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Article 28

CPLR 3120(b): Court Disallows Non-Party's Disclosure Expenses Temporarily

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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).

party's expenses temporarily and permanently disallowed his attorney's fees. The court reasoned that the non-party's expenses would not be known until after the non-party had made disclosure and thus ruled that after the disclosure the non-party could make an application to the court for reimbursement of money *actually paid out.* However, because of the close relationship of the non-party and one of the litigants, the court permanently disallowed attorney's fees.

While the court's reasoning was sound, a problem is implicit in its ruling as illustrated by the following hypothetical. A non-party is ordered to make disclosure at a cost of $300. He is not able to obtain an order for the payment of costs before advancing the money. Then, he must hire a lawyer to make an application to the court for reimbursement. Thus, his reimbursement will be $300 minus his attorney's fee. Perhaps a better solution would be for the court, on its own motion, to order reimbursement of costs as soon as the non-party sends an itemized bill to the court and to the party who originally sought disclosure.[108]

CPLR 3121: Limited by CPLR 3101 (b).

CPLR 3121 provides for the exchange and inspection of medical reports along with the inspection of litigants and hospital records where the mental or physical condition of a party is in issue. However, CPLR 3101(b), limiting the provisions of 3121, states that "[u]pon objection by a party privileged matter shall not be obtainable." In *Koump v. Smith,*[109] the physical condition of the defendant, allegedly intoxicated, at the time of an automobile accident, was in controversy. The question was whether the defendant had waived his right to object under 3101(b) to the disclosure of his medical records. Defendant neither counterclaimed nor offered an affirmative defense.

In a 3-2 decision, the appellate division, second department, held that since the plaintiff failed to show either that the medical records were not privileged or waiver of the right to object to examination of the records on the grounds of privilege, he was not entitled to disclosure. The dissent did not concentrate on the "privilege" factor and felt that defendant's condition at the time of the accident was sufficiently in controversy to entitle plaintiff to obtain that portion of the hospital record relating to defendant's physical condition.

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[108] 7B McKINNEY'S CPLR 3120, supp. commentary 97-98 (1967).
[109] 29 App. Div. 2d 981, 289 N.Y.S.2d 667 (2d Dep't 1968).