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WORK PRODUCT EXCEPTION TO DISCOVERY —THE NEW YORK EXPERIENCE

Glenn E. Coven, Jr.†

The various discovery devices of modern civil procedure are the keystone of the liberalized forms of pleading and practice. The adoption of notice pleading has required the development of a new method for giving one's adversary sufficient information to permit him to prepare his defense. Also, the "sporting" theory of justice has been displaced by the belief that justice is served by revealing information and thereby minimizing surprise at trial. Thus, the decision to open pre-trial channels of communication between parties not only resulted from the need to supplement notice pleading, but also countenanced a basic improvement in our judicial system.

Nevertheless, the pretrial transmission of information among litigants is not the only element in our system that promotes justice. At some point the policies embodied in discovery must give way to the competing policies that underlie other institutions, such as those underlying our adversarial system. The adversarial process begins before trial, since the parties must prepare their own cases and conduct their own investigations. Only through the independent efforts of adversaries can the evidence be sifted properly and the legal theories analyzed adequately. These goals necessarily conflict with those of discovery procedures, since the latter aim to reveal to each party the product of the other's pretrial preparation. The conflict is especially salient where one party seeks to use discovery procedures to avail himself of what may constitute the opposing attorney's work product.

In the few years since New York enacted its work product rule,¹ a surprisingly large body of interpretive law has developed. Partly because of this sudden surge of litigation, the New York courts have frequently turned to arbitrary classifications and ritualistic slogans to resolve their cases. As a result, the policies underlying the rule are in danger of lapsing into obscurity, and the principles that should guide application of the rule are in need of reformulation.

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¹ N.Y. CIV. PRAC. LAW §§ 3101(c)-(d) (McKinney 1963) [hereinafter cited as CPLR] provide that "[t]he work product of an attorney" cannot be discovered and that certain "[m]aterial prepared for litigation" is discoverable only if "injustice or undue hardship" would otherwise result. See pp. 100-101 *infra*.

I

ANTECEDENTS OF THE NEW YORK STATUTE

In *Hickman v. Taylor*,² decided in 1947, the Supreme Court dealt with the conflicting policies underlying liberal discovery and the adversarial system. Though the Court intended to establish a widely applicable rule,³ the facts of the case were actually quite narrow. An attorney retained specifically for litigation had elicited statements from witnesses; the Court held that the statements were not subject to discovery absent a showing of necessity.⁴

The Court reasoned that “the public policy underlying the orderly prosecution and defense of legal claims” made it “essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.”⁵ A lack of such privacy would promote “[i]nefficiency, unfairness and sharp practices.”⁶ The legal profession would become demoralized, and consequently “the cause of justice would be poorly served.”⁷ The Court enumerated “interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs” as some of the materials that would be covered by the work product rule.⁸ In sum, the rule is meant to protect the attorney whenever he is involved in the adversarial process.

The Court in *Hickman* feared two undesirable results of discovery. First, the professional independence of the attorney who moves for discovery is endangered by the possibility of a “free ride” at the expense of opposing counsel. Liberal discovery might corrode an attorney’s motive to investigate the relevant evidence or develop legal theories independently. Since he may, therefore, exert less than his maximum effort, his client, and ultimately the cause of justice, will suffer.

Second, discovery may interfere with the work of the attorney from whom it is sought. Were discovery unrestricted, the attorney would have to conduct his affairs guardedly in order to minimize the potential advantage that might be gained by opposing counsel. Thus, for example, interoffice memoranda would have to be destroyed for

² 329 U.S. 495 (1947).

³ See *id.* at 510-14.

⁴ *Id.* at 512.

⁵ *Id.* at 510-11.

⁶ *Id.* at 511.

⁷ *Id.*

⁸ *Id.*

fear that opposing counsel might obtain access to the office files. Such disruption would disserve clients and impede justice.

The rule of *Hickman v. Taylor* was meant to avert the disastrous consequences of unrestricted discovery. But because of the relatively simple fact pattern of the case, questions were left unanswered concerning the full scope of work product protection. For example, should similar protection be afforded a private investigator who assists an attorney preparing for litigation? If so, must the investigation proceed under the direction of the attorney? How long before the trial can activity occur and still be protected? Should protection ever be extended to activities not oriented toward litigation?

In the surprisingly few cases decided since *Hickman*, the various circuit courts have tended to uphold the values behind full discovery and to restrict the scope of the work product rule.⁹ The leading decision to the contrary, *Allmont v. United States*,¹⁰ may have turned on the involvement of the Federal Bureau of Investigation.¹¹ Although some conflict concerning the extent of work product protection has evolved among the circuits,¹² the Supreme Court has not decided a work product case since *Hickman*.

II

THE NEW YORK RULE

Most states have adopted work product rules, either by statute or through case development.¹³ The origin, purpose, and judicial treatment of the rules vary so considerably that the only safe generalization is that state courts tend to restrict discovery more than do the federal courts.¹⁴ The New York rule, ultimately enacted as Section 3101 of the Civil Practice Law and Rules,¹⁵ provides in pertinent part:

⁹ *E.g.*, *Goosman v. A. Duie Pyle, Inc.*, 320 F.2d 45 (4th Cir. 1963); *Atlantic Greyhound Corp. v. Lauritzen*, 182 F.2d 540 (6th Cir. 1950).

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

¹¹ For no sound reason, courts have been reluctant to order discovery against federal investigative agents. *See Snyder v. United States*, 20 F.R.D. 7 (E.D.N.Y. 1956).

¹² *Compare* *Southern Ry. v. Campbell*, 309 F.2d 569 (5th Cir. 1962), *with Hauger v. Chicago, R.I. & P.R.R.*, 216 F.2d 501 (7th Cir. 1954). *See generally* 4 J. MOORE, *FEDERAL PRACTICE*, ¶ 26.23 (2d ed. 1966). For an excellent summary of the conflicting federal decisions, see *American Express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F.2d 277, 285 (2d Cir. 1967) (Lumbard, C.J., dissenting).

¹³ *See* Comment, *The Work Product Doctrine in the State Courts*, 62 MICH. L. REV. 1199 (1964).

¹⁴ *Compare* *Wise v. Western Union Tel. Co.*, 36 Del. 453, 178 A. 640 (1935), *with Dean v. Superior Court*, 84 Ariz. 104, 324 P.2d 764 (1958). *See* IOWA R. CIV. P. 141(a); ME. R. CIV. P. 26(b); MD. R. CIV. P. 410, § d; N.J.R. CIV. P. 4:16-2. For rules which make the prohibition absolute and not voidable on a showing of necessity, see, *e.g.*, MO. R. CIV. P. 57.01(b); PA. R. CIV. P. 4011(d).

¹⁵ CPLR § 3101.

(a) Generally. There shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof

. . . .

(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.

The legislative history of the section is helpful in determining precisely what items the legislature intended to protect. Originally, the Advisory Committee on Practice and Procedure, the draftsmen of the CPLR, had intended the New York rule to parallel the federal case law. Their report stated: "The rule laid down . . . in *Hickman v. Taylor* . . . has been adopted."¹⁶ Recognizing the lack of uniformity among the circuits, the committee recommended that developments in the Second Circuit be followed.¹⁷ The district courts in the Second Circuit, which are among the most liberal in ordering discovery, seldom uphold work product claims.¹⁸ Thus, the committee must have intended only a narrow restriction on discovery. Presumably, they had concluded that *Hickman* and subsequent federal cases had achieved a workable balance of interests.

The rule proposed by the Advisory Committee in 1961, however, differed from that finally enacted by the legislature. The proposal provided in part:

(c) Attorney's work product; material prepared for litigation. The following shall not be obtainable unless the court finds that withholding it will result in injustice or undue hardship:

¹⁶ N.Y. TEMPORARY COMM'N ON THE COURTS, FIRST PRELIMINARY REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE, 1957 N.Y. Leg. Doc. No. 6(b), at 120.

¹⁷ *Id.*

¹⁸ For example, one court, refusing to extend work product protection to accident reports prepared by postal employees, reasoned that there was no showing that legal knowledge was used in creating the report and held that the mere prospect of litigation was insufficient to bring the reports within the ambit of protection. *Burke v. United States*, 32 F.R.D. 213 (E.D.N.Y. 1963). See also *Brown v. New York, N.H. & H.R.R.*, 17 F.R.D. 324 (E.D.N.Y. 1955); *Szymanski v. New York, N.H. & H.R.R.*, 14 F.R.D. 82 (S.D.N.Y. 1952). Another court permitted discovery of narrative statements written by the defendants to the attorney setting forth certain facts in the case. *Lundberg v. Welles*, 11 F.R.D. 136 (S.D.N.Y. 1951).

1. the work product of an attorney;
2. any opinion of an expert prepared for litigation; and
3. any writing or any thing created by or for a party or his agent in preparation for litigation.¹⁹

The legislature, however, partially rejected the recommendation and abandoned the notion that the broad range of material protected from full discovery can be treated uniformly. The more complex rule that was adopted shifted the emphasis somewhat in favor of protecting the lawyer and restricting discovery.

The final version first appeared in the Fifth Report,²⁰ published only a few weeks after the Final Report of the Advisory Committee and actually constituting the first report prepared by a legislative committee. Unfortunately, the revision contained no explanation of either the reason for the change or its intended effect. There is nothing to suggest, however, that the legislature intended to increase the classes of materials protected. Rather, the change merely singled out for further insulation a class of materials already partially protected—"work product." Thus, the New York rule was meant to be no broader than that applied in the district courts of the Second Circuit.

III

JUDICIAL CONSTRUCTION OF "MATERIAL PREPARED FOR LITIGATION"

Subsection (c), the work product rule, covers only a narrow range of items closely associated with the thought processes of an attorney, and has been of little significance in the courts.²¹ When protection is

¹⁹ N.Y. FINAL REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE A-432 (Advance Draft, Edward Thompson Co. 1961).

²⁰ N.Y. SENATE FINANCE COMM. & ASSEMBLY WAYS AND MEANS COMM., FIFTH PRELIMINARY REPORT ON REVISION OF THE CIVIL PRACTICE ACT, 1961 N.Y. Leg. Doc. No. 15, at 443-44.

²¹ The absolute immunity accorded an attorney's work product is a substantial departure from the general policy favoring disclosure. Because the harsh result of applying subsection (c) can rarely, if ever, be justified, the provision should be construed as narrowly as is consistent with protecting the adversarial system in the most restricted sense of that term. Limiting this subsection to materials containing an attorney's "analysis and trial strategy" seems most appropriate, and the legislature probably intended no more. *See* 3 J. WEINSTEIN, H. KORN, & A. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 3101.44 (Supp. 1966). Happily, the courts have so construed this provision. *See, e.g., O'Neill v. Manhattan & Bronx Surface Transit Operating Auth.*, 47 Misc. 2d 765, 263 N.Y.S.2d 187 (Civ. Ct. 1965), *rev'd on other grounds*, 27 App. Div. 2d 185, 277 N.Y.S.2d 771 (1st Dep't 1967); *Wickham v. Socony Mobil Oil Co.*, 45 Misc. 2d 311, 256 N.Y.S.2d 342 (Sup. Ct. 1965); *Babcock v. Jackson*, 40 Misc. 2d 757, 243 N.Y.S.2d 715 (Sup. Ct. 1963). The single suggestion that subsection (c) might be read expansively, a dictum in *Kandel v. Tocher*, 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965), is out of line with the decided cases.

sought for the more unusual items, subsection (d) is the applicable provision. Thus, an examination of the scope of the New York rule must concentrate on the judicial treatment accorded subsection (d).

The subsection conditionally exempts from discovery two classes of material: the opinion of an expert prepared for litigation, and "any writing or anything created by or for a party or his agent in preparation for litigation." The provision concerning the opinion of an expert has assumed no importance in the case law and will not be considered further. The second exclusion, however, is probably the most litigated provision in the CPLR, because it is potentially applicable in almost every tort litigation involving either a self-insurer or an insurance company. Most of the cases decided under subsection (d) have concerned either accident reports given by an employee to his employer, or reports given by an insured to his insurance company.

A. *Accident Reports*

Cases involving accident reports deal principally with the question whether a document prepared for many purposes may be protected under subsection (d). The answer in each case depends partly on the interpretation given the expression "preparation for litigation" and partly on the applicable rules of evidence.

1. *Regular Course of Business*

Most corporations and individuals create and retain myriad records, which constitute potential evidence in any future litigation. A vendor, for example, retains a receipt for each delivery of goods. Should the vendee later deny having received them, the receipt would be vitally important in any resulting litigation. The vendor is probably aware of potential litigation when he preserves the receipt, but since discovery would in no way threaten the adversarial system, the materials should not be protected. Thus, preservation of a document partly because it may become useful in a subsequent lawsuit does not properly constitute "preparation for litigation." Shortly after enactment of the CPLR, the courts distinguished materials prepared in the regular course of business from those prepared for litigation.²² They concluded that, where a document is routinely created and preserved, its potential use in litigation is too speculative to justify the application of subsection (d).²³

²² *E.g.*, *Babcock v. Jackson*, 40 Misc. 2d 757, 243 N.Y.S.2d 715 (Sup. Ct. 1963).

²³ Compare *In re City of New York*, 43 Misc. 2d 173, 174, 250 N.Y.S.2d 664, 666 (Sup. Ct. 1964) ("dominant purpose") and *Board of Educ. v. Ace Test Boring, Inc.*, 47 Misc. 2d 864, 263 N.Y.S.2d 193 (Sup. Ct. 1965), with *Renwal Prods., Inc. v. Kleen-Stik Prods., Inc.*, 43 Misc. 2d 644, 251 N.Y.S.2d 776 (Sup. Ct. 1964).

When an accident occurs, however, subsequent litigation may be probable rather than merely possible. But since accident reports have a multitude of business uses,²⁴ they may not qualify as material "prepared for litigation." The questions before courts in accident report cases are (1) how prominent a motive for preparation was the potential litigation, and (2) how likely was it that there would be subsequent litigation? The answers to these questions may vary independently of whether the report was prepared routinely.²⁵ Recognizing this difficulty in an early decision, the Appellate Division, Second Department, squarely held that routine creation of materials does not alone preclude the application of subsection (d).²⁶ Both the First and Third Departments have reached similar conclusions.

*O'Neill v. Manhattan and Bronx Surface Transit Operating Authority*²⁷ concerned a traffic accident involving one of defendant's buses. It was standard procedure for the bus driver to fill out a printed form and mail it directly to defendant's attorney. The attorney filed an affidavit with the court stating that the report was for his exclusive use, and argued that it was absolutely protected either under the attorney-client privilege or under subsection (c). The trial court summarily rejected these assertions because of the insignificant role of the attorney in the preparation of the report.²⁸ The court also rejected a claim under subsection (d) on the ground that such reports should, and probably would, be used by utilities for a variety of business purposes. The fact that the report was mailed to the attorney was treated as evidence, but was not conclusive.²⁹ Alternatively, at the time the report was prepared its use in litigation was too speculative to qualify for subsection (d) protection.³⁰

On appeal, the First Department took a different view of the facts and reversed.³¹ It construed the evidence as clearly demonstrating that the report was for the exclusive use of the attorney and that, if man-

²⁴ For example, they may be used to improve working conditions, or to discipline employees.

²⁵ *Brown v. Saint Paul City Ry.*, 241 Minn. 15, 36, 62 N.W.2d 688, 701-02 (1954); Note, *Aspects of the Minnesota Rule Prohibiting Discovery of Work-Product and Expert Conclusions*, 48 MINN. L. REV. 977, 987 (1964).

²⁶ *Reese v. Long Island R.R.*, 24 App. Div. 2d 581, 262 N.Y.S.2d 194 (2d Dep't 1965).

²⁷ 27 App. Div. 2d 185, 277 N.Y.S.2d 771 (1st Dep't 1967), *rev'g* 47 Misc. 2d 765, 263 N.Y.S.2d 187 (Civ. Ct. 1965).

²⁸ 47 Misc. 2d at 768, 263 N.Y.S.2d at 190.

²⁹ *Id.* at 770, 263 N.Y.S.2d at 192.

³⁰ *Id.* at 771, 263 N.Y.S.2d at 193.

³¹ *O'Neill v. Manhattan & Bronx Surface Transit Operating Auth.*, 27 App. Div. 2d 185, 277 N.Y.S.2d 771 (1st Dep't 1967).

agement sought to investigate the accident for other purposes, other reports would be prepared, which would be discoverable by plaintiff.³² The court did not address itself to the alternative ground relied upon below that, when the report was made, the prospect of litigation was too "hypothetical" to justify subsection (d) protection. Significantly, however, the court added:

[I]t would not be the actual use to which the particular report was put that would be significant. If the practice of the utility was to have the reports available for uses other than litigation, they are not protected.³³

Parker v. New York Telephone Co.,³⁴ also a borderline case, was in some respects similar. There a railroad employee was injured by wires of the defendant telephone company. Plaintiff sought statements that had been taken by "defendant self-insurer's claims bureau" from witnesses who were employees of the railroad. The court concluded that there could be "no reasonable conclusion other than that the statements were created in preparation for litigation"³⁵

It appears, therefore, that a court will protect an accident report, whether routinely prepared or not, if it was prepared exclusively for litigation and is not available to management generally.³⁶ This standard provides a reasonable basis for distinguishing the mass of discoverable material from that which clearly deserves protection.

2. Probability of Litigation

The more difficult question is how likely litigation must appear at the time the report is prepared in order for it to receive protection. The First Department indicated, in any early decision, that a report made shortly after an accident would be subject to discovery.³⁷ The reasoning has persisted that the timing of the report might be critical.³⁸ Thus, in *O'Neill* the lower court suggested that reports made almost immediately

³² *Id.* at 186, 277 N.Y.S.2d at 772.

³³ *Id.* at 187, 277 N.Y.S.2d at 773.

³⁴ 24 App. Div. 2d 1067, 265 N.Y.S.2d 740 (3d Dep't 1965), *aff'g* 47 Misc. 2d 342, 262 N.Y.S.2d 700 (Sup. Ct. 1965).

³⁵ *Id.* at 1068, 265 N.Y.S.2d at 742.

³⁶ *Haire v. Long Island R.R.*, 53 Misc. 2d 536, 279 N.Y.S.2d 88 (Sup. Ct. 1967); *see Weisgold v. Kiamesha Concord, Inc.*, 51 Misc. 2d 456, 273 N.Y.S.2d 279 (Sup. Ct. 1966); *In re Brooklyn Bridge S.W. Urban Renewal Project*, 50 Misc. 2d 478, 270 N.Y.S.2d 703 (Sup. Ct. 1966).

³⁷ *Bloom v. New York City Transit Auth.*, 20 App. Div. 2d 687, 246 N.Y.S.2d 414 (1st Dep't 1964).

³⁸ *E.g.*, *Board of Educ. v. Ace Test Boring, Inc.*, 47 Misc. 2d 864, 263 N.Y.S.2d 193 (Sup. Ct. 1965).

after the event would not normally be protected, since litigation was then too hypothetical.³⁹

The question of timing is most important when a report was prepared exclusively for possible litigation. To consider all such reports as "prepared for litigation," regardless of the timing, would result in an unwarranted extension of *Hickman*.⁴⁰ The "preparation for litigation" concept must be understood and applied in light of the policy conflict the *Hickman* Court sought to resolve.

In applying the attorney-client privilege, courts need not distinguish between trial preparations and other communications with the attorney, since the privilege persists throughout the relationship. The privilege is unlimited in time because the interest of full and free communication deserves protection without regard to whether litigation is imminent or even foreseeable.

The work product doctrine, however, is entirely different. It was born of an awareness that a trial is not a collegial search for truth and that the independence of adversaries must be preserved. Routine gathering of data bears none of the earmarks of the adversarial process, particularly when done by an investigator who is not supervised directly by an attorney. The advantage gained by discovering a factual recitation of an event is no less warranted than that gained by discovering any other type of evidence. An attorney is no more disrupted and his privacy is no more invaded by having to copy and deliver a document prepared without his substantial help than by having to divulge any other nonprivileged communication. An attorney may regret discovery when it hurts rather than helps his client, but the battle over pretrial discovery was concluded long ago.

The picture changes, of course, when litigation becomes a concrete expectation. No longer is the attorney or his agent interested merely in learning what transpired. Seeking out favorable witnesses, he selectively develops evidence that tends to support or refute one or another legal theory. Here the unfairness of rooting through the papers of one's adversary is manifest; and here the work product rule may properly be invoked. To be sure, competent attorneys and even well-trained investigators are always attuned to favorable evidence and are guided by an awareness of some possible line of argument. But dis-

³⁹ 47 Misc. 2d at 771, 263 N.Y.S.2d at 193.

⁴⁰ See *Menyweather v. Niagara Frontier Transit Sys., Inc.*, 50 Misc. 2d 244, 269 N.Y.S.2d 888 (Sup. Ct. 1965), *aff'd*, 25 App. Div. 2d 821, 269 N.Y.S.2d 1019 (4th Dep't 1966), where the lower court suggested that the first report of an accident made by an employee to his public utility employer might always be deemed made in the regular course of business and thus always discoverable.

covery should be disallowed only when inconsistent with the minimum requirement of safeguarding the integrity of the attorney's work. This point is not reached until the litigation appears reasonably probable. Absent some showing that the report was prepared at a time when there was substantial reason to believe that litigation would ensue, discovery of accident reports should be permitted even if they were prepared for the sole use of an attorney.⁴¹

An analogous problem was dealt with recently in *Corona Courts, Inc. v. Frank G. Shattuck Co.*⁴² The grantor of a franchise to operate a motel conducted an investigation of the grantee's business, and on the basis of the resulting report he sought to terminate the franchise. The grantee's effort to discover the report was rebuffed under subsection (d). The court reasoned that the investigation was not in the regular course of business but was directed toward a specific problem.⁴³ But that should not be dispositive. As in the accident report cases, the court should have considered the precise function the report served. If the grantor had concluded that something was seriously amiss at the motel and had ordered the report to substantiate his doubts, the report was probably deserving of protection. The termination of a valuable franchise was contemplated at the time the report was made, and such a termination would likely entail litigation. On the other hand, if the report was merely a spotcheck on a motel having some difficulties or if it was a part of a periodic review, discovery would have been proper, even if the report formed the sole basis for any resulting litigation.⁴⁴

3. Identity of the Person Preparing the Report

The courts have viewed the involvement of a claims agent or an attorney as evidence of preparation for litigation. The absence of such involvement is, of course, nearly conclusive evidence that the report should not be protected. Under these circumstances protection is proper only if litigation was imminent and if the one taking the statement delivered it to the legal department without making other use of it. The converse, however, is not true. A statement should not be protected merely because it was taken by an attorney. As noted in *O'Neill*, the inquiry is not who takes the statement but who uses it, and the language

⁴¹ "It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case." *Hickman v. Taylor*, 329 U.S. 495, 515 (1947) (Jackson, J., concurring). See also Note, *Work Product in Criminal Discovery*, 1966 WASH. U.L.Q. 321.

⁴² 50 Misc. 2d 1066, 272 N.Y.S.2d 217 (Sup. Ct. 1966).

⁴³ *Id.* at 1067, 272 N.Y.S.2d at 219.

⁴⁴ See *Ruggeiro v. Board of Educ.*, 49 Misc. 2d 532, 267 N.Y.S.2d 942 (Sup. Ct. 1966).

in *Parker* to the contrary is certainly wrong. Even a report prepared for the exclusive use of an attorney or claims agent should not be protected under subsection (d) unless it was prepared specifically for litigation.⁴⁵

4. *Burden of Proof*

While the departments of the Appellate Division seem in general agreement on the law, for a time there appeared to be a conflict among them, the First Department allowing discovery of items which the Second Department protected under subsection (d).⁴⁶ Closer analysis reveals that the actual conflict concerned such evidentiary matters as burden of proof.

In an early case, the First Department announced the general rule that reports submitted by an employee to his employer prior to the institution of suit would not be protected.⁴⁷ This holding was amplified in *Kandel v. Tocher*,⁴⁸ which distinguished reports to insurers from internal reports made as a part of the normal business routine and used for a variety of purposes. In a third and more recent case,⁴⁹ the First Department again permitted discovery of an accident report, but noted that there was no showing that the report had in fact been prepared for litigation.

Clearly, the Second Department has denied discovery where the First Department would have allowed it; to this extent the departments have split.⁵⁰ Nevertheless, the Second Department initially held only that accident reports would be protected unless they were prepared in the regular course of business.⁵¹ In a later case, *Reese v. Long Island Railroad*,⁵² the trial court, expressly seeking to follow the distinctions set out in *Kandel*, permitted discovery of statements taken by a claims agent of the railroad. The rationale was that such a report is a matter of internal routine and is created to serve many purposes.⁵³ The Second

⁴⁵ See *Brunswick Corp. v. Aetna Cas. & Sur. Co.*, 49 Misc. 2d 1018, 269 N.Y.S.2d 30 (Sup. Ct. 1966).

⁴⁶ See *Speight v. Allen*, 44 Misc. 2d 1072, 255 N.Y.S.2d 918 (Sup. Ct. 1965).

⁴⁷ *Bloom v. New York City Transit Auth.*, 20 App. Div. 2d 687, 246 N.Y.S.2d 414 (1st Dep't 1964).

⁴⁸ 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

⁴⁹ *Metropolitan Life Ins. Co. v. Lane Klinow & Co.*, 23 App. Div. 2d 646, 257 N.Y.S.2d 415 (1st Dep't 1965).

⁵⁰ See 3 J. WEINSTEIN, H. KORN, & A. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 3101.50a (Supp. 1966).

⁵¹ *Bresson v. Radio City Music Hall Corp.*, 23 App. Div. 2d 581, 256 N.Y.S.2d 758 (2d Dep't 1965); *Lonigro v. Baltimore & O.R.R.*, 22 App. Div. 2d 918, 255 N.Y.S.2d 737 (2d Dep't 1964).

⁵² 24 App. Div. 2d 581, 262 N.Y.S.2d 194 (2d Dep't 1965), *rev'g* 46 Misc. 2d 5, 259 N.Y.S.2d 231 (Sup. Ct. 1965).

⁵³ 46 Misc. 2d at 7, 259 N.Y.S.2d at 233.

Department reversed on the facts, declaring that insufficient consideration had been given the railroad's argument that the report was in fact created solely for trial use.⁵⁴ The lower court's reasoning was characterized as logically compelling a rule that no accident report routinely created can be treated as preparation for litigation. This reasoning was rejected as too broad.⁵⁵

The First Department permits discovery on a showing that the report was made to the employer in accord with usual business practice,⁵⁶ though the court is open to a showing that a particular accident report was prepared for the limited purpose of litigation. In the *O'Neill* case, the First Department found that such a showing had been made, and therefore granted protection under subsection (d). The Second Department, unlike the First, does not assume that a report prepared in the normal course of business is meant to serve a variety of business purposes. Rather, the burden is on the party seeking discovery to show that the report is in fact multifunctional.

This extra burden of proof on the party seeking discovery is an unwarranted impediment to the pretrial process. While the work product rule serves a legitimate function in the administration of justice, the general policy of the law favors discovery. The party seeking the benefit of an exception to discovery should, therefore, bear the burden of showing that the exception applies.⁵⁷ Furthermore, the facts surrounding the creation and use of the materials are known, perhaps exclusively, to the one who instigated their preparation and who now resists their discovery. As a matter of fairness and expeditious trial administration, the burden of proof should be on the resisting party.⁵⁸ Finally, statements that *may* be used in a variety of ways probably *will* be used in a variety of ways. The party asserting the less probable should bear the burden of proof. Where a statement is obviously useful for several purposes, the party resisting discovery should have to show that it was used exclusively for litigation purposes.

⁵⁴ 24 App. Div. 2d at 581, 262 N.Y.S.2d at 195.

⁵⁵ *Id.*

⁵⁶ *But see* Loubriel v. Grace Line, Inc., 52 Misc. 2d 90, 274 N.Y.S.2d 941 (Sup. Ct. 1966), where the court stated it would allow discovery only if the moving party proved that the statements were not taken in preparation for litigation. The better rule was stated in Weisgold v. Kiamesha Concord, Inc., 51 Misc. 2d 456, 273 N.Y.S.2d 279 (Sup. Ct. 1966), where discovery was permitted on a showing that the document was created in the normal course of business. The court remarked that there was no showing by the resisting party that "the report in question was prepared specifically and solely in contemplation of litigation. . . ." *Id.* at 460, 273 N.Y.S.2d at 284.

⁵⁷ *See* Weisgold v. Kiamesha Concord, Inc., 51 Misc. 2d 456, 273 N.Y.S.2d 279 (Sup. Ct. 1966).

⁵⁸ The unfairness of the rule on burden of proof that has been adopted by the Sec-

In practice, then, the party seeking discovery should be able to overcome a subsection (d) defense by a nominal showing that the material was prepared in the course of routine business practice. Discovery should be ordered unless the resisting party can satisfactorily demonstrate the applicability of the exception.⁵⁹

The Third Department, following the better rule of the First, has held that the burden rests on the party resisting discovery to show that the subsection (d) exception applies.⁶⁰ A court in the Fourth Department has reached a similar conclusion. Emphasizing that the report was submitted to the corporate employer and not to an insurance company, the court "assumed" it was made in the regular course of business.⁶¹

B. *Reports to Insurance Companies*

Most of the cases arising under subsection (d) involve efforts by plaintiffs to discover statements of an insured defendant to his automobile liability insurance company. Although the courts have treated the insurance cases as unique, the issues are similar to those previously considered. An important question is whether litigation was sufficiently certain when the report was made to warrant application of subsection (d). An even more fundamental question is whether insurance companies can ever qualify for the protection of subsection (d).

Automobile liability insurance companies usually require their insureds to file a report with the company immediately after any accident. Presumably the document is the primary source of information to the insurer in deciding how to proceed. Plaintiffs often seek to discover the report, not only because the insurance company is likely to

ond Department appears most clearly in *Meadow Brook Nat'l Bank v. Lerner*, 25 App. Div. 2d 436, 266 N.Y.S.2d 914 (2d Dep't 1966). The court accepted what it termed the "somewhat conclusory statements" of plaintiff bank's attorney and vice-president that the memorandum in question was protected by subsection (d), and held that the defendant had failed to prove the contrary. In order to obtain such proof, however, defendant would have had to conduct discovery concerning the collateral question of how and why such memoranda are prepared. Though defendant could not have accomplished this without incurring prohibitive expense, it would have been a simple matter for the bank to substantiate its assertion. In *Haire v. Long Island R.R.*, 53 Misc. 2d 536, 279 N.Y.S.2d 88 (Sup. Ct. 1967), similarly conclusory allegations by the resisting party were rejected as insufficient to show preparation for litigation.

⁵⁹ Of course, once the exception is shown to apply, the party seeking discovery bears the burden of showing injustice or undue hardship sufficient to justify discovery under subsection (d). Cf. *McCoy, California Civil Discovery: Work Product of Attorneys*, 18 STAN. L. REV. 783, 804-05 (1966).

⁶⁰ *Linton v. Lehigh Valley R.R.*, 25 App. Div. 2d 334, 269 N.Y.S.2d 490 (3d Dep't 1966).

⁶¹ *Davis v. Eastman Kodak Co.*, 45 Misc. 2d 1006, 258 N.Y.S.2d 573 (Sup. Ct. 1965).

rely on it, but also because it may be useful in impeaching the defendant's later statements. Normally, the party who made the report is available for pretrial examination. Thus, if the report is covered by subsection (d), the requisite necessity for avoiding the conditional privilege is difficult to establish. As might have been expected, some of the first cases decided under the CPLR involved the application of subsection (d) to reports made to insurers.⁶²

The trial courts initially split on the question, the majority of them holding the items protected. No persuasive rationale for their decisions was presented; presumably the courts preferred to await guidelines from the Appellate Division. Those that permitted discovery spoke of the broad policy favoring full disclosure;⁶³ some looked to whether the statement was made before or after the institution of suit.⁶⁴ Courts that protected the reports noted that subsection (e) permitted discovery of one's own statement but not that of an adversary.⁶⁵ In general, they assumed that automobile insurers contemplate litigation after every accident.⁶⁶

In 1965 the issue came before the First and Second Departments, and they concurred in holding the statements protected. In the first of these cases, *Finegold v. Lewis*,⁶⁷ the Second Department did not appreciably improve upon the reasoning of the lower courts. Noting that the insurance company is "in a very real sense" a defendant,⁶⁸ the court disposed of the "preparation for litigation" question by asserting that the activities of an insurance company are always in preparation for litigation.⁶⁹

Speaking for the First Department in *Kandel v. Tocher*,⁷⁰ Justice Breitell set out more extensively the guidelines of protection under subsection (d). He expressly limited the decision to situations involving automobile liability insurance, which was characterized as "simply litigation insurance."⁷¹ Internal accident reports of a public utility

⁶² Analogous problems arise when a police officer involved in an accident submits a report to a self-insuring municipality. *Donnelly v. County of Nassau*, 46 Misc. 2d 895, 261 N.Y.S.2d 192 (Sup. Ct. 1965), applied the rationale of the insurance company cases to a police officer's report.

⁶³ *E.g.*, *Calace v. Battaglia*, 44 Misc. 2d 97, 252 N.Y.S.2d 973 (Sup. Ct. 1964).

⁶⁴ *E.g.*, *Doughty v. Greenberg*, 43 Misc. 2d 267, 250 N.Y.S.2d 681 (Sup. Ct. 1964).

⁶⁵ *E.g.*, *Braxton v. Batey*, 44 Misc. 2d 34, 252 N.Y.S.2d 844 (Sup. Ct. 1964).

⁶⁶ *E.g.*, *Maiden v. Aid Carpet Serv., Inc.*, 43 Misc. 2d 660, 251 N.Y.S.2d 987 (Sup. Ct. 1964).

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

⁶⁸ *Id.* at 448, 256 N.Y.S.2d at 359.

⁶⁹ *Id.*

⁷⁰ 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

⁷¹ *Id.* at 515, 256 N.Y.S.2d at 900.

made in the normal course of business and used for a variety of purposes were distinguished on the ground that every act of the insurer is in preparation for either litigation or settlement.⁷² Justice Breitel reasoned that, as a matter of sound policy, protection from discovery was necessary to encourage full disclosure by the insured to his insurer.⁷³ The court deemed it immaterial that no attorney was involved at the time the statement was made, because a liability insurer is "an institutionalized substitute for the individualized attorney-client relationship"⁷⁴

It is not entirely clear that automobile liability insurance may be distinguished from other types of insurance by being characterized as "litigation insurance." Most claims arising out of automobile accidents are settled before litigation becomes a serious possibility. Furthermore, at the time a report is filed there is usually some doubt about who was at fault; it is seldom clear whether the one submitting the report will be a plaintiff or a defendant. The report is not filed in "preparation for litigation," since the decision to litigate is not reached until after the contents of the report are analyzed. When a routine claim becomes a probable source of litigation, subsequent reports and documents may qualify for protection. The initial report should rarely qualify.

The *Kandel* opinion ignored the multifariousness of claims. Most reports to insurance companies concern minor accidents, and there is little likelihood that small claims will proceed to litigation. They are commonly settled by employees of the insurer who have had only superficial training. To protect such reports under a rule designed to preserve the adversarial system is preposterous.

Since automobile liability insurance companies do not treat every claim as likely to be litigated, their activities are difficult to distinguish from those of other insurers for the purposes of subsection (d). All insurers are contractually obligated to pay for specified costs of the insured under certain conditions. They all gather information, usually from the insured, to ascertain whether they are so obligated and to determine the amount of the obligation. They all run the risk of involvement in litigation if their valuation of the damage is not accepted. But the court in *Kandel* specifically distinguished other insurers, and the courts have in fact treated discovery against other insurers on a case-by-case basis, as with accident report cases.⁷⁵ For example, a routine

⁷² *Id.*

⁷³ *Id.* at 517, 256 N.Y.S.2d at 902.

⁷⁴ *Id.* at 518, 256 N.Y.S.2d at 902.

⁷⁵ *Id.* at 515, 256 N.Y.S.2d at 899.

report of an insurance adjuster is not protected,⁷⁶ whereas protection is accorded the report of an agent investigating a doubtful claim⁷⁷ and the report of an auditor retained in anticipation of the filing of a fraudulent claim.⁷⁸ Though the likelihood of litigation is greatest with respect to automobile liability insurance, clearly a prospect of litigation is not sufficient to invoke either subsection (c) or (d).

Even if an insurance company treats a claim as likely to result in litigation, the policies underlying *Hickman v. Taylor* probably should not be extended to protect the relevant materials. Potential discovery is unlikely to have the same effect on an insurance company as on an attorney.

In describing insurance companies as institutionalized attorneys, the *Kandel* court may have been attempting to counter this objection by stressing the importance of full disclosure by the insured. But the argument is wide of the mark. The court was asserting the desirability of a communications privilege between the insured and the insurer analogous to the attorney-client privilege. But since subsection (d) was designed to serve a different function altogether, the judiciary would not be justified in interpreting it as creating an insured-insurer privilege.

The court's error can be perceived by comparing subsection (d) with a hypothetical insured-insurer privilege, which presumably would operate similarly to the attorney-client privilege.⁷⁹ The attorney-client privilege is properly a client's privilege, designed to enable him to speak freely to his counsel. Only the client may waive the privilege, and the attorney must respect that waiver. The *Hickman* rule, on the other hand, is designed to protect the attorney functioning in his professional capacity during litigation. Under subsection (d) the rule does not protect the client, because the adversary may obtain the materials if he demonstrates that he needs them. Should the legislature determine that an insured-insurer privilege is desirable, it could easily enact the appropriate legislation. It is quite improper for the courts to distort subsection (d) to that purpose.

⁷⁶ *Welch v. Globe Indem. Co.*, 25 App. Div. 2d 70, 267 N.Y.S.2d 48 (3d Dep't 1966).

⁷⁷ *Brunswick Corp. v. Aetna Cas. & Sur. Co.*, 49 Misc. 2d 1018, 269 N.Y.S.2d 30 (Sup. Ct. 1965), *modified*, 27 App. Div. 2d 182, 278 N.Y.S.2d 459 (4th Dep't 1967). The Appellate Division examined the facts even more closely than had the trial court and broadened the discovery order to include data obtained before the intervention of an attorney. *See also* *Albano v. Schwab Bros. Trucking, Inc.*, 27 App. Div. 2d 901, 278 N.Y.S.2d 780 (4th Dep't 1967); *Raylite Elec. Corp. v. New York Fire Ins. Co.*, 46 Misc. 2d 361, 259 N.Y.S.2d 641 (Sup. Ct. 1965).

⁷⁸ *Kent v. Maryland Cas. Co.*, 25 App. Div. 2d 653, 268 N.Y.S.2d 461 (1st Dep't 1966).

⁷⁹ *See Aldrich v. Cate Serv. Co.*, 51 Misc. 2d 16, 272 N.Y.S.2d 582 (Civ. Ct. 1965).

Subsection (d) is designed to allow preparation for litigation without fear of discovery and to protect against the demoralizing effect of the "free ride."⁸⁰ To determine whether subsection (d) should be applied to automobile liability insurance companies, the courts should consider whether the insurer's operations would in fact be impaired by the possibility of discovery. In light of the extensive operations of insurance companies and the consequent division of functions, it seems doubtful that discovery would appreciably affect or demoralize either those who litigate claims or those who investigate them. Yet, the courts have failed to consider whether there is any need at all to apply subsection (d) to such companies. Absent such a need, discovery should be allowed in accordance with the general policy favoring full disclosure.⁸¹

CONCLUSION

Although discovery has long been ingrained in our civil practice, the feeling lingers that there is something essentially unfair about rooting through the papers of one's adversary. Thus, it is not surprising that after the Supreme Court sanctioned an exception to federal discovery nearly every state followed suit. Indeed, many courts have applied the exception far more broadly than necessary.⁸²

In New York, Section 3101(d) of the CPLR has been misapplied because the courts have failed to discriminate between materials prepared for litigation and materials that merely form the basis for deciding whether to litigate. Until the decision to litigate has been reached, and until the adversarial process has begun, the exception to discovery should not be applied.

The cases decided under subsection (d) have generally sought to apply the provisions mechanically, whereas a proper decision requires careful analysis of the facts of each case. Although a decision under subsection (d) is not on the merits, and although a good procedural rule should be easy to apply, practice should not become rigid before the judiciary has thoroughly investigated the policies embodied in a rule. Since courts have seldom undertaken such an inquiry, they have so far failed to isolate the narrow factual settings that justify exemption from discovery.

⁸⁰ See p. 99 *supra*.

⁸¹ This conclusion in no way limits the protection of subsection (d) to attorneys. If, after the distillation process, an unsettled case is referred to the legal department for further action, the work of nonlegal investigators may well deserve protection.

⁸² *E.g.*, *Atlantic Coast Line R.R. v. Allen*, 40 So. 2d 115 (Fla. 1949).