

CPLR 3103: Examination of Defendant Allowed

St. John's Law Review

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

St. John's Law Review (1967) "CPLR 3103: Examination of Defendant Allowed," *St. John's Law Review*: Vol. 41 : No. 4 , Article 20.
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol41/iss4/20>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.

CPLR 3103: Examination of defendant allowed.

Under CPA § 300, an examination before trial of a resident party could be conducted *on notice* only in the county wherein the party resided, or wherein he had an office for the regular transaction of business in person. A *court order* was required to examine a party in any other location.⁴¹ Its successor, CPLR 3110, modifies prior law by providing that a party may also be examined, *on notice*, in the county where the action is pending—a court order is no longer required. If this increased choice of locations imposes a severe inconvenience upon the party to be examined, he may move for a protective order under CPLR 3103 to stay the examination.

In *Dworsky v. Bennett*,⁴² the plaintiff, a resident of Schenectady County, New York, brought an action to recover damages resulting from a motor vehicle accident which occurred near Naples, New York. Defendant, a resident of Naples, moved for a protective order under CPLR 3103(a) to prevent his deposition from being taken in Schenectady. In denying the defendant's motion to vacate the notice of examination, the court stated that "it is difficult to see . . . how the defendant will be annoyed, embarrassed or put to unnecessary expense as a result of an examination to be held 200 miles from his home."⁴³

CPLR 3122: Failure to timely seek a protective order.

CPLR 3122 provides that a party may serve a notice of motion for a protective order within five days of being served with a discovery and inspection notice under CPLR 3120 or an examination notice under CPLR 3121. However, it is not specified whether a party will be prejudiced if a protective order is sought after the five-day period. Nor is it specified what will occur if he first attempts to avoid disclosure when the opposing party applies to the court to compel disclosure.⁴⁴

In 1964, in *Coffey v. Orbachs, Inc.*,⁴⁵ the appellate division, first department, held that where a protective order was not applied for within the five-day period of 3122, the party *waived* his right to object to a 3120 discovery notice or a 3121 examination notice.

routine and assembled for transmittal to an attorney are not—by such gathering and forwarding—changed in character to a thing 'created . . . in preparation for litigation.'"

⁴¹ *Lowsley v. Uretzky*, 205 Misc. 610, 613, 129 N.Y.S.2d 742, 745 (Sullivan County Ct. 1954).

⁴² 51 Misc. 2d 383, 273 N.Y.S.2d 211 (Sup. Ct. Schenectady County 1966).

⁴³ *Dworsky v. Bennett*, 51 Misc. 2d 383, 384, 273 N.Y.S.2d 211, 213 (Sup. Ct. Schenectady County 1966).

⁴⁴ See CPLR 3124 and 3126.

⁴⁵ 22 App. Div. 2d 317, 254 N.Y.S.2d 596 (1st Dep't 1964).