

FAMILY COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, CITY OF NEW YORK, PART 14

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In the Matter of

[REDACTED]

Children Under Eighteen Years of Age  
Alleged to be Neglected by

[REDACTED]

Respondent.

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**AFFIRMATION IN  
OPPOSITION TO MOTION**

Docket No.:

[REDACTED]

Rebecca Oyama, Esq., an attorney authorized to practice law in the State of New York, affirms, under penalty of perjury, the following:

1. I am the attorney of record, from The Bronx Defenders for [REDACTED], the respondent mother, and I am fully familiar with all papers and proceedings previously filed and had herein.
2. I make this Affirmation in Opposition to the June 16, 2014, Notice of Motion filed by counsel for the Administration for Children's Services ("the Petitioner"), seeking to compel Ms. [REDACTED] counsel to disclose all case related documents in their possession pursuant to CPLR §3124.

**PERTINENT PROCEDURAL AND FACTUAL HISTORY**

3. On November 28, 2011, ACS filed a neglect petition against Ms. [REDACTED] in Bronx Family Court. On that date, the Honorable Gayle P. Roberts remanded the children, [REDACTED] and [REDACTED] to the custody of the Administration for Children's Services ("ACS").
4. On April 19, 2012, ACS filed an abuse petition in Bronx Family Court against [REDACTED] and withdrew the neglect petition and a remand of the children was entered on the abuse docket.
5. On November 7, 2013, [REDACTED] gave birth to [REDACTED].
6. On November 13, 2013, ACS filed a derivative abuse petition against Ms. [REDACTED].

7. On June 13, 2014, petitioner sent an email to the undersigned asking for discovery. The email did not constitute a proper discovery request pursuant to CPLR § 3120; the email neither referenced a previous discovery demand nor stated the specific documents petitioner sought. Indeed, at no point during the 3 years that this case has been pending of this case has petitioner ever served respondent mother's counsel with a proper discovery demand pursuant to CPLR § 3120.
8. On June 13, 2014, counsel for Ms. [REDACTED] emailed petitioner to inform him that Bronx Defenders had no discoverable material to provide at this time.
9. On June 13, 2014, Petitioner asked if The Bronx Defenders had assigned a social worker to Ms. [REDACTED]. Despite having no obligation to provide this information, counsel told petitioner that The Bronx Defenders had assigned two social workers to work with Ms. [REDACTED]. When Petitioner asked why notes belonging to the social workers had not been provided, counsel for Ms. [REDACTED] explained to Petitioner that communications between the social workers and Ms. [REDACTED] and other notes taken at the direction of the attorney were not discoverable and protected by attorney client privilege and attorney work product.
10. On June 16, 2014, Petitioner filed a motion to compel Ms. [REDACTED] counsel to disclose all documents in their possession related to her case.

### **LEGAL ARGUMENT**

#### **I. Petitioner cannot compel discovery because it did not provide the requisite discovery notice pursuant to §3120 and thus a motion to compel is improper.**

11. CPLR §3120 provides that any party may serve a notice on another party to “produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served.” CPLR §3120(1)(i).
12. The discovery notice must specify the time, place and manner of making the discovery and must identify the items to be discovered, providing a description and category for each item. CPLR §3120(2).
13. Petitioner did not provide Respondent with a discovery notice specifying the time, place and manner of discovery or the specific documents he sought.
14. Therefore, pursuant to §3120(2), Petitioner cannot compel Respondent's counsel to provide the documents in Respondent's possession.
15. CPLR §3124 states that if a person “fails to respond or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response.” CPLR §3124.

16. A motion to compel is premature when a request for discovery pursuant to §3120 has not been made.
17. This neglect case was filed on November 13, 2013. On January 30, 2014, the case was set down for trial on June 17, 2014.
18. On May 8, 2014, this Court ordered that in the event ACS planned to file a summary judgment motion on this case, it must do so by May 19, 2014. Despite the Court's order, ACS attempted to file a motion for summary judgment on May 30, 2014, however was told to file an order to show cause seeking permission to file it, given the late filing. On June 2, 2014 on consent of all parties, ACS was permitted to file the summary judgment motion. As a result, the date of June 17, 2014 was vacated (as to the fact-finding only). At no point between Nov. 13, 2013 and the initial trial date of June 17, 2014, did Petitioner serve a discovery demand pursuant to CPLR §3120. Nor did it make any informal requests for discovery. It was not until ACS emailed respondent mother's counsel on June 13, 2014 – eight months after the filing of the derivative petition as to [REDACTED] that ACS made any attempt to request discovery of any kind from respondent mother.
19. To date, ACS still has not served respondent mother's counsel with any formal discovery demand pursuant to the CPLR.

**II. Even if Petitioner *had* provided notice pursuant to § 3120(2), social workers who act as part of an attorneys legal team are considered agents of the attorney and thus all communications, work product, and material made in anticipation of litigation are encompassed under the protections of the attorney-client privilege.**

**A. Material is not discoverable if it falls within the exceptions defined by CPLR § 3101.**

20. It is well settled that CPLR 3101 must be “interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason.” *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406, 235 N.E.2d 430, 432, 288 N.Y.S.2d 449, 452 (1968).
21. There are however, outlined in the CPLR, a number of exceptions to the general policy of liberal disclosure. “The CPLR establishes three categories of protected materials, also supported by policy considerations: privileged matter, absolutely immune from discovery (CPLR 3101 [b]); attorney's work product, also absolutely immune (CPLR 3101 [c]); and trial preparation materials.” The latter are immune unless there is “substantial need and no other method to obtain such disclosure.” *Spectrum Sys. Int’l Corp. v. Chem Bank*, 78 N.Y.2d 371, 376-377 (1991).
22. Work-product includes “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible” things. See Hickman v. Taylor, 329 U.S. 495 (1947).

23. Litigation materials include material “prepared in contemplation of litigation by non-lawyers and lawyers acting in a non-legal capacity.” Beller v. William Penn Life Ins. Co. of New York, 15 Misc.3d 350 (Sup. Ct. 2007).
24. Privileged work-product, litigation material, and/or confidential communication materials are not obtainable by an opposing party because they are protected under the CPLR. Annotated notes of C.P.L.R. 3101 (McKinney’s).
25. These categorical protections allow a lawyer to work on a client’s behalf “with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel...[Otherwise], much of what is now put down in writing would remain unwritten.” Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

**B. Communications between a client and an attorney’s agent are clearly privileged.**

26. The exceptions to the general rule of liberal discovery go beyond simply the conversations and work done by an attorney assigned to a given case, but extend to agents who act as members of the attorney’s legal team so long as they are acting at the direction of the attorney.
27. An agent of an attorney is one that: acts under the supervision or direction of an attorney (Delta Fin. Corp. v. Morrison, 15 Misc. 3d 308, 316-317 (Sup. Ct. 2007); is necessary to facilitate communication between the attorney and client (People v. Doe, 99 Misc. 2d 411, 415 (Sup. Ct. 1979) (internal quotation marks omitted); Mileski v. Locker, 14 Misc. 2d 252, 255-256 (Sup. Ct. 1958)); or has a relationship with the client’s attorney that reasonably leads the client to expect confidentiality (Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99 (Sup. Ct. 2003)).
28. “Exception to the general rule that communications made between defendant and counsel in known presence of third party are not privileged exists for statements made by client to attorney’s employees or in their presence because clients have reasonable expectation that such statements will be used solely for their benefit and remain confidential. McKinney’s CPLR 4503(a).” *People v. Osorio*, 550 N.Y.S.2d 612, 614-15 (1989).
29. “The scope of the agency privilege, which allows communications to counsel by one serving as an agent of either attorney or client to be protected under attorney-client privilege, is not defined by the third parties’ employment or function, but rather depends on whether the client had an expectation of confidentiality under the circumstances.” *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, (Sup. Ct. 2003).
30. In addition, when a client makes statements to attorney’s agents or to a third party in the attorney’s presence, clients have a reasonable expectation that such statements will be used solely for their benefit and remain confidential. CPLR § 4503(a). See *People v. Osorio*, 550 N.Y.S.2d 612, 614-15 (1989). If clients expect that their statements will be confidential, § 3101(d) limits discovery of those statements.

**C. Work done by an attorney's agent or employees acting at the direction of the attorney, is privileged under the CPLR §3101 work-product exceptions.**

31. An agent of an attorney is one that acts under the supervision or direction of an attorney (Delta Fin. Corp. v. Morrison, 15 Misc. 3d 308, 316-317 (Sup. Ct. 2007); is necessary to facilitate communication between the attorney and client (People v. Doe, 99 Misc. 2d 411, 415 (Sup. Ct. 1979) (internal quotation marks omitted); Mileski v. Locker, 14 Misc. 2d 252, 255-256 (Sup. Ct. 1958)); or has a relationship with the client's attorney that reasonably leads the client to expect confidentiality (Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99 (Sup. Ct. 2003)).
32. A social worker acts as the attorney's agent if he/she is employed by the attorney to assist in litigation. For instance, when a law guardian in a Family Court proceeding sought out and employed a social worker to determine a child's best interests, the social worker was deemed a "representative" of the infant for the purposes of [the § 3101] statute. Lenny McN., 183 A.D.2d, at 629. The social worker's materials only lose privileged immunity if the client chooses to have the social worker testify as a witness and thus waives that privilege.
33. A mental health expert is considered an attorney agent if the attorney consulted him to assist in analyzing or preparing the case as an adjunct to the lawyer's strategic thought processes (Hudson Ins. Co. v. Oppenheim, 72 A.D.3d 489, 490 (1st Dep't 2010) (internal quotation marks and citation omitted). See, e.g., Lisa W. v. Seine W., 9 Misc.3d 1125(A) (Fam. Ct. 2005) ("A mental health professional retained by an attorney is that party's 'representative' for purposes of CPLR 3101(d)(2) and 3101(c).").
34. On the other hand, a mental health expert is not an agent of the attorney if a client sought out the mental health expert on his or her own, rather than at the advice and direction of the client's attorney. See Murray v. Bd. Of Educ. Of City of New York, 199 F.R.D. 154, 156-157 (S.D.N.Y. 2001).
35. An investigator acts as the attorney's agent if the professional relationship between investigator and attorney is such that the investigator conducts his investigation pursuant to the attorney's guidance and direction. In re Connecticut, 179 Misc. 2d 623, 627 (Co. Ct., Nassau Co. 1999).
36. If an attorney's agent prepares materials to assist with litigation, those materials are also covered by the § 3101 work-product exceptions. See Stenovich v. Wachtell, Lipton, Rosen & Katz, 195 Misc. 2d 99, 116 (Sup. Ct. 2003) (Work-product rule "applies to documents prepared principally or exclusively to assist in anticipated or ongoing litigation," when party is aware the document might be useful in the event of litigation); Matter of Rosalie S., 172 Misc. 2d 176, 177 (Fam. Ct. 1997) (work product included a report from a psychologist because Family Court had hired him to assist the respondent parent); Matter of People v. Edney, 39 N.Y.2d 620 (1976) ("An attorney may consult a psychiatrist to obtain advice concerning the efficacy of

an insanity plea and the product of such a consultation is protected by the work product doctrine.”)

37. Moreover, Family Court has specifically recognized that if social workers are hired by attorneys their communication with clients are protected by the attorney-client privilege, and their work is immune from disclosure as attorney work product or material prepared in anticipation of litigation. See also Renee B. v. Michael B., 227 A.D.2d 315 (1st Dep’t 1996) (internal citations omitted). (“The child’s communications with the law guardian, *as well as with the social worker hired by the law guardian*, implicate the attorney-client privilege...and thus, the subpoena[] demanding the testimony of the...social worker [was] properly quashed.”) (emphasis added).
38. Furthermore, documents covered by attorney-client privilege need not exclusively contain references to legal concerns. Fields v. First Liberty Ins. Corp., 38 Misc. 3d 431 (Sup. Ct. 2012) (“The attorney-client privilege is not lost because the documents also contain or refer to some nonlegal concerns”).

**D. Ms. [REDACTED] and Ms. [REDACTED] are agents of Ms. [REDACTED] attorney and members of Ms. [REDACTED] legal team thus their communications with Ms. [REDACTED] are privileged and their work product is immune from discovery as attorney work-product and material prepared in anticipation of litigation.**

39. Like social workers hired by Attorney’s for Children from the Legal Aid Society in child welfare cases Ms. [REDACTED] and Ms. [REDACTED] are social workers hired and employed by the The Bronx Defenders, which provides legal counsel to Ms. [REDACTED]. Social workers have clearly been determined to be attorney’s agents in child welfare cases. See Lenny McN., 183 A.D.2d, at 629. Both Ms. [REDACTED] and Ms. [REDACTED] are part of Ms. [REDACTED] legal team and they are acting under the supervision and direction of Ms. [REDACTED] attorneys. In addition, Ms. [REDACTED] has a reasonable expectation that all communications between herself and her legal team will remain confidential. Ms. Nivar and Ms. Bronson are part of that legal team.
40. As part of their role on the legal team, Ms. [REDACTED] and Ms. [REDACTED] act as de facto investigators, gathering facts about Ms. [REDACTED] case “pursuant to the *attorney’s* guidance and direction.” See In re Connecticut, 179 Misc. 2d 623, 627 (Co. Ct., Nassau Co. 1999).
41. Neither Ms. [REDACTED] nor Ms. [REDACTED] provide clinical services or acted in the capacity of clinical therapist for Ms. [REDACTED].
42. Petitioner misses the point and completely miscomprehends Ms. [REDACTED] arguments that because §1046 (vii) of the FCA provides that privilege in a neglect or abuse case child protective proceeding does not apply, the notes of Ms. [REDACTED] and Ms. [REDACTED] are discoverable. Ms. [REDACTED] does not assert that such a privilege applies here. She asserts that the notes of Ms. [REDACTED] and Ms. [REDACTED] social

workers consulting on her legal case and working at the direction of her lawyers are privileged attorney-client communications and constitute attorney-client work product.

43. In addition, Ms. [REDACTED] has not called Ms. [REDACTED] or Ms. [REDACTED] to act as witnesses, so she has not consented to waiving the attorney-client privilege attached to their communication. See In re Cravath, 110 N.Y.S. 454 (Ct. of Gen. Sess, 1908).

For all the foregoing reasons, counsel for Ms. [REDACTED] respectfully requests that the Court deny the instant motion in its entirety and cease to compel discovery of privileged information now and for all future discovery requests, may they be proper or not proper.

Dated: Bronx, NY  
July 24, 2014

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