

## CPLR 3121: Apparent Conflict Between Rules of the Appellate Division, Second Department and CPLR 3121

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are waived if not served within certain time periods (all terminating before trial). There is no analogous provision with respect to substantive objections. They need not be made before trial. Thus, the practitioner should cautiously analyze his objections; while he may consider a certain objection substantive in nature, he may find himself precluded from raising it at the trial because the court has ruled that it relates only to form. To be completely safe, *all* objections to questions—both written and oral—should be objected to in the manner prescribed by CPLR 3115(e). Furthermore, if the objection is unquestionably substantive, there is definite authority for raising it in a motion for a protective order pursuant to CPLR 3103(a).

*CPLR 3121: Apparent conflict between Rules of the Appellate Division, Second Department and CPLR 3121.*

Under CPLR 3121, a party may be compelled to submit to a physical, mental or blood examination when it is an issue in the action. In *Fiore v. Bay Ridge Sanitarium, Inc.*,<sup>106</sup> defendants moved, in a malpractice suit, to compel plaintiff to undergo a physical examination and to comply with other demands relating to such examination. Plaintiff opposed the motion on the ground that the special rules of the appellate division, second department, expressly except physical examinations and the exchange of medical information in malpractice actions.<sup>107</sup> Thus, an apparent conflict existed between CPLR 3121 and the court rules.

In holding that CPLR 3121 takes precedence over the rules, the court relied upon CPLR 101 which expressly states that the CPLR governs in civil judicial proceedings in all courts except where the procedure is regulated by inconsistent statute. The court reasoned that this construction, in conjunction with the policy behind CPLR 3121 which indicates a trend toward allowing disclosure under all circumstances, justified the granting of defendant's motion.

The court, in its decision, did not consider the possibility that the court rules govern only the *procedure* by which a party seeks medical information and merely except medical and dental malpractice from the purview of these procedural provisions. Thus, while the procedure by which one might obtain medical information in malpractice actions cannot be discovered by an examination of the court rules, these rules do not appear to exclude or prohibit the exchange of such information. Since the CPLR supplements the rules in the cases of doctors and dentists, the parties must refer to the CPLR for the disclosure and exchange of medical information in malpractice suits.

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<sup>106</sup> 48 Misc. 2d 318, 264 N.Y.S.2d 421 (Sup. Ct. Kings County 1965).

<sup>107</sup> Rules of N.Y. App. Div. pt. 4 (2d Dep't 1963).