

**Introduction and Overview of Discovery Under Article 31 of the N.Y.
Civil Practice Law and Rules**

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Article 31 of the N.Y. Civil Practice Law and Rules (hereinafter referred to as the CPLR) sets forth the rules pertaining to pretrial discovery. Once issue has been joined, discovery begins. The discovery tools that you have at your disposal to flush out your adversaries evidence during this pretrial phase are as follows: Demand for Discovery and Inspection (aka Document Production)(CPLR 3120), Insurance Disclosure (CPLR §3101(f)), Expert Disclosure (CPLR §3101(d)), Depositions (CPLR 3106-3116), Interrogatories (CPLR §3130-3133), Physical and Mental Examinations (CPLR §3121), Notices to Admit (CPLR §3123), a Party's Own Statement (CPLR §3101(e) (usually contained within a Demand for Document Production), Accident Reports (CPLR §3101(g) (usually contained within a Demand for Document Production), and Demand for Names and Addresses of Parties Having Appeared (CPLR 2103(e)(usually contained within a Demand for Document Production).

A. When does discovery begin?

I. Pre-Action Commenced: If you want to preserve testimony before you have even commenced an action, you must obtain a court order. CPLR §3102(c). This means that you will have to purchase an index number (\$210.00 (CPLR §8018(a)(1),(3)), a request for judicial intervention (\$95.00 (CPLR §8020(a)) and pay for a motion fee (\$45.00 (CPLR §8020(a)). Please note that once you have obtained this pre-action discovery, you cannot reuse the index

number, etcetera, once you are ready to commence your action. You must make these purchases anew.

II. After Action Has Been Commenced: The timing of discovery after an action has been commenced depends upon the particular discovery device you intend to use.

- 1) **Demand for Document Production:** May be used at any time after commencement of action. “After commencement of an action, any party may serve on any other party a notice or on any other person a subpoena duces tecum” CPLR 3120(1). The responsive time set forth in the Demand for Document Production is not less than 20 days (CPLR 3120(2), plus add an extra five days for mailing (CPLR 2103(b)(2). **If you have more than one adversary, you serve all. CPLR 2103(e).** “Each paper served on any party shall be served on every other party who has appeared” CLPR 2103(e).
- 2) **Insurance Disclosure:** The CPLR does not limit when this demand can be made. Presumably, it can be made once the action is commenced. Normally, however, it is included with the Demand for Document Production. Hence, there is a 20 day response time, plus 5 days for mailing.
- 3) **Expert Disclosure:** The CPLR does not limit when this demand can be made. Presumably, it can be made once the action is commenced. . Normally, however, it is included with the

Demand for Document Production. Hence, there is a 20 day response time, plus 5 days for mailing.

- 4) **Deposition Notice:** Plaintiff cannot serve deposition notice prior to defendant having served its Answer without leave of Court. CPLR 3106. Once issue is joined, plaintiff may serve. However, defendant normally has priority because it serves notice with its Answer. See *Bucci v. Lydon*, 116 A.D.2d 520, 497 N.Y.S.2d 669 (1st Dep't 1986). If defendant fails to serve deposition notice with Answer, then priority of deposition examination goes to the party who first served such notice. *Id.* (Query the situation in which defendant who first serves deposition notice, calendars the deposition date for 90 days from the date of such notice and plaintiff, thereafter, serving its deposition notice for 20 days hence (plus five days for mailing)). Must give 20 days notice (CPLR 3107), plus 5 days for mailing. A party who has been served with a deposition notice, can cross-notice for deposition of any other party upon 10 days notice, plus 5 days for mailing. This same time period is also applicable to non-party witness deposition notices. Even though you subpoena a non-party, you must still give notice of the deposition to the other parties in the action. CPLR 3107.
- 5) **Demand for Interrogatories:** Can be served any time after issue has been joined. CPLR 3132. "After commencement of

an action, any party may serve written interrogatories upon any other party. Interrogatories may not be served upon a defendant before that defendant's time for serving a responsive pleading [Answer] has expired" CPLR 3132. Remember, service of a Demand for Interrogatories on one party must be served on all parties. The responsive time set forth in the Demand Interrogatories is not less than 20 days (CPLR 3133(a), plus add an extra five days for mailing.

- 6) **Demand for Physical and Mental Examination:** Can be served any time after commencement of action in which the mental or physical condition . . . of a party . . . is in controversy. . . ." CPLR §3121(a). Must give 20 days notice (CPLR §3121), plus 5 days for mailing. CPLR §3121(a).
- 7) Notice to Admit: 20 days after service of the Summons or any time after service of Answer. Can be served up to twenty (20) days prior to trial. CPLR §3123.

- B. § 3101. Scope of disclosure:** "There shall be **full disclosure** of all matter **material and necessary** in the prosecution or defense of an action, **regardless of the burden of proof**, by:
- (1) a party, or the officer, director, member, agent or employee of a party;
 - (2) a person who possessed a cause of action or defense asserted in the action;
 - (3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or **a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding**

disclosure, or who has been retained by such party as an expert witness; and

4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.”

CPLR §3101(a)(emphasis added). Therefore, a defendant cannot subpoena plaintiff’s non-party treating physician for deposition, unless that doctor resided more than 100 miles away. *Roeck v. Columbia-Greene Medical Center*, 248 A.D.2d 921, 670 N.Y.S.2d 269 (3rd Dep’t 1998). Only a plaintiff can depose his/her treating physician. *Jones v. Sherpa*, 5 A.D.3d 634, 774 N.Y.S.2d 767 (2nd Dep’t 2004). Moreover, such a deposition of one’s treating physician is not considered in the nature of discovery and therefore, may be done post note of issue. *Id.*

Privileged matter, including attorney work product is not discoverable. CPLR 3101(b) and (c). Moreover, “materials prepared in anticipation of litigation or for trial, whether by the attorney, insurance company, *etcetera*, “may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” CPLR §3101(d)(2)(see sample Order). “[M]ental impressions, conclusions, opinions or legal theories of an attorney” are not discoverable. *Id.*

C. CPLR 3120--Demand for Document Production: Includes a demand to “permit entry upon designated land or other property” CPLR 3120(1)(ii). Demand for Document Production must “describe each item and category with reasonable particularity.” CPLR 3120(2). Can serve non-party with subpoena duces tecum for documents, but must also serve all parties with a copy of the

subpoena “at the same time” the subpoena is served. CPLR 3120(3). Five days after the non-party has responded with the sought after documentation, you must provide the other parties with notice of such compliance. CPLR 3120(3).

Caveat: A subpoena served on a city, county, state, municipal agency or library must be “so-ordered”. CPLR §2307. You are also required to give that municipal agency “one day’s notice” that you will be presenting the subpoena to Court to be so-ordered. CPLR §2307 and 3120(4).

Caveat: Even a subpoena served on a doctor or hospital for medical records, whether or not it has been “so ordered”, does not have to be complied with or objected to if not accompanied by a HIPAA-compliant authorization. CPLR 3122. The subpoena must so inform the medical provider of this requirement in bold-faced type on its face. *Id.*

Expert Disclosure: CPLR 3101(d) provides, in pertinent part, the following: Upon demand, you must identify your expert—however, in a medical malpractice case, you do not have to identify the name of your expert (CPLR 3103(d)(1)). Furthermore, you must disclose “in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert’s opinion.” CPLR 3101(d)(1).

Even if you retained an expert at the last minute and failed to provide proper notice prior to trial, the statute specifically states that “the party shall not thereupon be precluded from introducing the expert’s testimony at trial solely on grounds of noncompliance with this paragraph.” CPLR 3101(d)(1). “[T]he court

may make whatever order may be just.” *Id.* See also *Cutsogeorge v. Hertz Corp.*, 264 A.D.2d 752, 695 N.Y.S.2d 375 (2nd Dep’t 1999)(so long as nondisclosure was not intentional, court has discretion to allow expert to testify).

1. In a medical malpractice action, either party can serve a written offer on all parties to disclose the name of that party’s expert and to produce that expert for oral deposition. CPLR §3101(d)(ii). The written offer is also to be filed with Court. *Id.* Thereupon, the responding parties have twenty (20) days to accept or reject the offer by serving a written reply on all parties, a copy of the same to be filed with Court. *Id.* Only if all parties accept the offer, then “each party shall be required to produce his or her expert witness for examination upon oral deposition upon receipt of a notice to take oral deposition” *Id.* “If any party, having made or accepted the offer, fails to make that party’s expert available for oral deposition, that party shall be precluded from offering expert testimony at the trial of the action.” *Id.*
2. Whether a personal injury or medical malpractice case, a party is free to depose his/her treating physician who has been retained to be that party’s expert at trial. CPLR §3101(d)(iii). See also, CPLR §3101(a)(3)(full disclosure by physician retained by party demanding such disclosure). “[T]he deposition of a [physician] may be used by any party without the necessity of showing unavailability or special circumstances” CPLR 3117(a)(4). Other than the exception set forth in paragraph 2, *supra*, or the exception for a party producing

his/her own treating physician for deposition, any other party who desires the deposition of their adversary's expert must first obtain a court order upon a showing of "special circumstances". CPLR §3101(d)(iii). If successful, the moving party will be required to pay the expert's fee for his/her time at the deposition. *Id.*

Compare Federal Practice: Expert disclosure must provide name of expert, even in medical malpractice cases. Rule 26, Fed. R. Civ. Proc. (hereinafter referred to as "FRCP"). Must disclose a narrative report for each expert you will call as expert. Narrative report must contain all the expert's opinions and the basis and reasons therefore, data or other information relied upon in forming such opinions and exhibits that may be used to support the opinions. *Id.* Also must provide the expert's qualifications, list of all publications authored by the expert during the preceding ten (10) years, compensation that the expert has and will be paid and listing of all cases (whether trial or deposition) in which the expert has provided expert testimony during the preceding four (4) years. *Id.*

See *also* "Exchange of Medical Reports in Personal Injury and Wrongful Death Actions", 22 N.Y.C.R.R. §202.17, for New York State practice.

4. A party is entitled to get a copy of his/her own statement. CPLR §3101(e). You are not entitled to get a copy of a witness' statement, since that falls under the attorney work-product privilege.

5. You are entitled to obtain information about the existence and contents of any insurance agreement that will be used to satisfy the

judgment. CPLR §3101(f). This does not include the application for insurance. *Id.*

6. Any accident report prepared in the ordinary course of business by any party is discoverable. CPLR §3101(g).

7. You are also entitled to full disclosure of all surreptitious recordings, photographs, videotapes, including all out-takes, transcripts and memoranda pertaining to it. CPLR §3101(i).

8. Documents are required to be produced “as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.” CPLR 3122(c).

Caveat: If the information/document became available subsequent to the time you responded to a discovery demand, you are obligated to provide it by amending your response or, if the information is no longer correct, correcting your response by supplementing it. CPLR §3101(h).

Certified Records CPLR 3122-a: “Business records produced pursuant to a subpoena duces tecum under Rule 3120 shall be [certified]” . . .” CPLR 3122-a.

A business record certification is sufficient to cause the records to be admissible without the need to subpoena, at trial, the custodian of the records. CPLR 3122-a(b). However, before they can be admissible as evidence at trial, you must give thirty (30) days notice, prior to trial, of your intent to offer them and “specify the place where such records may be inspected at reasonable times.” CPLR 3122-a(c). To prevent their admissibility, your adversary has ten (10) days in which to object and state the grounds for such objections. *Id.* If that happens, you can

still subpoena the custodian of such records along with the original records. *Id.* For instance, if you intend to offer records that were neither subpoenaed nor certified, your adversary would have a valid objection to their admissibility. See *Zweng v. DeBellis & Semmens*, 22 A.D.3d 845, 803 N.Y.S.2d 681 (2nd Dep't 2005).

D. **CPLR §3130--Demand for Interrogatories:** If you serve a demand for interrogatories, you **cannot** also serve a demand for a bill of particulars, except in matrimonial actions. CPLR §3130. In personal injury/wrongful death/property damage actions **premised on negligence only**, if you serve a demand for interrogatories, you are **not** permitted to depose that party without Court order. *Id.* You are free to serve a demand for interrogatories as well as conduct depositions in actions such as strict products liability—such an action is not solely predicated on negligence. See *Cardona v. South Bend Lathe Co.*, 72 A.D.2d 758, 421 N.Y.S.2d 373 (2nd Dep't 1979); *Ribley v. Harsco Corp.*, 57 A.D.2d 228, 394 N.Y.S.2d 740 (3rd Dep't 1977).

“Interrogatories may relate to any matters embraced in the disclosure requirement of section 3101 and the answers may be used to the same extent as the depositions of a party.” CPLR §3131. It is permissible to demand copies of “papers, documents or photographs as are relevant to the answers required” in interrogatories. *Id.*

1. You have twenty (20) days to answer a demand for interrogatories (plus five (5) for mailing). CPLR 3133(a). If there is an objection, you are not required to answer the

specific objectionable interrogatory. *Id.* However, the objection must be set forth in reasonable particularity. *Id.*

2. “Each question shall be answered separately and fully, and each answer shall be preceded by the question to which it responds.” CPLR 3133(b). Moreover, interrogatories must be in writing and signed by the party under oath. *Id.*
3. CPLR §3101(h), which pertains to amending and supplementing your discovery responses, is applicable to interrogatory responses as well. CPLR 3133(c).

Compare Federal Interrogatory Requirements: Federal Interrogatories are limited in number to twenty-five (25), including subparts. Rule 33, FRCP. The Southern District limits initial interrogatories to “seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature.” Local Civil Rule 33.3. Quite frankly, Local Civil Rule 33.3 seems outmoded when compared to Rule 26, FRCP, accelerated disclosure provision: names, addresses and telephone numbers of all witnesses, a copy of or location of all documents, data compilations and other things in a party’s control must be automatically disclosed without waiting for a request (demand in State practice) from your adversary for such information. Rule 26(a)(1), FRCP. Accelerated

disclosure also includes making available the party's insurance agreement. Rule 26(a)(1)(D), FRCP.

D. CPLR §3123--Notice to Admit:

"[A] party may serve upon any other party a written request for admission by the latter of the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry. Copies of the papers, documents or photographs shall be served with the request unless copies have already been furnished."

CPLR §3123(a). These matters are "deemed admitted", unless within twenty (20) days (plus five days mailing), the responding party provides a written, sworn statement, signed by that party, (1) specifically denying the item for which an admission is sought; (2) "setting forth in detail the reasons why he cannot truthfully either admit or deny those matters"; or (3) admit the matters with a material qualification. CPLR §3123(a).

Although admissions can be amended and withdrawn with leave of court, a party can still introduce that withdrawn admission at trial. Unreasonable denials can result in the imposition of costs and reasonable attorney's fees if the requesting party is able to prove the truth of those matters for which admissions were sought. CPLR §3123(c).

E. Depositions: Depositions may be oral or written. CPLR 3107 and 3108. If a witness is out of state, you will need to obtain a commission or letters rogatory. CPLR 3108. In addition to taking the testimony of a witness (either party or non-party), the notice of deposition can also require the deponent to

produce various documents to be marked as exhibits at the deposition. CPLR 3111. “Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court.” CPLR 3113(c). For instance, the plaintiff, in a medical negligence case, can elicit expert opinion testimony at the defendant doctor’s deposition. *Johnson v. N.Y.C. Health & Hosp. Corp.*, 49 A.D.2d 234, 374 N.Y.S.2d 343 (2nd Dep’t 1975). The parties can stipulate that “a deposition be taken by telephone or other remote electronic means and that a party may participate electronically.” CPLR 3113(d). See also 22 NYCRR 202.15 which permits videotaped depositions.

Depositions can be used to impeach the credibility of a witness. CPLR 3117(a)(1). A party’s deposition testimony may be used by any other party for any purpose. CPLR 3117(a)(2). Also, the deposition of any witness (not a party) may be used against any party who was present at that deposition or had notice of it for any purpose if the witness is dead, is more than 100 miles from the trial court, too sick or infirm to attend trial or has been imprisoned, or the “party offering the deposition has been unable to procure the attendance of the witness by diligent efforts” or “exceptional circumstances” exist. CPLR 3117(3). If only part of deposition is read, the other party may read the omitted portions. CPLR 3117(b). With the exception of when an adverse party’s deposition is used, a party who introduces the deposition testimony of any witness makes the deponent his/her witness. CPLR 3117(d).

F. Objection to Disclosure—CPLR 3122: Objections must be timely made. Hence, objections are to be made within twenty (20) days of a demand for

document production under CPLR 3120 or demand for a physical or mental examination under CPLR §3121. CPLR 3122.

G. Protective Orders CPLR §3103: “Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” CPLR §3103(a). “Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.” CPLR §3103(b). (Likewise service of a summary judgment motion, pursuant to CPLR 3212, suspends all discovery, until its determination or the court rules otherwise. CPLR 3214(b).

H. Supervision of Disclosure—CPLR §3104. “Upon the motion of any party or witness on notice to all parties or on its own initiative without notice, the court in which an action is pending may by one of its judges or a referee supervise all or part of any disclosure procedure.” CPLR §3104(a). You have five (5) days to appeal by motion to the court an adverse order of a referee. CPLR §3104(d). Discovery on that particular matter is stayed pending review by the court of the referee’s order appealed from. *Id.*

I. Failure to Disclose; Motion to Compel Disclosure--CPLR 3124: “If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order . . . , except a notice to admit . . . , the party seeking disclosure may move to compel compliance or a response.”

I. Penalties for Refusal to Comply with Order or to Disclose--CPLR

§3126: A party or its employee or agent “refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed . . . the court may . . .” issue an order deeming the issues resolved or issue and order “prohibiting the disobedient party from supporting or opposing designated claims or defense, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental . . . condition sought to be determined, or from using certain witnesses; or . . .” the Court can strike the pleadings, hold the disobedient party in default or dismiss the action. CPLR §3126. See also, 22 N.Y.C.R.R. §130-1.1 (awarding sanctions up to \$10,000.00 for frivolous conduct and reasonable attorney’s fees to the other side).