2014-2015 Civil Disclosure Update

2015 Joint NYSCALA/OCA CLE Program

John Higgitt

(jhiggitt@nycourts.gov)

1. CPLR 2214; Materials submitted to the court in connection with a disclosure motion

A party submitting material on a CD-R or related device in connection with a motion must ensure that the court can open and read the material

● Garrison v Quirk, 120 AD3d 753, 991 NYS2d 334 (2d Dept 2014)

Under CPLR 2214(c), a moving party must file with the court all of the papers (or their functional equivalents) on which he or she relies on a motion. The movant in Garrison submitted to the trial court a CD-R purportedly containing various medical records upon which the movant's expert witness relied in preparing an affirmation in connection with the motion. Because the record on appeal contained no evidence establishing that the CD-R was readable by the trial court, let alone that the CD-R actually contained the relevant certified medical records, the Second Department concludes that the movant violated CPLR 2214(c) and therefore failed to make a prima facie showing of entitlement to judgment as a matter of law. The Court also concludes that even assuming a readable CD-R containing the certified medical records had been submitted to the trial court on a prior motion, the trial court was not required to locate and access that CD-R on the subsequent summary judgment motion.

Note: Attorneys frequently provide with their motion papers small devices – a disc, a CD-R, a zip drive – containing voluminous information referenced in motion papers. If we do not accept or want information submitted in such a fashion, we should alert the attorneys that we require paper copies of all evidence.

2. CPLR 2214; Materials submitted to the court in connection with a motion

● CPLR 2214(c) (L 2014, ch 109)

CPLR 2214(c) was amended in 2014 to modify partially the rule that a party must file all papers referenced in a motion, including a paper that was previously filed with the court (see Biscone v JetBlue Airways Corp., 103 AD3d 158, 957 NYS2d 361 [2d Dept 2012, Austin, J.]). In Biscone, the Court held that a movant in an electronically-filed action was required to "e-file" all of the papers relevant to its motion; the movant couldn't simply reference the e-file docket number of a previously filed paper. The Legislature responds to Biscone by adding an exception to the file-

everything-on-a-motion rule. Now, in an e-filed action, unless a court rule provides otherwise, a party that files papers in connection with a motion need not include a paper that was previously e-filed; the party can just make reference to the paper's e-file system docket number.

Note: The amended statute contemplates and reinforces our right to demand "working copies" in e-filed cases (see CPLR 2214[c] ["Except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system."]).

3. CPLR 3101(a); Disclosure of information that is material and necessary; Liberal disclosure generally favored; Trial admissibility not determinative on issue of discoverability

Trial court must not give undue weight to whether evidence will ultimately be admissible at trial when making determination regarding whether information is discoverable

● In the Matter of Steam Pipe Explosion at 41st Street and Lexington Avenue, 127 AD3d 554, 8 NYS3d 88 (1st Dept 2015)

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." The Court of Appeals has directed that the phrase "material and necessary" is "to be interpreted liberally to require disclosure … of any facts bearing on the controversy" (Allen v Crowell-Collier Publicity Co., 21 NY2d 403, 406, 288 NYS2d 449, 452 [1968]). In Matter of Steam Pipe Explosion, the defendants/third-party plaintiffs sought documents relating to a prior incident involving the defendant/third-party defendant. Supreme Court denied defendants/third-party plaintiffs' motion to compel disclosure of the documents. The First Department reversed, stating that "[t]he motion court applied too harsh a standard in determining that documents concerning the prior … incident are not discoverable. We are not concerned with the ultimate admissibility of the evidence at trial, but with the discovery of information concerning the prior incident, as to which a more liberal

standard applies. The motion court's reliance on cases involving the exclusion of testimony or the evaluation of evidence submitted in opposition to a defendant's motion for summary judgment underscores that it applied a more restrictive standard in evaluating the discoverability of evidence concerning [the defendant/third-party defendant] and other incidents" (127 AD3d at 555-556, 8 NYS3d at 89-90 [internal citations omitted]). The defendant/third-party defendant's excess application of leak sealant was a contributing factor in both the steam pipe explosion giving rise to the litigation and a prior incident at a Texas refinery, and the defendants/third-party plaintiffs alleged that, in the New York incident giving rise to this litigation, excess application of sealant caused blockages of steam traps, preventing the removal of condensed steam from inside the steam main, and leading to a condition that caused the main to rupture. Because the precipitating causes and the circumstances surrounding both incidents were sufficiently similar, disclosure regarding the prior incident was warranted.

Note: The Court in Matter of Steam Pipe Explosion also held that defendants/third-party plaintiffs were entitled to disclosure of all matter material and necessary to their claims and defenses regardless of whether any such matter was publically available (127 AD3d at 556, 8 NYS3d at 90 [defendants/third-party plaintiffs' "independent efforts to obtain publicly-available documents, whether through record searches or Freedom of Information Law requests, do not extinguish [defendant/]third-party defendant's obligations to comply with the CPLR."]; see Rawlings v St. Joseph's Hospital Health Center, 108 AD3d 1191, 969 NYS2d 687 [3d Dept 2013, Peters, P.J.]).

4. CPLR 3101(a); Disclosure of information that is material and necessary; Social media postings

A party's mere possession of a social media account is not a sufficient basis to compel the party to provide access to the account to the other parties

● Tapp v New York State Urban Dev. Corp., 102 AD3d 620, 958 NYS2d 392 (1st Dept 2013); Richards v Hertz Corp., 100 AD3d 728, 953 NYS2d 654 (2d Dept 2012); Fawcett v Altieri, 38 Misc 3d 1022, 960 NYS2d 592 (Sup Ct, Richmond County 2013, Maltese, J.); see A.D. v C.A., ___AD3d___, ___NYS3d___, 2015 NY Slip Op 25283 (Sup Ct, Westchester County 2015, Ecker, J.) (reviewing discoverability of social media evidence in matrimonial action on issue of child custody)

Parties in civil actions are often interested in disclosure of other parties' social media postings (e.g., Facebook, LinkedIn, Twitter, etc.). Maybe some entries or pictures on a party's social media site will contain information that is relevant to the incident(s) giving rise to the lawsuit, the issue of a tort plaintiff's damages, or both. When is a party permitted to disclosure of another party's social media postings? The party seeking disclosure must establish some factual predicate for a request for such disclosure -- some showing that the postings contradict or conflict with the social media poster's allegations in the lawsuit. If there is a factual predicate for disclosure of a party's social media postings but some suggestion that the postings also contain information that is unrelated to the incident(s) or the poster's potential damages, the court may review in camera the social media materials and release only those it deems material and necessary to the prosecution or defense of the action (see Richards, supra). In such a situation, a court could also consider requiring the disclosing party's counsel to perform an initial review of the materials, limiting in camera review to those materials counsel does not consent to revealing to the other party (see Nieves v 30 Ellwood Realty LLC, 39 Misc 3d 63, 966 NYS2d 808 [App Term,1st Dept 2013]; Melissa G. v North Babylon Union Free School District, 48 Misc 3d 389, 6 NYS3d 445 [Sup Ct, Suffolk County 2015, Rebolini, J.]; see also Del Gallo v City of New York, 43 Misc 3d 1235[A], 997 NYS2d 98 [table] [Supreme Court, New York County 2015, Freed, J.]).

Note 1: How can a party obtain information to form a factual predicate for social media disclosure? The party can look at any publicly available materials on the other party's social media sites (see Spearin v Linmar, L.P., 129 AD3d 528, 11 NYS3d 156 [1st Dept 2015]; Richards, supra; Melissa G., supra), and ask questions about the content (both public and private) of the

sites during the poster's deposition (see Hon. Mark Dillon, Discovery of Private Social Media Postings, April 9, 2013 New York Law Journal).

Note 2: Information on a social media account is not shielded from disclosure merely because a party used a privacy feature to restrict access to the information (see Melissa G., supra; Del Gallo, supra).

5. CPLR 3101(a); Waiver of physician-patient privilege in personal injury action

When does a plaintiff place his or her entire medical condition in issue so as to waive entirely the physician-patient privilege?

● See Reading v Fabiano, 126 AD3d 1523, 6 NYS3d 360 (4th Dept 2015); Schlau v City of Buffalo, 125 AD3d 1546, 4 NYS3d 450 (4th Dept 2015); Gumbs v Flushing Town Center III, L.P., 114 AD3d 573, 981 NYS2d 394 (1st Dept 2014); Montalto v Heckler, 113 AD3d 741, 978 NYS2d 891 (2d Dept 2014); Bravo v Vargas, 113 AD3d 577, 978 NYS2d 313 (2d Dept 2014); Moreira v M.K. Travel and Transport, 106 AD3d 965, 966 NYS2d 150 (2d Dept 2013); M.C. v Syvia Marsh Equities, Inc., 103 AD3d 676, 959 NYS2d 280 (2d Dept 2013); McLeod v MTA, 47 Misc 3d 1219(A), 2015 NY Slip Op 50705(U) (Sup Ct, New York County 2015, Stallman, J.)

As noted above, CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." But privilege law may prohibit disclosure that would otherwise occur under CPLR 3101(a). One of the most frequently-invoked privileges is the physician-patient privilege, which provides that "a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he [or she] acquired in attending a patient in a professional capacity, and which was necessary to enable him [or her] to act in that capacity" (CPLR 4504[a]). The "privilege is a rule of evidence that protects communications and medical records" (People v Rivera, 25 NY3d 256, 261, 11 NYS3d 509, 512 [2015, Pigott, J.]). But, "by bringing or defending a personal injury action in which mental or physical condition is affirmatively put in issue, a party waives the privilege"; the waiver is limited to the conditions affirmatively placed in controversy and conditions related thereto (see Koump v Smith, 25 NY2d 287, 294, 303 NYS2d 858, 864 [1969]). Sometimes a tort plaintiff, by virtue of his or her allegations,

places his or her entire medical condition in controversy, allowing the defendant to obtain broad disclosure regarding the plaintiff's medical history. When has a plaintiff entirely waived his or her physician-patient privilege? No bright-line test exists to answer this question, but here are some relevant considerations: Did the plaintiff make "broad" allegations of injuries; did the plaintiff allege an injury to a discreet body part or parts, or did plaintiff allege an injury to a body system or function? Did the plaintiff allege future lost earnings? Did the plaintiff allege a permanent injury? Did the plaintiff claim loss of enjoyment of life?

Note: In determining which conditions a party has placed in controversy in a lawsuit, we are aided by expert evidence from the parties.

6. CPLR 3101(a)(4); Non-party disclosure

The requirement that a party seeking disclosure from a non-party specify the circumstances or reasons why the disclosure is desired need not establish "special circumstances" for the non-party disclosure

● Kapon v Koch, 23 NY3d 32, 988 NYS2d 559 (2014, Pigott, J.)

CPLR 3101(a)(4) allows a party to obtain information relevant to an action from a non-party. Prior to 1984, the statute required a party to obtain a court order compelling the non-party to provide disclosure, and the order would not issue unless the party established "special circumstances" justifying that disclosure, e.g., that the information could only be obtained from the non-party. The statute was amended in 1984 to remove the court order-special circumstances requirement, substituting therefore a clause permitting a party to serve a subpoena on a non-party with a notice specifying "the circumstance or reasons [the] disclosure in being sought." In the wake of the amendment, the First and Fourth Departments concluded that CPLR 3101(a)(4) only requires that the information sought from the non-party be relevant to the action; the Second and Third Departments, however, continued to require special circumstances or something similar thereto justifying non-party disclosure (see e.g. Connors, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3101, C3101:22, 2011 and 2010 Pocket Parts). In Kapon, the Court of Appeals puts the issue to rest: the information need only be relevant to the action and no special circumstances need exist. The Kapon Court concludes that a party seeking disclosure from a non-party must sufficiently state the circumstances or

reasons underlying the subpoena, and the non-party, in moving to quash, must establish either that the disclosure sought is utterly irrelevant or that the process to uncover anything legitimate is obviously futile.

7. CPLR 3101(a)(4); Non-party disclosure; Disclosure of information relating to a party's family members

In lead paint personal injury cases, information concerning medical and educational history of a plaintiff's family members may be (but is not necessarily) discoverable

● Perez v Fleischer, 122 AD3d 1157, 997 NYS2d 773 (3d Dept 2014, McCarthy, J.)

As discussed above, CPLR 3101(a)(4) allows a party to obtain information relevant to an action from a non-party. In a lead paint personal injury action, evidence concerning the medical and educational history of the plaintiff's family members may be relevant on the issue of causation, i.e., were the plaintiff's injuries caused, in whole or in part, by factors other than lead poisoning. A defendant seeking such evidence must demonstrate a predicate for its disclosure; the defendant has to show that the desired information is material and necessary to determining the causes and contributing factors related to the plaintiff's condition. Even assuming that the defendant demonstrates the proper predicate, disclosure may be limited by the physician-patient privilege (see CPLR 4504). In Perez, supra, the defendants, the owners of the property on which the plaintiff was allegedly exposed to lead paint, moved to compel disclosure of academic and medical records of the plaintiff's siblings and mother, and to compel the mother to take an IQ test. Supreme Court granted the motion to the extent of requiring (1) the disclosure of the academic and medical records of the mother, (2) the mother to appear for an IQ test, and (3) the production of the siblings' academic and medical records for in camera review. The Third Department modified the order to limit the disclosure. First, the Court determined that the medical records of the mother and the siblings were not discoverable because they neither waived the physician-patient privilege nor consented to disclosure of the records. Second, the Court concluded that the educational records of the siblings and the mother were private but not privileged, and that, given the defendants' expert evidence indicating that those records were material and necessary to determine whether other factors caused the plaintiff's conditions, in camera inspection of those records was warranted.

Third, the Court found that the mother did not have to submit to a IQ test. Although the defendants' expert evidence indicated that the mother's IQ may be relevant on the issue of the cause of the plaintiff's diminished mental capacity, the private and personal nature of that information and the potential delay of the resolution of the action engendered by the administration of the IQ test militated against compelling the mother to submit to it.

Note: This type of non-party disclosure is only permissible where the defendant submits expert evidence indicating that the medical and educational history of a plaintiff's family members may be relevant to the plaintiff's claims in the litigation.

8. CPLR 3101(d)(1)(i); Pre-trial statement regarding identity, qualifications and opinions of expert; Timing of service of statement

A party's failure to serve CPLR 3101(d)(1)(i) expert statement before the filing of the note of issue does not necessarily preclude the party from relying on the expert's opinion in connection with a summary judgment motion

● Rivers v Birnbaum, 102 AD3d 26, 953 NYS2d 232 (2d Dept 2012, Belen, J.)

CPLR 3101(d)(1)(i) governs the "disclosure" of expert witnesses. Critically, it contains no express deadline for the disclosure of an expert. The provision says that, "Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall 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" (emphasis added). And "where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph" (emphasis added). Although the statute is couched in terms of disclosure of experts to be used at trial, the courts have applied it to experts used in conjunction with summary judgment motions. Some courts have concluded that a party's failure to disclose an expert prior to the filing of the

note of issue - regardless of how far off into the future a trial may be - precludes the party from using the expert on a summary judgment motion (see e.g. Garcia v City of New York, 98 AD3d 857, 951 NYS2d 2 [1st Dept 2012]; Construction by Singletree, Inc. v Lowe, 55 AD3d 861, 866 NYS2d 702 [2d Dept 2008]).

The court in Rivers refines the approach in the Second Department. Now, "the fact that disclosure of an expert pursuant to CPLR 3101(d)(1)(i) takes place after the filing of the note of issue ... does not, by itself, render the disclosure untimely. Rather, the fact that pretrial disclosure of an expert pursuant to CPLR 3101(d)(1)(i) has been made after the filing of the note of issue ... is but one factor in determining whether disclosure is untimely. If a court finds that the disclosure is untimely after considering all of the relevant circumstances in a particular case, it still may, in its discretion, consider an affidavit or affirmation from that expert submitted in the context of a motion for summary judgment, or it may impose an appropriate sanction." But, the court opens the door to a trial court imposing a specific deadline (for example, prior to the filing of the note of issue or prior to the making of a motion for summary judgment). In determining whether to exercise its discretion to consider the affidavit of an expert who was not disclosed timely, a court may give particular weight to whether the party proffering the expert offers a reasonable excuse for the failure to disclose timely the expert, whether that party intentionally or willfully failed to disclosure timely the expert, and whether the opposing party was prejudiced (see e.g. Begley v City of New York, 111 AD3d 5, 972 NYS2d 48 [2d Dept 2013, Eng, P.J.]); Kozlowski v Oana, 102 AD3d 751, 959 NYS2d 500 [2d Dept 2013]; LeMaire v Kuncham, 102 AD3d 659, 957 NYS2d 732 [2d Dept 2013]).

In Ramsen A. v New York City Housing Authority, 112 AD3d 439, 976 NYS2d 73 (2013), the First Department joined the Second Department in concluding that a party's failure to respond to a demand for an expert statement until after the filing of the note of issue does not automatically preclude the party from relying on the expert to support or defeat a summary judgment motion or calling the expert at trial. The fact that disclosure of an expert pursuant to CPLR 3101(d)(1)(i) is made after the filing of the note of issue is but one factor in determining whether disclosure is untimely. If a court finds that the disclosure is untimely after considering all of the relevant circumstances in a particular case, it still may, in its discretion, consider an affidavit or affirmation from that expert submitted in the context of a motion for summary judgment, or it may impose an appropriate sanction. But see

DeSimone v City of New York, 121 AD3d 420, 993 NYS2d 551 (1st Dept 2014) ("The [motion] court providently exercised its discretion in denying plaintiff's cross motion to submit a disclosure of his expert professional engineer, since it was first submitted in opposition to defendants' motions for summary judgment dismissing the complaint, and subsequent to the filing of the note of issue and certificate of readiness").

9. CPLR 3101(d)(1)(i); Expert statement; Identifying an expert

A party moving for summary judgment must disclose the identity of the expert; the expert's name cannot be redacted

● Rivera v Albany Medical Center Hospital, 119 AD3d 1135, 990 NYS2d 310 (3d Dept 2014, McCarthy, J.)

CPLR 3101(d)(1)(i) provides that, "In an action for medical, dental or podiatric malpractice, a party, in responding to a request [for a CPLR 3101[d][1][i]] statement, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required." That provision has been applied to allow a non-moving party on a summary judgment motion in a medical, dental or podiatric malpractice action to withhold the name of his or her expert in the affidavit or affirmation. The Court in Rivera holds that the statute does not permit a party seeking summary judgment to withhold the name of the expert. If a summary judgment movant submits an anonymous expert affidavit or affirmation, the submission is inadmissible.

10. CPLR 3101; Electronic disclosure; Preliminary conferences

The Uniform Rules governing preliminary conferences in regular Supreme Court parts and the Commercial Division are amended to clarify how the counsel are to address e-disclosure at those conferences

● 22 NYCRR 202.12(b), (c)(3), and 202.70(g)(rule 8)

22 NYCRR 202.12 concerns itself with the business of preliminary conferences, providing many particulars for this important early event in litigation. Where a case is "reasonably likely" to present electronic disclosure issues, certain additional obligations are imposed on counsel before and at the preliminary conference. The first amendment to 202.12,

the addition of subparagraph 1 to subdivision (b), provides guidance to counsel as to when it is "reasonably likely" that a given case will present electronic disclosure issues. The second amendment to 202.12, and an amendment to 202.70(g)(rule 8), the Commercial Division's rule regarding consultation among the parties before a preliminary conference or compliance conference, eliminate inconsistencies between the rules of the regular Supreme Court parts and the Commercial Division setting forth the e-disclosure topics that counsel should be prepared to address before and at the preliminary conference.

11. CPLR 3103; Protective orders; Who may seek an order

Statute amended to make clear that the "person about whom" the disclosure is sought may seek relief under CPLR 3103

● L. 2013, ch. 205 (effective July 31, 2013)

CPLR 3103 permits a court to issue a protective order regulating disclosure. The statute said that the court could issue a protective order sua sponte, and permitted a motion for a protective order by (1) any party or (2) any person from whom discovery was sought. The statute did not expressly authorize a motion by a person about whom the disclosure was sought. With the amendment, that class is authorized to move for relief under 3103. The beneficiaries of the amendment are non-parties about whom information is sought in litigation.

12. CPLR 3113; Non-party depositions; Participation by counsel for the non-party

New legislation overrules case law prohibiting counsel to a non-party from participating in the non-party's deposition

● CPLR 3113(c) (L 2014, ch 379)

In Thompson v Mather (70 AD3d 1436, 894 NYS2d 671 [2010]) and Sciara v Surgical Associates of Western New York, 104 AD3d 1256, 961 NYS2d 640 (4th Dept 2013), lv granted 107 AD3d 1503, 967 NYS2d 863 (Table) (4th Dept 2013), appeal withdrawn 2015 NY Slip Op 60389 (Jan. 8, 2015), the Fourth Department concluded that counsel for a non-party deponent does not have the right to object during or otherwise participate in the deposition.

In both cases, the Court cited CPLR 3113(c), which provides that the examination and cross-examination of a deponent shall proceed as permitted at trial (and counsel for non-parties are not allowed to object to or openly participate in examinations during trial). Those decisions are legislatively overruled with an amendment to that statute. The amendment makes plain that a non-party deponent's counsel may participate in the deposition and make objections in the same manner as counsel for a party deponent.

13. CPLR 3116; deposition transcripts

A witness may make significant changes to his or her deposition testimony on an errata sheet, provided the witness gives a sufficient reason why the changes are necessary

● Lieblich v Saint Peter's Hospital of the City of New York, 112 AD3d 1202, 977 NYS2d 780 (3d Dept 2013, Egan, J.)

CPLR 3116(a) provides that a witness may make a change to the form or substance of his or her deposition testimony by noting the change at the end of the transcript, and providing a statement of the reasons for making the change. Even significant changes are permitted so long as the witness provides a sufficient reason why the changes are necessary. The Court in Lieblich holds that a witness who makes significant changes to his or her deposition in the errata sheet of the transcript may be required to appear for a further deposition.

Note: The greater the change to the deposition testimony, the stronger the reason must be to permit the change (see Ashford v Tannenhauser, 108 AD3d 735, 970 NYS2d 65 [2d Dept 2013]).

14. CPLR 3116; Deposition transcripts

A court should not, sua sponte, conclude that an uncertified deposition transcript is inadmissible and refuse to consider it; the court should alert the party who submitted the transcript of the infirmity and give the party a chance to correct it

● Rosenblatt v St. George Health & Racquetball Association, LLC, 119 AD3d 45, 984 NYS2d 401 (2d Dept 2014, Leventhal, J.)

CPLR 3116(b) requires the court reporter or other officer before whom a deposition was taken to certify that the witness was duly sworn and that the deposition is a true record of the testimony provided by the witness. If a party submits an uncertified deposition transcript in connection with a motion, the testimony may be inadmissible. But another party or the court itself must raise the issue, and afford the movant an opportunity to correct the irregularity (see CPLR 2001).

15. CPLR 3119; Uniform Interstate Depositions and Discovery Act

Under CPLR 3119, a New York court may review subpoenas issued under the authority of a sister state court seeking disclosure in New York

● Hyatt v State of California Franchise Tax Bd., 105 AD3d 186, 962 NYS2d 282 (2d Dept 2013, Hall, J.)

CPLR 3119 (enacted in 2010) adopts a procedure for the seeking of the aid of the New York courts to secure disclosure in New York for use in an action or proceeding in a sister state or federal court. It provides that a party may submit a subpoena issued under authority of a sister state court to the county clerk in the New York county in which discovery is sought to be conducted. The county clerk, in turn, issues a subpoena for service in New York on the person to whom the out-of-state subpoena is directed. The New York subpoena may, alternatively, be issued by a New York-licensed attorney. The Hyatt Court observes that a CPLR 3119 subpoena issued by a county clerk or New York attorney may be challenged by motion to quash, and that motion is governed by the rules of the discovery state (here, New York). Therefore, the Court reviews under New York law a subpoena initially issued under authority of the California courts and subsequently issued in New York by a New York attorney.

Note: In Hyatt, there had been no prior judicial review of the subpoena. If a court of another state has already reviewed a CPLR 3119 subpoena, that review is to be accorded significant deference by a New York court (see In re Aerco International, Inc., 40 Misc 3d 571, 964 NYS2d 900 [Sup Ct, Westchester County 2013, Connelly, J.]).

16. CPLR 3121; Medical examinations; Exchange of medical reports

A personal injury plaintiff cannot be compelled to produce, prior to medical examinations noticed under CPLR 3121, medical reports causally relating the plaintiff's alleged injuries to a defendant's tortious conduct

● Hamilton v Miller, 23 NY3d 592, 992 NYS2d 190 (2014, Lippman, C.J.)

CPLR 3121(a) provides that when a party's mental or physical condition is in issue, any other party may serve on the party whose condition is in controversy notice "to submit to a physical, mental or blood examination by a designated physician." A noticed party then is required under 22 NYCRR 202.17(b)(1) to provide "copies of the medical reports of those medical providers who have previously treated or examined the party seeking recovery. These shall include a recital of the injuries and conditions as to which testimony will be offered at the trial, referring to and identifying those X-ray and technicians reports which will be offered at the trial, including a description of the injuries, a diagnosis and a prognosis." What does the rule require of a personal injury plaintiff who was never treated for or diagnosed with certain injuries he or she alleges in the action? The Court in Hamilton holds that a plaintiff cannot avoid disclosure under 202.17 simply because his or her treating or examining medical providers have not drafted any reports within the meaning of the rule. If a plaintiff's medical reports do not contain the information required by the rule, then the plaintiff must have the medical providers draft reports setting forth that information. If that is not possible, the plaintiff must seek relief from disclosure and explain why he or she cannot comply with the rule. The Court also holds, however, that 202.17 does not require that medical providers causally relate the plaintiff's injuries to a defendant's tortious conduct.

17. CPLR 3122-a; Certification of business records produced by non-parties

The statute providing a smooth authentication process for the business records of a non-party is expanded to include records produced voluntarily, i.e., without a subpoena

● CPLR 3122-a(d) (L 2014, ch 314)

CPLR 3122-a was adopted to facilitate the introduction of business records produced by non-parties in disclosure or for trial. The statute eliminates the need for a non-party to call a witness (such as a records custodian) to establish the authenticity of the records; a witness with the requisite knowledge can simply provide a certificate with the records attesting to their authenticity. But CPLR 3122-a contained a significant limitation: it only applied to business records produced pursuant to a subpoena duces tecum issued under CPLR 3120. That limitation was removed in 2014 by the addition of subdivision (d), which states that, "[t]he certification authorized by [3122-a] may be used as to business records produced by nonparties whether or not pursuant to a subpoena so long as the custodian or other qualified witness attests to the facts set forth in paragraphs one, two and four of subdivision (a)."

18. CPLR 3126; Penalties for a party's failure to comply with a discovery order or willful failure to disclose

Disclosure sanction under CPLR 3126 must be commensurate with particular disobedience it is designed to punish

● Merrill Lynch, Pierce, Fenner & Smith, Inc. v Global Strat Inc., 22 NY3d 877, 976 NYS2d 678 (2013)

CPLR 3126 provides that if a party refuses to obey an order for disclosure or wilfully fails to disclose information that the court finds ought to have been disclosed, the court may make such orders with regard to the failure or refusals as are just. An order under CPLR 3126 may include the entry of a default judgment against the non-complying party. Although a trial court has discretion to determine the nature and degree of the penalty, the sanction should be "commensurate with the particular disobedience it is designed to punish, and go no further than that." So says the Merrill Lynch Court. It disturbs the 3126 penalty imposed by Supreme Court (and affirmed by the

Appellate Division) on the basis that Supreme Court abused its discretion in imposing a penalty that was not commensurate with the recalcitrance the penalty was designed to punish (see Arpino v F.J.F. & Sons Electric Co., Inc., 102 AD3d 201, 959 NYS2d 74 [2d Dept 2012, Austin, J.]).

19. Spoliation of evidence; Standard for spoliation sanctions

Spoliation of non-electronically stored information is governed by New York common law, not federal Zubulake standard employed by New York courts for electronically stored information

●Strong v City of New York, 112 AD3d 15, 973 NYS2d 152 (1st Dept 2013, Saxe, J.)

New York courts have applied Zubulake v UBS Warburg, 220 FRD 212 (SD NY 2003), and its three-element test, to requests for disclosure sanctions for the spoliation of electronically stored information (ESI) (VOOM HD Holdings, LLC v EchoStar Satellite LLC, 93 AD3d 33, 939 NYS2d 321 [1st Dept 2012] [the party seeking spoliation sanctions for ESI must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a "culpable state of mind," and (3) the destroyed evidence was "relevant" to the moving party's claim or defense."]). Will the courts apply Zubulake to requests for sanctions for spoliation of non-ESI (such as a document or audiotape)? "No," says the First Department in Strong, since New York has a well-settled body of case law on the issue of spoliation of non-ESI. That case law provides that where evidence was negligently (or willfully, deliberately, or contumaciously) destroyed and the alleged spoliator was on notice that the destroyed evidence might be needed for future litigation, a spoliation sanction, such as an adverse inference charge or preclusion, may be warranted (see Malouf v Equinox Holdings, Inc., 113 AD3d 422, 978 NYS2d 160 [1st Dept 2015]). Because the spoliated evidence at issue in Strong was an audiotape, the court applies New York's common law.

Note: Notwithstanding the holding in Strong, some post-Strong decisions from the First Department have applied the Zubulake test to claims of spoliation of non-ESI (see Duluc v AC & L Food Corp., 119 AD3d 450, 990 NYS2d 24 [1st Dept 2014]).

Query: What is the difference between the Zubulake test for spoliation sanctions of ESI and New York's common law rule for spoliation sanctions of non-ESI?

20. CPLR article 31; Spoliation

A party's duty to preserve potential evidence may be limited, sometimes by the conduct of the party seeking the preservation of the evidence

● Duluc v AC & L Food Corp., 119 AD3d 450, 990 NYS2d 24 (1st Dept, July 10, 2014)

A party may be obligated to preserve information that may be needed in litigation. Such a party may be subject to spoliation sanctions, which can greatly affect that party's case, if the party had an obligation to preserve information at the time the information was destroyed; the information was destroyed with a "culpable state of mind" (which includes ordinary negligence); and the destroyed evidence is relevant to another party's claim or defense. The first step in the spoliation equation is whether the alleged spoliator had an "obligation" to preserve the information; this means "duty." In Duluc, the Court considered the extent of a party's duty to preserve surveillance tapes of an accident scene. There, in response to a request from plaintiff's counsel to preserve certain footage of the plaintiff's accident, the defendant preserved an 84-second portion of footage. The trial court denied the plaintiff's motion for spoliation sanctions based on the defendant's destruction of other footage related to the accident -- the six hours of footage leading up to the accident from all 32 cameras in the defendant's premises. The Appellate Division affirms, stressing (1) that plaintiff's counsel only sought preservation of a limited segment of footage --"any and all video recordings/surveillance tapes/still photos of any nature that depict the subject slip and fall accident" -- and (2) that the defendant had a good reason why it no longer had other footage -- the defendant's computer system at the time automatically erased all unpreserved footage every three weeks, and that system subsequently broke and was replaced.

21. CPLR article 31; Spoliation of electronically stored information

In the realm of spoliation of ESI, the spoliator's failure to issue a written "litigation hold" commanding preservation of potentially useful information does not, standing alone, constitute gross negligence

● Pegasus Aviation I, Inc. v Varig Logistica S.A., 118 AD3d 428, 987 NYS2d 350 (1st Dept 2014)

The party asserting a claim of spoliation of ESI must establish that the alleged spoliator had an obligation to preserve information at the time the information was destroyed; that the information was destroyed with a "culpable state of mind"; and that the destroyed evidence is relevant to another party's claim or defense. With respect to the last element, relevance will be presumed if the alleged spoliator was grossly negligent in destroying the information. Is a party's failure to issue a written "litigation hold" to the members of its organization directing preservation of ESI per se gross negligence? "No," says the First Department in Pegasus Aviation. Whether a party was grossly negligent in allowing ESI to be destroyed is determined based on the particular facts of the case, and the failure to issue a written litigation hold is but one of those facts. Although the defendants failed to issue a written litigation hold, their conduct, viewed in its totality, amounted to simple negligence at most. Therefore, the plaintiff could not benefit from the presumption of prejudice afforded when the spoliator engaged in gross negligence, and the plaintiff was required, but failed to, demonstrate that it was prejudiced by the destruction of the subject information.

Note: The presumption of relevance of spoliated evidence that arises when a spoliator is grossly negligent may be rebutted (see AJ Holdings Group, LLC v IP Holdings, LLC, 129 AD3d 504, 11 NYS3d 55 [1st Dept 2015]).

22. CPLR article 31; Sanctions for fraud on the court

When a party commits a fraud on the court the party is subject to sanctions, including the striking of its pleading

● CDR Creances S.A.S. v Cohen, 23 NY3d 307, 991 NYS2d 519 (2014, Rivera, J.)

CPLR 3126 provides for penalties when a party refuses to obey a disclosure order or willfully fails to disclose information that the court determines should have been disclosed. The doctrine of spoliation allows for the

imposition of a penalty when a party destroys relevant evidence. Can a party be penalized for engaging in fraudulent conduct in the course of litigation that falls outside the scope of CPLR 3126 and the doctrine of spoliation? Yes. A court has inherent power to address actions that are meant to undermine the truth-seeking function of the judicial system and threaten the integrity of the courts. Thus, the Court in CDR holds that where a court finds, by clear and convincing evidence, conduct that constitutes fraud on the court, a sanction may be imposed on the fraudster to ensure the integrity of the judicial system. To establish fraud, the non-offending party must establish (again, by clear and convincing evidence) that the offending party acted knowingly in an attempt to hinder the fact-finder's fair adjudication of the case. Proof of fabrication of evidence, perjury, and falsification of documents would probably satisfy that standard. The more egregious the conduct, the stiffer the penalty the court may impose. The striking of a pleading is appropriate on exceptional facts; lesser penalties, such as awarding attorneys' fees, awarding costs incurred, or precluding evidence, are available if the fraud was not central to the substantive issues in the case or was isolated.

23. CPLR 3216; Dismissal for want of prosecution

The want-of-prosecution statute is amended in three material respects

● CPLR 3216 (L 2014, ch 371)

CPLR 3216 provides a defendant or the court with a means of compelling a plaintiff to resume prosecution of its action. By service of a CPLR 3216 90-day notice, a defendant or the court can require a plaintiff to complete disclosure proceedings and file a note of issue and proper certificate of readiness (see Dutchess Truck Repair, Inc. v Boyce, 120 AD3d 543, 991 NYS2d 639 [2d Dept 2014]; Furrukh v Forest Hills Hospital, 107 AD3d 966 NYS2d 497 [2d Dept 2013]) within 90 days of service of the notice. Because there can be serious consequences to a plaintiff who does not comply with the demand (including dismissal of the complaint), a defendant or the court must strictly comply with the statutory requirements. Those requirements are expanded as a result of the 2014 amendments to CPLR 3216. Now, the statute requires a court to give the parties notice before it dismisses a complaint based on a plaintiff's failure to comply with the 90-day demand (this appears to be a codification of a requirement imposed by the Court of Appeals decision in Cadichon v Facelle, 18 NY3d 230, 938

NYS2d 232 [2011, Pigott, J.]) (CPLR 3216[a]). The statute was also amended to extend (in most cases) the amount of time a defendant or the court must wait before seeking dismissal. Under the old law, neither a motion to dismiss nor court action could be initiated until at least one year elapsed since the joinder of issue. CPLR 3216(b)(2) is amended to provide that no motion to dismiss can be made and no court action can be undertaken until the later of the expiration of one year following the joinder of issue or the passage of six months since the issuance of a preliminary conference order (assuming one was issued in the case). Lastly, CPLR 3216(b)(3) was amended to require that when a court itself serves a 90-day demand, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay.