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At the other end of the spectrum, an accident report made out by an employee at the request of his employer is most suspect. Here, even though the accident report is sent by the employer to the employer's attorney, a strong showing that the primary purpose of the report was for litigation purposes must be made to bring such a report under the shelter of CPLR 3101(d).[73] This is because, in such situations, accident reports are most often made for "use in the regular course of business" to permit management to effectively control and supervise the operations of the company.[74]

In *O'Neill v. Manhattan & Bronx Surface Transit Operating Authority*,[75] the appellate division, first department, has shown what will suffice to bring materials at this more suspect end of the spectrum under CPLR 3101(d). There, a bus driver employed by defendant bus company had filled out an accident report and forwarded it directly to defendant's attorneys. Affidavits[76] presented by defendant's attorney showed that the accident report was solely for the professional use of defendant's corporation counsel, and was not for any managerial use whatever.

Thus, it would seem that the evidentiary requirements for qualification as "material prepared for litigation" will be satisfied if it is *affirmatively* shown that the report has no purpose other than for use in litigation.

CPLR 3110: Objection rules out attorney's office for taking deposition.

CPLR 3110 prescribes the geographical locality, *i.e.*, county, where depositions shall be taken within the state. Only subsection (3), which pertains solely to public corporations,[77] designates a

[73] Weisgold v. Kiamesha Concord, Inc., 51 Misc. 2d 456, 273 N.Y.S.2d 279 (Sup. Ct. Sullivan County 1966). For a discussion of this case *see The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 642, 652 (1967).

[74] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3101.50 (1964).

[75] 27 App. Div. 2d 185, 277 N.Y.S.2d 771 (1st Dep't 1967).

[76] For a complete statement of the facts, reference must be made to the lower court opinion, O'Neill v. Manhattan & Bronx Surface Transit Operating Authority, 47 Misc. 2d 765, 263 N.Y.S.2d 187 (N.Y.C. Civ. Ct. 1965).

[77] Allen v. Brower, 21 App. Div. 2d 876, 251 N.Y.S.2d 738 (2d Dep't 1964) (dictum). "Public corporations are the instrumentalities of the state, founded and owned by it in the public interest, supported by public funds and governed by managers deriving their authority from the state." Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y.S. 554, 555 (4th Dep't 1924). N.Y. GEN. CORP. LAW § 3(1) describes a "public corporation" as either a municipal corporation, a district corporation, or a public benefit corporation.

particular place within a county for taking such depositions.[78]

In *Ambrose v. Wurlitzer Company*,[79] the appellate division, second department, held that the supreme court had abused its discretion when the court directed defendant, over its objection, to be examined in plaintiff's attorney's office. The appellate division then modified the lower court's order and directed that the examination take place in the courthouse of the supreme court.

As the Wurlitzer Company is not a public corporation,[80] the basis for the court's action could not have been 3110(3). Apparently, it acted under 3103(a) which allows the court to regulate and condition the use of any disclosure device in order to prevent prejudice.[81] The question arises, however, whether or not *Ambrose* conforms with CPLR 3110.

The most logical and convenient place for the taking of pre-trial depositions is in the offices of the lawyers involved. The last paragraph of CPLR 3110, although not substantively at issue in the instant case, was specifically added to assist lawyers in noticing and taking examinations at their offices.[82] This would indicate that the legislature generally approved rather than disapproved of attorneys' offices for taking pre-trial depositions.

The court's opinion in *Ambrose* that "it was an improvident exercise of discretion to direct that appellant, over its objection, be examined at the offices of plaintiff's attorney,"[83] would indicate that a simple, matter of course, preemptory objection will be sufficient to send the examination to the courthouse. This in effect means that, unless the parties mutually agree, the office of the examining party's attorney is not a proper place to notice an examination before trial.

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[78] CPLR 3110 (3) provides: "when the party to be examined is a public corporation or any officer, agent or employee thereof . . . the place of such examination shall be in the court in which the action is pending unless the parties stipulate otherwise."

[79] 27 App. Div. 2d 732, 277 N.Y.S.2d 160 (2d Dep't 1967) (memorandum decision).

[80] The Wurlitzer Company, an Ohio corporation incorporated in 1890, is a major manufacturer of pianos, organs, and phonographs. It is listed on the New York Stock Exchange and has 1,210,000 shares of stock outstanding. Compare this with note 77 *supra*, which gives the definition of a "public corporation."

[81] CPLR 3103(a) provides: "The court may at any time on its own initiative or on motion of any party or witness, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage. . . ."

[82] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3110.09 (1964).

[83] Ambrose v. Wurlitzer Co., 27 App. Div. 2d 732, 277 N.Y.S.2d 160, 161 (2d Dep't 1967).

It is submitted that such a result, although not violative of CPLR 3110's express wording, does violate its spirit. It remains to be seen whether the second department will qualify the holding in *Ambrose* (as might easily be done since the opinion does not expressly say that the objection was not supported by facts tending to establish real prejudice). But, presently, the law in the second department is that a mere preemptory objection will suffice.

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3211(a)(8): Motion challenging jurisdiction granted after service of answer.

Brodsky v. Spencer,[84] previously discussed in this issue of the *Survey*, dealt primarily with the sufficiency of notice under a court ordered service. However, the interesting problem of raising a defense in a timely manner was also presented. The court allowed a motion challenging jurisdiction although it was not made in the interval "before service of the responsive pleading is required."

The legislature, though attempting to prevent dilatory tactics and yet achieve the economy afforded by preliminary hearings aimed at avoiding trial, seemingly left no specific provision whereby the defendant[85] could speed a determination of a jurisdictional issue when it is raised in the answer.

While the court found no problem with the limitation, it provided no rationale for its action. However, its holding can be justified in two ways. First, a 3211 motion can be treated as a 3212 motion for summary judgment. Under this provision the lack of jurisdiction could have been determined at any time prior to trial and was thus timely.[86] Second, justification can be drawn from 3211 itself. The defendant properly raised the defense in his answer, so as not to waive it under 3211, but then moved for an early adjudication of his claim. This specific procedure is not provided for by 3211. However, the section stresses the correct procedure so as not to waive the defense—raising the defense in the answer as the defendant did. Seemingly, then, it does not torture the section to allow a determination of the defense by motion.[87] Such an interpretation would hurt neither the plaintiff nor defendant and would help clear the court's calendar.

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[84] 52 Misc. 2d 4, 277 N.Y.S.2d 802 (Sup. Ct. Monroe County 1966).
[85] The plaintiff can, by 3211(b), make a motion to dismiss a defense.
[86] 7B McKINNEY'S CPLR 3211, supp. commentary 140 (1967).
[87] *Ibid.*