

CPLR 3101(d): Discovery Limited to Reports Received Prior to Rejection of Claim

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that a marshall would commit perjury if he signs for a landlord's agent, as was apparently done in this case.¹⁰²

The lamentable reluctance of our district attorneys to prosecute those who commit perjury in civil actions is in significant part responsible for the practice so rightfully condemned in the instant case. Judge Lane is to be commended for his righteous indignation about this blatant misuse of the judicial process.

ARTICLE 31 — DISCLOSURE

CPLR 3101(d): Discovery limited to reports received prior to rejection of claim.

While "all evidence material and necessary in the prosecution or defense of an action"¹⁰³ is subject to disclosure, material prepared for litigation need not be disclosed unless: (1) it can no longer be duplicated, and (2) failure to disclose will cause undue hardship.¹⁰⁴ The scope of this conditional immunization has been a source of extensive litigation, especially in regard to insurance companies' investigative reports.¹⁰⁵ At what point do reports prepared by independent investigators for an insurance company become entitled to the conditional protection of CPLR 3101(d)?

At issue in *Millen Industries, Inc. v. American Mutual Liability Insurance Co.*,¹⁰⁶ was whether such reports concerning dishonest acts of employees of a policyholder were protected. The Appellate Division, First Department, determined that: (1) the business of the defendant included payment or rejection of claims, and (2) reports which aided in such determinations were made in the ordinary course of business rather than in preparation for litigation. Subsequent reports, however, were held to be within the ambit of CPLR 3101(d).¹⁰⁷

CPLR 3120(a): Discovery of defendant hospital's non-medical records relating to non-party.

In *Mayer v. Albany Medical Center Hospital*,¹⁰⁸ the Appellate Division, Third Department, approved disclosure of non-medical information concerning a patient who had assaulted a visitor in the de-

¹⁰² 67 Misc. 2d at 738, 324 N.Y.S.2d at 933, citing N.Y. PENAL LAW art. 210 (McKinney 1967).

¹⁰³ CPLR 3101(a).

¹⁰⁴ CPLR 3101(d).

¹⁰⁵ 3 WK&M ¶ 3101.50b.

¹⁰⁶ 37 App. Div. 2d 816, 324 N.Y.S.2d 930 (1st Dep't 1971) (per curiam).

¹⁰⁷ *Id.*, 324 N.Y.S.2d at 931.

¹⁰⁸ 37 App. Div. 2d 1011, 325 N.Y.S.2d 517 (3d Dep't 1971) (mem.).