

# CPLR 3120: Discovery and Inspection Available Against the State as Nonparty Witness

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this minor gap in the symmetry of the CPLR should be rectified by the Legislature.

#### ARTICLE 31 — DISCLOSURE

*CPLR 3120: Discovery and inspection available against the state as nonparty witness.*

In *Kaplan v. Kaplan*,<sup>79</sup> the Court of Appeals decided whether the state is immune from disclosure as a nonparty witness. The state is subject to discovery by court order under CPLR 3102(f) when it is a party to an action.<sup>80</sup> In *Butironi v. Putnam County Civil Service Commission*,<sup>81</sup> the Appellate Division, Second Department, held that the state was not required to make disclosure as a witness. The court reasoned that when the Legislature amended CPLR 3102(f) to make clear that disclosure was available against the state as a party, it had foregone the opportunity of similarly broadening CPLR 3120(b) to permit disclosure against the state as a witness.<sup>82</sup>

In *Kaplan*, the defendants applied under CPLR 3120 for discovery and inspection of documents in the possession of the State Department of Health. The department resisted the application on the ground that it was not a party to the action and was not "a person not a party" made equally subject to disclosure under CPLR 3120(b) as a party is under CPLR 3120(a).<sup>83</sup> The Supreme Court, New York County, ordered disclosure, and the Appellate Division, First Department, unanimously affirmed. The Court of Appeals unanimously affirmed, construing the word "person" in CPLR 3120(b) to include the state.<sup>84</sup> The Court rejected the *Butironi* rationale, reasoning that the Legislature did not amend CPLR 3120(b) because it was decided under the CPA that the state could be examined as a witness.<sup>85</sup>

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L. Rev. 121, 141 (1966); *Kurcz v. Kurcz*, 13 App. Div. 2d 954, 216 N.Y.S.2d 736 (1st Dep't 1961) (mem.); *Glick v. Glick*, 63 Misc. 2d 944, 311 N.Y.S.2d 623 (Sup. Ct. Nassau County 1970). The more liberal view of the *Deane* case, which allows its use, is endorsed by Professor Siegel. 7B MCKINNEY'S CPLR 3016, supp. commentary at 172 (1972).

<sup>79</sup> 31 N.Y.2d 63, 286 N.E.2d 691, 334 N.Y.S.2d 379, *affg* 38 App. Div. 2d 691, 327 N.Y.S.2d 543 (1st Dep't 1971).

<sup>80</sup> However, the state cannot be required to answer interrogatories or to make admissions.

<sup>81</sup> 29 App. Div. 2d 474, 288 N.Y.S.2d 734 (2d Dep't 1968), *discussed in The Quarterly Survey*, 43 ST. JOHN'S L. REV. 302, 325 (1968).

<sup>82</sup> *Id.* at 476, 288 N.Y.S.2d at 737.

<sup>83</sup> CPLR 3120(a) provides for the discovery and production of documents and things for inspection, copying, testing, or photographing.

<sup>84</sup> 31 N.Y.2d at 69, 286 N.E.2d at 262, 334 N.Y.S.2d at 381.

<sup>85</sup> *Id.*, *citing* *City of Buffalo v. Hanna Furnace Corp.*, 305 N.Y. 369, 113 N.E.2d 520

The policy of the drafters of the CPLR was to broaden disclosure against the state and against litigants in general.<sup>86</sup> The Court of Appeals' sound construction in *Kaplan* reinforces the liberalization intended by the present disclosure article.

*CPLR 3124: Statute does not mandate immediate ruling on dispute at examination before trial.*

When a deponent declines to answer a question in a disclosure proceeding, the party taking the deposition may (1) file a formal motion on notice to compel disclosure after completing the remainder of the deposition,<sup>87</sup> or in certain courts, (2) seek an immediate informal ruling from the presiding judge of the *ex parte* motion part.<sup>88</sup>

In *Cohen v. Heine & Co.*,<sup>89</sup> the defendants, who had not sought an immediate ruling on disputed questions by the presiding judge, who was available, moved to strike the case from the calendar. The Supreme Court, Nassau County, denied the motion and held that the defendants had waived their right to seek disclosure of the controverted questions. The Appellate Division, Second Department, affirmed without prejudice to the defendants' right to move at special term for further disclosure.<sup>90</sup> Deeming it error to interpret CPLR 3124 as mandating that "in chambers" rulings be sought, the court indicated that the CPLR contemplates a single post-disclosure motion.<sup>91</sup>

This decision correctly construes CPLR 3124. A party is entitled to make an omnibus motion for formal rulings as to all disputed questions. The informal procedure offers speed and convenience, but a formal motion better assures the formulation of a record for pos-

(1953). In construing the words "any . . . person," other than a party, subject to disclosure under CPA 288, the Court therein stated:

Courts should not strain to limit the availability of such an important remedy, by narrowly circumscribing the reach of words so inclusive as "any . . . person," whose very generality bespeaks a legislative design that the provision be accorded a very broad content. Of exceeding significance is the consideration that the "testimonial duty to disclose knowledge needed in judicial investigation" is essentially one that rests upon all persons alike, upon public officers and agents, as well as upon private individuals.

305 N.Y. at 377, 113 N.E.2d at 524.

<sup>86</sup> See *Tely v. State*, 49 Misc. 2d 418, 267 N.Y.S.2d 865 (Ct. Cl. 1966); *Chester v. Zima*, 41 Misc. 2d 676, 246 N.Y.S.2d 144 (Sup. Ct. Erie County 1964); *Roma v. Newspaper Consol. Corp.*, 40 Misc. 2d 1085, 244 N.Y.S.2d 723 (Sup. Ct. N.Y. County 1963).

<sup>87</sup> This procedure is authorized by CPLR 3124.

<sup>88</sup> CPLR 3124 does not expressly provide for this procedure although it is commonly practiced in certain areas. See 7B MCKINNEY'S CPLR 3124, commentary at 629 (1970).

<sup>89</sup> 39 App. Div. 2d 563, 331 N.Y.S.2d 751 (2d Dep't 1972) (mem.).

<sup>90</sup> *Id.*, 331 N.Y.S.2d at 752.

<sup>91</sup> *Id.*, citing 7B MCKINNEY'S CPLR 3124, commentary at 628-31 (1970).