

CPLR 3101: Court Sanctions Disclosure Under CPLR 3111 of an Item Apparently Protected by CPLR 3101(d)

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Therefore, if a pleading requirement imposed by Article 30 is violated, prejudice as well as the violation itself must be shown.⁹⁶

There is evidence that the liberal spirit of CPLR 3026 has been adopted by the judiciary. It has been held that regardless of how imperfectly stated, a complaint attacked for insufficiency is deemed to allege whatever can be fairly implied from its contents.⁹⁷ Thus, if *any* cause of action cognizable by the law can be fairly gathered from *all* the averments, the complaint will be sustained.⁹⁸ It should be noted, however, that poorly drawn and inartistic pleadings are not viewed favorably, and may be subject to a corrective motion.

ARTICLE 31 — DISCLOSURE

CPLR 3101: Court sanctions disclosure under CPLR 3111 of an item apparently protected by CPLR 3101(d).

The protection from disclosure which CPLR 3101(d) accords to "material prepared for litigation" is to be withheld *only* if "the court finds that the material can no longer be duplicated because of a change in conditions and that withholding it will result in injustice or undue hardship." Both conditions must be satisfied to obtain disclosure.

In *Gunther v. Roaman's, Inc.*,⁹⁹ an action by an administrator against a corporation, plaintiff sought an examination of the manager of defendant's store, and also the production of an accident report which the manager had prepared on a form supplied by defendant's insurer. Discovery of the report was apparently sought pursuant to CPLR 3120. The court held that the report constituted "a writing created for or by a party or his agent in preparation for litigation . . .,"¹⁰⁰ and that it was conditionally immune from disclosure.¹⁰¹

While such a holding seems sound, the court ordered that the report be produced pursuant to CPLR 3111 to be used in conjunction with the examination of the store manager. The query which

⁹⁶ 7B MCKINNEY'S CPLR 3026, supp. commentary 129-30 (1965).

⁹⁷ 21 App. Div. 2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964).

⁹⁸ *Id.* at 63-65, 248 N.Y.S.2d at 125-27; see also *Dulberg v. Mock*, 1 N.Y.2d 54, 56, 133 N.E.2d 695, 696, 150 N.Y.S.2d 180, 181 (1956); *Condon v. Associated Hosp. Serv.*, 287 N.Y. 411, 414, 40 N.E.2d 230, 231 (1942); *FIRST REP.* 68; 3 WEINSTEIN, KORN & MILLER, *NEW YORK CIVIL PRACTICE* ¶ 3026.02 (1965).

⁹⁹ 24 App. Div. 2d 738, 263 N.Y.S.2d 486 (1st Dep't 1965).

¹⁰⁰ *Gunther v. Roaman's, Inc.*, 24 App. Div. 2d 738, 739, 263 N.Y.S.2d 486, 487 (1st Dep't 1965).

¹⁰¹ See, *e.g.*, *Kandel v. Tocher*, 22 App. Div. 2d 513, 256 N.Y.S.2d 898 (1st Dep't 1965); *Finegold v. Lewis*, 22 App. Div. 2d 447, 256 N.Y.S.2d 358 (2d Dep't 1965); *The Biannual Survey of New York Practice*, 40 ST. JOHN'S L. REV. 122, 154-58 (1965).

logically follows is whether the language of CPLR 3111, a mere disclosure device, can sanction the production of an item otherwise conditionally protected from disclosure by CPLR 3101. It would seem that if an item is held to be "material prepared for litigation," the conditions of 3101(d) must be met before *any* disclosure may be had. The court in no way indicated whether or not such conditions had been satisfied. It merely stated that 3111 allowed production of the report. This statement does not appear to be consonant with the language of 3101(d).

CPLR 3108 and 3109: Availability of written questions where non-party witness cannot be served with subpoena within state.

In *Gorie v. Gorie*,¹⁰² defendant sought disclosure, through written questions in California, of plaintiff's former husband (who was apparently not amenable to process in New York) with respect to their understanding on separation and the validity of their Mexican divorce. To this, plaintiff asserted various objections. The court discussed the applicable CPLR provisions¹⁰³ governing written questions, and held that when a non-party witness is not subject to the in personam jurisdiction of the courts, he may be examined without the state regardless of his residence or domicile.

CPLR 3108 provides for the taking of a deposition upon written questions "when the testimony is to be taken without the state." However, that provision proceeds upon the assumption that there exists a valid basis for the taking of testimony outside New York. Thus, the question of the validity of out-of-state depositions must necessarily precede the question of the availability or at least the effectiveness of the 3108 device. Clearly, the language of the court has reference to a situation where the witness sought to be examined may not be compelled by our courts to consent to an examination. Thus, the efficacy of the court's holding must depend upon out-of-state sanction pursuant to a provision similar to CPLR 3102(e).¹⁰⁴ Fortunately, California, the state where the witness was to be examined, has just such a statute.¹⁰⁵

CPLR 3109, as the court indicated, outlines the procedure to be followed when CPLR 3108 is employed. Various time limits are specified within which the questions must be served. CPLR 3115(e) provides that objections to the form of written questions

¹⁰² 48 Misc. 2d 411, 265 N.Y.S.2d 19 (Sup. Ct. N.Y. County 1965).

¹⁰³ The two main provisions are CPLR 3108 and 3109.

¹⁰⁴ CPLR 3102(e) enables our courts to compel a witness in a foreign proceeding to appear and testify where such would be proper according to the law of the jurisdiction wherein the foreign proceeding is pending. This provision represents New York's adoption of the Uniform Foreign Depositions Act. 7B MCKINNEY'S CPLR 3102, commentary 139 (1963).

¹⁰⁵ CAL. CODE CIV. PROC. § 2023.