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CPLR 3101(a), (d): Opinion Questions of Defendants Permitted at an Examination Before Trial

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participant,[51] or where the names were necessary for the party to substantiate his claims.[52]

In *Rivera v. Stewart*,[53] plaintiff, at the examination before trial, sought the identity of witnesses to the accident known to the defendant. The defendant refused to disclose the requested information. The court required disclosure of the names and addresses of the passengers in the defendant's car as well as those witnesses who were found by the defendant through personal observation at the scene of the accident. Such witnesses were considered a part of the facts and circumstances of the accident. However, the court did not allow disclosure of the names and addresses of witnesses which were obtained by the defendant through an investigation after the accident since such information came within CPLR 3101(d) as "material prepared for litigation," and the plaintiff had not shown himself to be within one of the recognized exceptions.

CPLR 3101(a), (d): Opinion questions of defendants permitted at an examination before trial.

In *People* ex rel. *Kraushaar Bros. & Co. v. Thorpe*,[54] a tax certiorari case, the Court of Appeals held that a third party witness, a tax assessor, subpoenaed as an expert, was not required to give his expert opinion at the trial, although he could be questioned as to the facts he observed concerning the case.

In a similar case, *McDermott v. Manhattan Eye, Ear & Throat Hosp.*,[55] the defendant physicians objected to being called as expert witnesses on plaintiff's behalf in a malpractice case. However, the Court of Appeals held that the plaintiff was entitled to call the defendants to the stand at the trial and question them about both their factual knowledge of the case, and, if qualified, their knowledge as experts concerning the standards of skill and care ordinarily exercised by doctors in the community under similar circumstances. *McDermott* was distinguished from *Kraushaar* on the basis that in the former the expert opinion was elicited from a *defendant*, while in the latter it was elicited from a *third party* expert witness.

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[51] Pistana v. Pangburn, 2 App. Div. 2d 643, 151 N.Y.S.2d 742 (3d Dep't 1956); Votey v. New York City Transit Authority, *supra* note 50.

[52] Majchrzak v. Hagerty, 49 Misc. 2d 1027, 268 N.Y.S.2d 937 (Sup. Ct. Erie County 1966); McMahon v. Hayes-73rd Corp., 197 Misc. 319, 98 N.Y.S.2d 84 (Sup. Ct. Queens County 1950); Matter of Pennino's Estate, *supra* note 48.

[53] 51 Misc. 2d 647, 273 N.Y.S.2d 644 (Sup. Ct. Monroe County 1966).

[54] 296 N.Y. 223, 72 N.E.2d 165 (1947).

[55] 15 N.Y.2d 20, 203 N.E.2d 469, 255 N.Y.S.2d 65 (1964).

In *Kennelly v. St. Mary's Hosp.*,[56] plaintiff's intestate, while a patient at the defendant hospital, was severely burned when the oxygen tent he was in burst into flames because of alleged negligence. At an examination before trial, plaintiff sought to have the hospital's administrator and acting administrator answer certain hypothetical questions which required the expression of an expert opinion. The supreme court, Ulster County, held that *McDermott* was applicable not only at trial but also to pretrial discovery, and that these defendants who were treated as experts could be asked opinion questions in their field of expertise.

It should be noted that to bring the case within the *McDermott* rule, the court in *Kennelly* appears to have treated the administrator and acting administrator as defendants. Also, the court did not consider the possible applicability of CPLR 3101(d), which conditionally exempts expert opinion from disclosure. However, this could be due to the fact that 3101(d)(1) applies solely to expert opinions *prepared for litigation.*

CPLR 3124: Appealability of rulings made upon objections at an examination before trial.

Both CPA and CPLR cases uphold the principle that rulings made upon objections on an examination before trial are not appealable as of right.[57] While two recent appellate division cases appear to agree with this principle, they seem to disagree as to whether such rulings or orders are appealable *by permission* pursuant to CPLR 5701(c).

In *Tri-State Pipe Lines Corp. v. Sinclair Ref. Co.*,[58] the defendant appealed from an order denying its motion, pursuant to CPLR 3124, to compel answers to questions asked and production of documents sought at an examination before trial of the plaintiff. The appellate division, first department, held that the order denying defendant's motion was not appealable. The court suggested that the proper procedure was for the defendant to move for an order reopening the examination before trial so as to permit the questions to be answered.[59] However, this

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[56] 52 Misc. 2d 352, 275 N.Y.S.2d 597 (Sup. Ct. Rensselaer County 1966).

[57] See, *e.g.*, Lee v. Chemway Corp., 20 App. Div. 2d 266, 247 N.Y.S.2d 287 (1st Dep't 1964); Brimberg v. Frielich, 10 App. Div. 2d 850, 199 N.Y.S.2d 128 (2d Dep't 1960); Brown v. Golden, 6 App. Div. 2d 766, 174 N.Y.S.2d 75 (4th Dep't 1958); Hall v. Wood, 5 App. Div. 2d 998, 173 N.Y.S.2d 541 (2d Dep't 1958).

[58] 26 App. Div. 2d 285, 273 N.Y.S.2d 976 (1st Dep't 1966).

[59] See also Kogel v. Trump, 271 App. Div. 890, 66 N.Y.S.2d 899 (2d Dep't 1946), which held that an order at an examination before trial was not appealable but that the proper procedure was to move for an order reopening the examination before trial.