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CPLR 3101(d): Accident Report "Made Out" to Attorney Not Immune from Discovery

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CPLR 3101(d): *Accident report "made out" to attorney not immune from discovery.*

CPLR 3101(d) provides that material prepared for litigation shall be conditionally³⁶ excepted from 3101(a)'s proviso that "there shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action"

To be distinguished from material prepared for litigation are accident reports *made in the ordinary course of business* by employees of an organization. These reports are obtainable even though they may eventually be used in litigation.³⁷ However, accident reports will come within the protection of 3101(d) if they were prepared for use in litigation, rather than for ordinary business purposes.

In *Weisgold v. Kiamesha Concord, Inc.*,³⁸ an employee of defendant testified that he was instructed to "make all accident reports out" to defendant's attorney. The attorney, in turn, submitted an affidavit stating that this policy was followed in order to prepare for potential litigation. In determining whether these reports were obtainable, the court's chief difficulty resulted from a lack of information. The court did not know whether the report was forwarded directly to the attorney by the employee, or whether it was filed with the employer who then forwarded a copy to the attorney. Despite this uncertainty, the court, finding that the *regular internal purposes* of the defendant were likely to be served by the report, held that it "should not become immune from discovery . . . by the mere fact that it was 'made out' to an attorney."³⁹

Weisgold highlights the problem which arises when accident reports serve the dual purpose of furthering internal business operations and of preparing for potential litigation. In this area, attorneys have attempted to have otherwise obtainable items categorized as material prepared for litigation. It appears that the *Weisgold* court has properly forestalled one such attempt. If courts were to hold that materials routinely prepared for the internal business purposes of an organization could be made unobtainable by the mere device of routing them directly to an attorney, the ordinary course of business category would be devitalized.⁴⁰

³⁶ See note 51 *infra*.

³⁷ *Kandel v. Tocher*, *supra* note 27, at 515-16, 256 N.Y.S.2d at 901.

³⁸ 51 Misc. 2d 456, 273 N.Y.S.2d 279 (Sup. Ct. Sullivan County 1966).

³⁹ *Id.* at 459, 273 N.Y.S.2d at 283-84. *Accord*, *O'Neill v. Manhattan & Bronx Surface Transit Operating Authority*, 47 Misc. 2d 765, 263 N.Y.S.2d 187 (N.Y.C. Civ. Ct. 1965). In *O'Neill*, an accident report made in the regular course of business by the operator of defendant's bus was subject to discovery even though it was directly forwarded to defendant's counsel.

⁴⁰ See 3 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶ 3101.54 (1965), where it is stated that "materials created as part of normal business