 Misc. 2d 757, 762, 243 N.Y.S.2d 715, 720 (Sup. Ct. 1963); In Myles E. Rieser Co. v. Loew's Inc., 194 Misc. 119, 81 N.Y.S.2d 861 (Sup. Ct. 1948), information which was acquired by an attorney while acting in a negotiating capacity was held not to be privileged.

32. 7 F.R.D. 732 (D.D.C. 1948).

33. Id. at 734.

34. N.Y. C.P.L.R. 3101(d).

35. In William L. Mantha Co. v. DeGraff, 266 N.Y. 581, 195 N.E. 209 (1935) (memorandum decision), account books were held to be prepared in the regular course of business and therefore not privileged. See Bloom v. New York City Transit Authority, 20 App. Div. 2d 687, 246 N.Y.S.2d 414 (1st Dep't 1964) (memorandum decision) (accident reports); Stewart v. Roosevelt Hospital, 22 App. Div. 2d 648, 252 N.Y.S.2d 968 (1st Dep't 1964) (ambulance records); In the Matter of the Estate of Phillips, 10 Misc. 2d 714, 173 N.Y.S.2d 632 (Surr. Ct. 1958) (ledger entries).

36. The first department has allowed such reports to be discovered. E.g., Stewart v. Roosevelt Hosp., 22 App. Div. 2d 648, 252 N.Y.S.2d 968 (1st Dep't 1964). This is not the case in the second department. In Lonigro v. Baltimore & O. R.R., 22 App. Div. 2d 918, 919, 255 N.Y.S.2d 737, 740-41 (2d Dep't 1964), reports made to an employer by an employee were held privileged, following that department's tendency to treat such reports as made in anticipation of litigation rather than in the normal course of employment.

37. See Rios v. Donovan, 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964); Speight v. Allen, 44 Misc. 2d 1072, 255 N.Y.S.2d 918 (Sup. Ct. 1965); Calace v. Battaglia, 44 Misc. 2d 97, 252 N.Y.S.2d 973 (Sup. Ct. 1964). In the latter case, the court, in permitting

confusion appears to have been settled by two recent cases, *Finegold v. Lewis*[38] and *Kandel v. Tocher*,[39] holding that insurance reports and other material given to the insurance carrier by the insured were matter prepared for litigation. The *Kandel* court's rationale was that automobile insurance is nothing more than litigation insurance and thus reports obtained by the insurer were in anticipation of litigation.[40] The court made a noteworthy distinction by pointing out that "automobile liability insurance is not to be confused with the investigation, reports, and statements resulting from the regular internal operation of an enterprise [where] . . . the purpose is not limited to . . . preparing for a litigation risk. . . . In that situation the preclusive provisions of the disclosure statutes do not apply."[41]

These courts noted that the fact that the reports were obtained prior to the commencement of the action was immaterial.[42] However, the federal district courts have reached a contrary conclusion,[43] finding as a rule that insurance

discovery of insurance reports, reasoned that where there is any doubt in determining whether material is protected under subsection (d), it should be resolved in favor of disclosure to be consistent with the general policy of maximum discovery. Accord, Doughty v. Greenberg, 43 Misc. 2d 267, 250 N.Y.S.2d 681 (Sup. Ct. 1964).

38. 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).

39. 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965). In Gugluizza v. Gugluizza, 45 Misc. 2d 868, 257 N.Y.S.2d 693 (Sup. Ct. 1965), the court, sitting within the fourth department, based its holding on Kandel v. Tocher, 22 App. Div. 2d 513, 515, 256 N.Y.S.2d 898, 900 (1st Dep't 1965), and Finegold v. Lewis, 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965), since there had been no definitive holding on this point in the fourth department. For a complete discussion of the effect of Kandel and Finegold on the prior New York law with respect to insurance reports, see the Biannual Survey of New York Practice: Part V, 40 St. John's L. Rev. 125, 154-59 (1965).

40. Id. at 515-16, 256 N.Y.S.2d at 900. In Raylite Elec. Corp. v. New York Fire Ins. Co., 46 Misc. 2d 361, 259 N.Y.S.2d 641 (Sup. Ct. 1965), disclosure was sought of reports made to a fire insurance carrier by a fire adjuster. The court, in allowing disclosure, distinguished Kandel on the ground that fire insurance, unlike automobile insurance, is not litigation insurance. It appears, therefore, that the non-liability insurer must prove that such reports were prepared for litigation, rather than in the course of insurance business, in order to be shielded by subsection (d), while the liability insurer enjoys a presumption that they were so prepared. Biannual Survey of New York Practice: Part V, supra note 39 at 159.

41. Id. at 515-16, 256 N.Y.S.2d at 900.

42. In Finegold v. Lewis, 22 App. Div. 2d 447, 448, 256 N.Y.S.2d 358, 359 (2d Dep't 1965), the court stated that "the relative dates of the delivery of the statement and of the commencement of the action are immaterial." Accord, Kandel v. Tocher, 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965); Zavaglia v. Englert, 23 App. Div. 2d 790, 258 N.Y.S.2d 720 (2d Dep't 1965); Schulgasser v. Young, 25 Misc. 2d 788, 206 N.Y.S.2d 81 (Sup. Ct. 1960). An insured's statement to an insurer was held to be protected even though the insurer had not retained counsel. Hollien v. Kaye, 194 Misc. 821, 87 N.Y.S.2d 782 (Sup. Ct. 1949). The court reasoned that the insurer was under a contractual duty to defend the insured in anticipation of litigation.

43. Burke v. United States, 32 F.R.D. 213 (E.D.N.Y. 1963); Colpak v. Hetterick, 40 F. Supp. 350 (E.D.N.Y. 1941); Price v. Levitt, 29 F. Supp. 164 (E.D.N.Y. 1939); Bough v. Lee, 28 F. Supp. 673 (S.D.N.Y. 1939). See Comment, Disclosure—Attorney's Work Product and Material Prepared for Litigation—Confusion Compounded, 10 N.Y.L.F. 574, 588 (1964).

reports obtained prior to the commencement of the law suit are obtained in the routine course of insurance business and hence are not privileged.

B. *Opinion of an Expert*

Subsection (d) extends the privilege to the work of experts prepared in anticipation of litigation. If, however, the court finds that the opinion of the expert was prepared in the normal course of a business, it is not protected.[44]

In determining, as subsection (d) requires, whether undue hardship would result in the absence of disclosure, the courts seem reluctant to grant disclosure of an expert's opinions where the mere disclosure of his factual findings would be sufficient. Thus, where certain articles could no longer be examined, the court allowed discovery of the notes of the expert, but not of his opinions or conclusions.[45]

C. *Impossibility of Duplication and Undue Hardship*

The privilege is lost upon a showing of both the unavailability of the material sought and undue hardship.[46] Where the information sought is exclusively in the possession and control of the other party, the requirement of impossibility of duplication is met.[47] It is also satisfied when the party seeking disclosure can show that the resources required for duplication are destroyed or unavailable.[48] However, the fact that the party seeking disclosure will be put to an expense in obtaining a duplication is not sufficient to waive the requirement.[49] Nor will the court necessarily order disclosure where the unavailable information previously could have been obtained, but the party seeking disclosure failed to do so.[50]

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44. Fibron Prods., Inc. v. Hooker Chem. Corp., 26 Misc. 2d 779, 206 N.Y.S.2d 659 (Sup. Ct. 1960). See Reese v. Long Island R.R., 46 Misc. 2d 5, 259 N.Y.S.2d 231 (Sup. Ct.) rev'd mem. on other grounds, 24 App. Div. 2d 581, 262 N.Y.S.2d 194 (2d Dep't 1965); Baczmaga v. Reynolds, 44 Misc. 2d 997, 255 N.Y.S.2d 582 (Sup. Ct. 1965).

45. Pfaudler Permutit, Inc. v. Stanley Steel Service Corp., 28 Misc. 2d 388, 212 N.Y.S.2d 106 (Sup. Ct. 1961); Colden v. R. J. Schofield Motors, 14 F.R.D. 521 (N.D. Ohio 1952).

46. N.Y. C.P.L.R. 3101(d).

47. Roma v. Newspaper Consol. Corp., 40 Misc. 2d 1085, 244 N.Y.S.2d 723 (Sup. Ct. 1963); Caswell v. United Air Lines, 191 Misc. 941, 78 N.Y.S.2d 387 (Sup. Ct. 1948).

48. In Sherman v. M. Lowenstein & Sons, Inc., 42 Misc. 2d 770, 248 N.Y.S.2d 1000 (Sup. Ct. 1964), the court ordered disclosure of test reports where the article tested was no longer available. Accord, Lachowitz v. Child's Hospital, 32 Misc. 2d 386, 225 N.Y.S.2d 123 (Sup. Ct. 1961); Babcock v. Jackson, 40 Misc. 2d 757, 243 N.Y.S.2d 715 (Sup. Ct. 1963); Pfaudler Permutit, Inc. v. Stanley Steel Serv. Corp., 28 Misc. 2d 388, 212 N.Y.S.2d 106 (Sup. Ct. 1961); Petruk v. South Ferry Realty Co., 2 App. Div. 2d 533, 157 N.Y.S.2d 249 (2d Dep't 1956).

49. In Renwal Prods., Inc. v. Kleen-Stik Prods., Inc., 43 Misc. 2d 644, 251 N.Y.S.2d 776 (Sup. Ct. 1964), the fact that plaintiff was a small company and wished to avoid the expense of making its own test was held not to be sufficient to waive the requirement.

50. Fibron Prods., Inc. v. Hooker Chem. Corp., 26 Misc. 2d 779, 206 N.Y.S.2d 659 (Sup. Ct. 1960). But see Kaye v. Penguin Cab Corp., 40 Misc. 2d 476, 243 N.Y.S.2d 380 (Sup. Ct. 1963), where the court stated it would be unreasonable to deny disclosure of a deceased's statement on the ground that the party seeking disclosure could have procured the statement prior to the witnesses' death.

In exercising its discretion, the courts consider, of course, the particular circumstances of the case at bar in determining whether undue hardship would ensue from non-disclosure.[51] Certainly if the material is necessary and essential to the party seeking disclosure for the preparation of his case, discovery should be allowed. Thus, the courts usually require disclosure of names of witnesses who have relevant information, since this is considered information crucial to the adversary's case.[52]

III. A Critique

A. *Absolute or Qualified Privilege*

As previously noted, the New York courts, under the CPLR, have accepted the *Hickman* concept of work product in defining that term as it is found in subsection (c).[53] However, it must be realized that *Hickman* granted only a qualified privilege to an attorney's work product, allowing it to be discovered upon a showing of sufficient cause. The Court expressly stated that if work product were absolutely privileged from disclosure "the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning."[54] Thus, it is doubtful that the *Hickman* Court would have defined an attorney's work product in such broad and nebulous terms if the privilege afforded it were to be absolute.

Under the CPLR, if an attorney takes the statement of a witness to an accident, it is considered his work product and absolutely shielded from discovery even though the witness is now unavailable and his statement is essential to the other party's claim or defense. Such absolute protection is unwarranted,[55] tends to create unjust results, and thwarts the underlying CPLR policy of maximum disclosure.[56] Apparently recognizing this anomalous situation, the New York Judicial Conference has recently recommended that subsection (c) be repealed and that subsection (d) be amended to expressly include an attorney's

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51. Roebling v. Anderson, 257 F.2d 615, 620 (D.C. Cir. 1958), cert denied, 366 U.S. 918 (1961); Kaye v. Penguin Cab Co., 40 Misc. 2d 476, 243 N.Y.S.2d 380 (Sup. Ct. 1963); Howe v. McBride, 193 Misc. 271, 84 N.Y.S.2d 283 (Sup. Ct. 1948).

52. Taylor v. Atchison, T. & S.F. Ry., 33 F.R.D. 283 (W.D. Mo. 1962); Kaye v. Penguin Cab Corp., 40 Misc. 2d 476, 243 N.Y.S.2d 380 (Sup. Ct. 1963).

53. Cases cited note 16 supra.

54. 329 U.S. at 512.

55. Admittedly, there are some trial preparations, such as an attorney's trial strategy or legal research, which an adversary should not be permitted to discover. However, even if work product were given only a qualified privilege, such material would be amply protected since the party seeking disclosure would as a practical matter be unable to show sufficient cause for its disclosure. See LaFrance, Work Product Discovery: A Critique, 68 Dick. L. Rev. 351, 369 (1964) where he states that there has been no demand for such materials in any reported case.

56. See Montgomery Ward Co. v. City of Lockport, 44 Misc. 2d 923, 924, 255 N.Y.S.2d 433, 435 (Sup. Ct. 1964); Calace v. Battaglia, 44 Misc. 2d 97, 99, 252 N.Y.S.2d 973, 975 (Sup. Ct. 1964).

work product, thereby making all trial preparations only qualifiedly immune.[57] The legislature has not approved this proposal.[58]

B. *Abrogation of the Work Product Concept*

While the legislature would be well advised to accept the Conference's recommendation that subsection (c) be repealed, the recommendation that subsection (d) be amended to include an attorney's work product is of questionable merit.

Although the *Hickman* doctrine of work product appears justified in theory, its application tends to create artificial and unclear standards and restrictions.[59] If, for example, an attorney photographs an accident scene, it is not his work product,[60] but if he diagrams the same scene, it is.[61] In the latter case, the attorney theoretically exercised his legal skill. But could it not be said that all trial preparations of an attorney reflect his legal skill either in the actual content of the material, or in knowing when and what to prepare for litigation? It seems incongruous that legal skill is protected in the former situation and not the latter, since disclosure in either situation could be equally prejudicial to the attorney.

If the term "work product" is inserted in subsection (d), there is still the danger that the courts will continue to distinguish between work product and other trial preparations. *Hickman*, which granted only a qualified privilege to work product and non-work product alike, nevertheless distinguished between them and required that something more than ordinary good cause, which was sufficient for discovery of non-work product, be established by the moving party in order to discover work product. The New York courts, prior to the CPLR, distinguished between work product and other trial preparations even though both classifications were only qualifiedly privileged from disclosure. Although the Conference's proposal would allow both work product and material prepared for litigation to be discovered upon a showing of impossibility of duplication and undue hardship, it is conceivable that the courts would define undue hardship in a stricter sense upon finding that the material sought was encompassed by the *Hickman* concept of work product.

IV. Conclusion

If the artificial standards resulting from the work product rule require its rejection, new limitations must be established to safeguard the attorney.

57. See Ass. Intro. No. 3088, Pr. No. 3163, N.Y. State Leg. 189th Sess. (1966).

58. Although the bill was passed in the Assembly, it was never reported out of the Senate Code Committee.

59. See generally Biannual Survey of New York Practice: Part V, supra note 39; Comment, Attorney's Work Product Rule—An Area of Confusion, 31 Fordham L. Rev. 530 (1963).

60. Cases cited note 18 supra.

61. Surmanek v. State, 18 Misc. 2d 343, 186 N.Y.S.2d 886 (Ct. Cl. 1959), where plaintiff was not entitled to discovery of a diagram which had been prepared solely for defense purposes. See text accompanying notes 17-19 supra.

Obviously, the disclosure of some trial preparations would be more prejudicial to the disclosing attorney than others. The disclosure of a witness's statement, for example, would prejudice the disclosing attorney's case to a greater extent than the mere disclosure of a witness' name. There is no reason why the courts should not distinguish among materials sought to be discovered on the ground of undue prejudice.

This can be accomplished by amending subsection (d) to expressly provide, in addition to the present requirement of a showing of impossibility of duplication by the moving party, that the court, before ordering disclosure, balance the undue prejudice that would result to the disclosing party with the potential undue hardship to the movant if discovery were denied. Under such a test, the ultimate intent of *Hickman* in formulating the work product concept, which was to protect the disclosing attorney from undue prejudice, would be fulfilled without forcing inequitable and inflexible distinctions between work product and other trial preparations.