

# CPLR 3101(a): Court Refuses Motion To Take Deposition Despite Satisfaction of Distance Criterion

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Service of a subpoena outside the state certainly should be valid, especially where there was personal jurisdiction in the main action which gave rise to the judgment. In *Underwriters Trust Co. v. Scala*,<sup>88</sup> wherein a subpoena was purportedly served within the state pursuant to CPLR 308(3), the court declared the mode of service proper, it "being authorized . . . by statute. . . ."<sup>89</sup> If CPLR 2303 adopts the qualifications embodied in CPLR 313, as both the statutory language and perhaps *Scala* indicate, it should be interpreted to authorize all of the beneficial provisions of that section.<sup>90</sup>

#### ARTICLE 31 — DISCLOSURE

*CPLR 3101(a): Court refuses motion to take deposition despite satisfaction of distance criterion.*

A motion under CPLR 3101(a)(3) to take deposition before trial of a witness who resides more than one hundred miles from the place of the trial is addressed to the discretion of the court. Although the Court of Appeals had indicated that this section should be liberally construed,<sup>91</sup> the Court of Claims of New York denied such a motion in *Winter v. State*.<sup>92</sup> Although the requirements of the statute were satisfied,<sup>93</sup> the court decided that the personal appearance of the witness, allegedly an eyewitness, was crucial to the orderly conduct of the trial and to a just decision. Otherwise, the trial judge could not observe or interrogate the witness.<sup>94</sup>

The exercise of discretion in *Winter* is clearly improper. That the witness's testimony may be crucial is precisely the reason to allow the taking of a deposition. The defense should not be surprised by this witness's testimony.

*CPLR 3104(a): Court declines to supervise disclosure proceeding.*

CPLR 3104(a) enables the court in which an action is pending to supervise disclosure proceedings either by a judge or a referee, upon its own motion or the motion of any party or witness.<sup>95</sup> Unfortunately, practical problems prevent full utilization of this provision. Calendar congestion precludes frequent assignment of judges to preside at dis-

<sup>88</sup> 62 Misc.2d 877, 311 N.Y.S.2d 454 (N.Y.C. Civ. Ct. N.Y. County 1970).

<sup>89</sup> *Id.* at 878, 311 N.Y.S.2d 454.

<sup>90</sup> See *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 354, 355 (1970).

<sup>91</sup> *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 499 (1968); see 7B MCKINNEY'S CPLR 3101, commentary 21 at 24 (1970).

<sup>92</sup> 65 Misc. 2d 587, 318 N.Y.S.2d 299 (Ct. Cl. 1971).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 588, 318 N.Y.S.2d at 230.

<sup>95</sup> See 3 WK&M ¶¶ 3104.01, 3104.03, 3104.04.