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DISCOVERY IN NEW YORK

It is important for a claims professional to have a working knowledge of the discovery provisions contained in the Civil Practice Law and Rules of New York. The disclosure section is contained in section 3101. CPLR § 3101(a) requires "full disclosure of all matter material and necessary in the prosecution or defense of an action." The test of what is "material and necessary" is one of usefulness and reason and focuses on whether the information sought is sufficiently related to the issues in the litigation that is reasonable to try to obtain such information in preparation for trial. The goal of this statute is to permit the parties to sharpen the issues early on and thereby to reduce delay and minimize surprise at trial. The emphasis of CPLR § 3101(a) is on broad disclosure. This section is therefore given to liberal construction by the courts. It works for the benefit of both plaintiffs and defendants.

The liberal mandate of CPLR § 3101(a) specifically states that the following items are discoverable: the statements of a party, the contents of an insurance agreement, accident reports, work or school records, financial records pertaining to a claim for lost wages or lost profits, medical records where the party's physical or mental condition is placed in issue by that party, the names and addresses of witnesses, and business records prepared in the ordinary course of a party's business and not exclusively for litigation.

Whether certain material is discoverable - indeed, whether it is ultimately admissible at trial - will in large part be a function of the pleadings. For example, it is improper to attempt to prove certain conduct by arguing that the person had performed a similar act on a prior and unrelated occasion. Thus, a defendant's poor prior driving record will not be relevant and will probably not be discoverable unless the plaintiff has raised a claim legitimately putting such information at issue - such as a claim that the owner of a vehicle driven by the defendant driver knew or should have known about the driver's poor prior record and negligently entrusted the vehicle to the driver.

As a general rule, the plaintiff is not entitled to the investigative work product of the defendant which is prepared by either the defendant's insurance carrier or the attorney retained by the insurance carrier on behalf of the insured. CPLR section 3101 provides various protections to the discovery of such material. The first protection is contained in CPLR § 3101(b). This section refers to privileged matter. It includes the attorney/client privilege. The purpose of this privilege is to promote full and frank communication between attorneys and their clients by assuring the clients that, absent

exceptional circumstance, what they tell their attorneys will be held in confidence. The attorney/client privilege belongs to the client and attaches if the information disclosed to the attorney is provided for the purpose of obtaining legal advice or services. In order to articulate a valid claim of privilege, the information sought to be protected must have been a confidential communication made to an attorney for the purpose of obtaining legal advice or services.

The work product of an attorney is also exempt from discovery. Although the protection afforded an attorney's work product is often intermingled with the attorney/client privilege, the two doctrines are separate and distinct. The former is based upon the attorney's interests in the attorney's work, analysis and thought processes in the adversary system of justice, while the latter is based upon the client's interest in keeping communications confidential. For that reason, waiver of the attorney/client privilege by the client does not necessarily result in a waiver of the "work product" protection afforded to attorney, and vice-versa.

The attorney work product protection is contained in CPLR § 3101(c). The phrase, "work product," embraces such items as interviews, statements, memoranda, correspondence, briefs, mental impressions and personal beliefs which were conducted and prepared or held by the attorney. The work product exception offers an absolute exemption. It is thus narrowly construed by the courts. Given the rationale behind the attorney work product doctrine, the more of an attorney's personal analysis, strategy and thoughts that went into a particular document, the more that it is likely that the document will be subject to protection. Documents such as internal memoranda reflecting analysis and strategy are clearly privileged, as are attorney diary entries. Moreover, statements taken by an attorney from a witness may be protected. The names and addresses of such witnesses are discoverable.

There is one more additional protection offered by CPLR Section 3101, and this is contained in 3101(d)(2). This deals with material prepared for litigation. This section has more relevance to the claims professional than the other two sections. For purposes of this discussion, it is important to note that materials that are prepared in anticipation of litigation and do not require the specialized skill of an attorney do not share the same level of protection but are instead given limited protection. More particularly, materials prepared in anticipation of litigation are exempt from disclosure unless the party seeking discovery can demonstrate a substantial need and an undue hardship which entitles him to the materials.

In order to be subject to the statute's limited protection, the material at issue must be prepared "in anticipation of litigation." That means that the only reason that the material was prepared was a contemplated or anticipated lawsuit. If dual motivations cause preparation of the material at issue, it will not be protected from disclosure. The qualified privilege will give way to a showing of substantial need and undue hardship. The statute also makes explicit reference to the work product of the attorney by requiring that courts "protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning litigation." If a claim is made that material sought was prepared in anticipation of litigation, the burden is on the party resisting disclosure to prove it is immune.

Parties' Statement - CPLR Section 3101(e)

CPLR Section 3101(e) provides that a party may obtain a copy of the party's own statement. The rule is unconditional and creates an exception to the privilege protecting material prepared for litigation. Although this section is commonly

used to obtain statements made to the opposing party, it pertains to any statements of the party making the request which were made to anyone as long as the statements are material and necessary under CPLR §3101(a). A demand for all statements made by a party should be served early on, and certainly before the party testifies at deposition. Not only is such disclosure vital to prepare a party for the party's deposition, but it may also help to make other strategic decisions and to map the course of the litigation.

Contents of Insurance Agreement - CPLR Section 3101(f)

CPLR Section 3101(f) provides that the contents of an insurance agreement that might provide coverage to satisfy a judgment or settle a lawsuit are discoverable. Courts have recognized that full disclosure of insurance information will facilitate, and might even encourage, settlement. The statutory provision makes no distinction between primary or excess insurance coverage, and the courts have accordingly held that both classes of coverage are included within the parameters of the statute.

Accident Reports - CPLR Section 3101(g)

CPLR Section 3101(g) provides that accident reports prepared in the regular course of business are discoverable. This provision is of common use to a personal injury plaintiff, who can request not only reports of a particular accident giving rise to the lawsuit, but also of accidents occurring before and after the accident at issue in order to determine whether a particular condition was dangerous. Before a court will compel disclosure of reports about accident other than the accident at issue, however, the other accidents must be sufficiently similar to the accident at issue to make them relevant to the legal and factual questions presented. A disclosure demand for all accident reports will often raise the issue of whether accident reports produced in the regular course of business may be protected by the privilege for materials prepared in anticipation of litigation. There is no definitive answer to this question in New York because there is a difference in opinion among the departments of the Appellate Division.

All four Appellate Division departments would agree that if the reports were prepared both in the course of regular business and in anticipation of litigation, then the privilege under CPLR § 3101(d)(2) would not apply and the material would be discoverable. The Third and Fourth Departments have reasoned, however, that the privilege given material prepared for litigation exempts material prepared solely for litigation from the disclosure requirements of CPLR § 3101(g). Therefore, if a party can demonstrate that an accident report was prepared exclusively for the purposes of litigation, the party need not disclose the reports. In other words, the Third and Fourth Departments have held that the privilege given materials prepared for litigation "trumps" the disclosure requirement applicable to accident reports.

The First and Second Departments, on the other hand, have held that even if an accident report was prepared solely for the purposes of litigation, the report is nevertheless discoverable if its preparation was the result of regular business procedures. Contrary to the Third and Fourth Department's analysis, the First and Second Departments have thus held that the required discovery of accident reports "trumps" the material prepared for litigation privilege.

Films, Photographs, Videotapes and Audiotapes - CPLR Section 3101(i)

This section of the CPLR provides that there will be "full disclosure of any films, photographs, videotapes or audiotapes, including transcripts or memoranda

thereof, involving a person referred to in paragraph "a" of Section 3101." Although this section on its face allows full disclosure without exception, at least one court has held that disclosure of the films, tapes, and photos covered by the statute may still be subject to the qualified privilege for material prepared in anticipation of litigation under CPLR § 3101(d)(2).

Requests for material in addition to the actual tape recordings have been found to be outside the scope of the statutory requirement because the requested material may be protected by another privilege, such as the attorney work product privilege or the attorney/client privilege. For instance, a request for memoranda concerning a surveillance video was granted only after redaction of information that constituted the attorney's work product, such as technical notes, confidential communications between attorney and client. Likewise, surveillance reports and memoranda, bills, invoices, correspondence, records and logs of investigators, as well as the amount of surveillance tape and the manner and equipment used in obtaining the videotaped surveillance were held to be materials protected by the attorney work product privilege and the privilege for materials prepared in anticipation of litigation. For similar reasons, a party is not entitled to depose the persons who filmed the videotaped surveillance unless the party requesting disclosure can establish substantial need and undue hardship and therefore satisfy the burden under CPLR §3101(d)(2).