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CPLR 3101(a): Names of Witnesses May Be Obtained on Disclosure

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CPLR 3101(a): "Evidence in chief" doctrine does not limit CPLR 3111.

Although CPLR 3101(a) sets forth the general disclosure guidelines—full disclosure of all evidence material and necessary—CPLR 3111 states that a notice may require the production of "books, papers and other things" and CPLR 3120 provides that such things must be set forth with reasonable particularity. Even though there is no express cross-reference between these sections, one commentator has stated that "the rules which govern what may be a proper subject for examination before trial under CPLR 3101 also determine what documents must be produced for use at an examination under CPLR 3111." [127] Therefore, it appears that where the material desired falls within the scope of an exclusionary provision of CPLR 3101, the court will not allow discovery, since 3101 should control.

In *Rutherford v. Albany Medical Center Hosp.*,[128] the court was expressly confronted with the interplay of 3101 and 3111, and held that 3101 was controlling. However, in reaching its decision, the court seemed to isolate itself from prior New York rulings which held that documents which are to be produced for discovery and inspection must be admissible as evidence at the trial.[129] The court stated that "the mere fact that documents may be inadmissible at the trial as evidence in chief should not prevent their disclosure at pretrial examination." [130]

The reasoning of this case together with the reasoning adopted by the court in *West v. Aetna Cas. & Sur. Co.*,[131] seems to indicate a liberalizing trend as to what material should be available on pretrial examinations. As a result, it appears that the barrier erected by the courts under pre-CPLR cases is slowly disintegrating and that all evidence not excluded under CPLR 3101(b)-(d) will be available for discovery and inspection.

CPLR 3101(a): Names of witnesses may be obtained on disclosure.

Previously, it was believed that *Rios v. Donovan* [132] had held that witnesses' names and addresses were a proper subject of in-

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[127] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3111.04 (1965).

[128] 48 Misc. 2d 1017, 266 N.Y.S.2d 470 (Sup. Ct. Albany County 1965).

[129] See, *e.g.*, People *ex rel.* Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927); Peters v. Marquez, 21 Misc. 2d 720, 196 N.Y.S.2d 840 (Sup. Ct. Westchester County 1959).

[130] Rutherford v. Albany Medical Center Hosp., 48 Misc. 2d 1017, 1019, 266 N.Y.S.2d 470, 473 (Sup. Ct. Albany County 1965).

[131] 49 Misc. 2d 28, 266 N.Y.S.2d 600 (Sup. Ct. Onondaga County 1965).

[132] 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964).

quiry in an examination before trial when the witnesses were witnesses to the event itself.[133]

However, the Supreme Court, Erie County, in *Majchrzak v. Hagerty*,[134] has stated that the *Rios* case did *not* so hold. The court here asserted that *Rios* was "merely concerned with the procedure to be followed in attempting to obtain such disclosure." [135]

Majchrzak involved a suit for damages sustained by plaintiff in an automobile accident. Plaintiffs examined defendant before trial, at which time defendant stated that he knew the names of witnesses, but that he refused to disclose them. Plaintiffs then sought an order directing defendant to supply this information.

The court noted that plaintiff's injuries prevented her from obtaining the names of any witnesses to the accident. Also, an extensive investigation by plaintiff failed to provide any information. Therefore, the court held that where the information is necessary to establish what occurred, *and* where the party seeking it was or is unable with due diligence to obtain it, the names of witnesses should be disclosed.[136]

Thus, the court, while not accepting *Rios* as authority for the position it takes, nevertheless arrives at the same conclusion.

CPLR 3101(d): Where statements are material prepared for litigation they are not available for disclosure.

Kandel v. Tocher[137] and *Finegold v. Lewis*[138] held that accident reports made by an insured to his insurance company were material prepared for litigation and, thus, were conditionally privileged from disclosure under CPLR 3101(d).

In *Parker v. New York Tel. Co.*,[139] the appellate division, third department, joined the first and second departments in stating that where statements are material prepared for litigation, they are not available for disclosure, unless they can no longer be duplicated and their withholding will result in injustice and undue hardship. The court followed *Kandel* despite the fact that that case involved reports made to an insurance company, while *Parker* involved reports prepared for a self-insured.

Another third department case, *Welch v. Globe Indem. Co.*,[140] however, while approving of the reasoning in *Kandel* and *Finegold*,

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[133] Votey v. N.Y.C. Transit Authority, 46 Misc. 2d 554, 260 N.Y.S.2d 124 (Sup. Ct. N.Y. County 1965); 7B McKINNEY'S CPLR 3120, supp. commentary 58, 59 (1965).

[134] 49 Misc. 2d 1027, 268 N.Y.S.2d 937 (Sup. Ct. Erie County 1966).

[135] Majchrzak v. Hagerty, 49 Misc. 2d 1027, 1028, 268 N.Y.S.2d 937, 938 (Sup. Ct. Erie County 1966).

[136] *Id.* at 1028, 268 N.Y.S.2d at 939.

[137] 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965).

[138] 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965).

[139] 24 App. Div. 2d 1067, 265 N.Y.S.2d 740 (3d Dep't 1965).

[140] 25 App. Div. 2d 70, 267 N.Y.S.2d 48 (3d Dep't 1965).