

# Notwithstanding Local Court Rules, Disclosure May Be Had in Malpractice Cases

St. John's Law Review

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### Recommended Citation

St. John's Law Review (1965) "Notwithstanding Local Court Rules, Disclosure May Be Had in Malpractice Cases," *St. John's Law Review*: Vol. 39 : No. 2 , Article 55.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol39/iss2/55>

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In *Williams v. Sterling Estates, Inc.*,<sup>213</sup> the court suggested that the ambiguity could be reconciled by restricting discovery on mere notice to parties, and requiring a motion as against non-parties, with the caveat that in the latter instance there must be a showing of a special circumstance within the meaning of CPLR 3101(a)(4). This resolution seems to be in accord with the "primary purpose of Article 31 [which] is to require maximum disclosure of facts with minimum resort to the courts."<sup>214</sup>

It should be noted that although the majority opinion in *Avila* could have been more liberal, it did not leave the defendant without remedy. The court suggested that the defendant might require the production of the records at an examination before trial pursuant to CPLR 3111. Therefore by using CPLR 3111 and an examination before trial the defendant could accomplish that which he could not do under CPLR 3120(1). Since the effect of CPLR 3120(1) can be achieved against non-parties through CPLR 3111; since the philosophy of the CPLR is liberality; and since an adequate protective order can be employed (under CPLR 3103) to prevent abuse, it is submitted that CPLR 3120(1) should not be interpreted so as to restrict discovery to parties.

*Notwithstanding local court rules to the contrary, disclosure may be had in malpractice cases.*

Where the mental or physical condition of a party is in issue CPLR 3120 and 3121 provide for discovery, inspection and a medical examination on notice. There are no specified exceptions to this rule. On the other hand, Rule XI of the New York and Bronx County Supreme Court provides for such discovery, *except* in malpractice cases. The issue presented in *Kromanik v. Twiss*,<sup>215</sup> a malpractice case, was whether the CPLR takes precedence over the local court rules. The court held that it does.

CPLR 101 provides that the CPLR "shall govern the procedure in civil judicial proceedings in all courts of the state . . . except where the procedure is regulated by inconsistent statute." By the plain meaning of this language the local court rules (which are not statutory enactments) are subservient to the provisions of CPLR 3120 and 3121, and malpractice cases are not without the ambit of discovery proceedings.

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<sup>213</sup> 41 Misc. 2d 692, 245 N.Y.S.2d 777 (Sup. Ct. 1963).

<sup>214</sup> 7B MCKINNEY'S CPLR art. 31, practice commentary 4; see also CPLR 104.

<sup>215</sup> 44 Misc. 2d 627, 254 N.Y.S.2d 718 (Sup. Ct. 1964).