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CPLR 3101(a): Court of Appeals Interprets "Material and Necessary"

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tween suits at law and in equity,[96] and in light of the broad powers afforded our courts to grant any type of relief justifiable, under CPLR 3017.[97] Moreover, the procedural advantages of an accounting in the situation posed by the transaction appeared to be clear.

In view of the peculiar appropriateness of the fact situation, the decision of the Court of Appeals, to deny an accounting, appears to be unfortunate.

ARTICLE 31 — DISCLOSURE

CPLR 3101(a): Court of Appeals interprets "material and necessary."

CPLR 3101(a) mandates that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action. . . ." The spirit with which the words "material and necessary" are to be construed has been demonstrated by the Court of Appeals in *Allen v. Crowell-Collier Publishing Co.*,[98] wherein it has endorsed the liberal interpretation given 3101(a) by various lower courts.[99] The test as to what is "material and necessary" when disclosure is sought is, in the words of the Court, one of "usefulness and reason."[100]

In approving an extremely liberal construction of CPLR 3101(a) the Court has adopted what practice commentators have strenuously urged.[101] The *Allen* case reflects a new philosophy of litigation which scorns stingy pre-litigation practice. Hopefully, lower courts, cognizant of the *Allen* case, will think in negative

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[96] CPLR 103(a), provides:
"One form of action. There is only one form of civil action. The distinction between actions at law and suits in equity, and the forms of those actions and suits, have been abolished."

[97] CPLR 3017(a), provides, *inter alia*:
"[T]he court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just."

[98] 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S.2d 449 (1968). In *Allen*, plaintiffs brought a class action for severance pay. Plaintiffs sought answers to certain interrogatories concerning defendant's retirement and severance pay procedures, and practices at its other offices and plants. The lower courts sustained a motion to strike these interrogatories.

[99] Rios v. Donovan, 21 App. Div. 2d 409, 250 N.Y.S.2d 818 (1st Dep't 1964); West v. Aetna Cas. & Sur. Co., 49 Misc. 2d 28, 266 N.Y.S.2d 600 (Sup. Ct. Onondaga County 1965). *See The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 303, 304, 305 (1966).

[100] 21 N.Y.2d at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452.

[101] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶¶ 3101.04, 3101.07, 3101.08 (1966); *see also* 7B McKINNEY'S CPLR 3101, supp. commentary 14-19 (1967).

terms when deciding disclosure motions and will deny them only where the information sought is *totally* useless, irrelevant or immaterial.

CPLR 3102(f): Disclosure not available when state is non-party witness.

Prior to the enactment of the CPLR disclosure was not available against the state in any court.[102] With the enactment of the CPLR, disclosure against the state became available, first, in the Court of Claims by order of that court,[103] and subsequently, by court order, in any action in which the state was properly a party.[104] This liberal trend in favor of private litigants has, to some extent, remedied an unjust situation which previously existed.[105]

CPLR 3102(f) presently provides that "[i]n an action in which the state is properly a party, whether as plaintiff, defendant or otherwise, disclosure by the state shall be available as if the state were a private person, except that it may be obtained only by order of the court in which the action is pending. . . ." In *Butironi v. Putnam County Civil Service Comm'n*,[106] plaintiff sought disclosure against the state as a non-party witness. The court held that disclosure under 3102(f) was not available in such circumstances. Hopefully, a second liberalization process will begin with respect to disclosure against the state in actions where it is a non-party witness.

CPLR 3120(b): Court disallows non-party's disclosure expenses temporarily.

CPLR 3120(b) provides for the discretionary allowance of costs and for the defrayal of expenses of a non-party who is ordered to make disclosure. In a recent case, *In re Stauderman's Will*,[107] the surrogate's court, Nassau County, disallowed a non-

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[102] Schmiedel v. State, 14 App. Div. 2d 33, 217 N.Y.S.2d 110 (4th Dep't 1961); Carey v. Standard Brands, 12 App. Div. 2d 233, 210 N.Y.S.2d 849 (3d Dep't 1961).

[103] Di Santo v. State, 22 App. Div. 2d 289, 254 N.Y.S.2d 965 (3d Dep't 1964).

[104] State v. Master Plumbers Ass'n, 47 Misc. 2d 187, 262 N.Y.S.2d 323 (Sup. Ct. Onondaga County 1965). *But see* State v. Boar's Head Provisions Co., 46 Misc. 2d 759, 260 N.Y.S.2d 418 (Sup. Ct. New York County 1965) (neither state nor its officers subject to pre-trial examination).

[105] 7B McKINNEY'S CPLR 3102, supp. commentary 60 (1967). Under prior law the state, while itself immune from disclosure, could obtain disclosure from the opposing party.

[106] 29 App. Div. 2d 474, 288 N.Y.S.2d 734 (2d Dep't 1968).

[107] 56 Misc. 2d 580, 289 N.Y.S.2d 703 (Surr. Ct. Nassau County 1968).