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have been disclosed.[187] The latter situation, it is argued, arises when a pretrial examination is sought upon notice.[188] General acceptance of the *Gaffney* construction of section 3126 would frustrate the basic purpose of article 31, which is to encourage the use of notices and to discourage applications for court orders except in special circumstances.[189] Indeed, it has already been held, in an instance in which procedure by notice is available (and it is available in most instances under the CPLR), that a motion for an order compelling disclosure does not lie *unless* the movant has previously sought such disclosure by notice.[190]

If notice must first be used where available, as held in *Schreter v. Brumer,*[191] and yet no penalty is available for its disobedience, as held in *Gaffney,*[192] the result is a disclosure article with a magnanimous quantity of notices, readily available but, unless the other party voluntarily responds, completely useless.

Use of Interrogatories Precluded in Malpractice Action Against a Physician

In *Fiorentino v. Jaques,*[193] the defendant in a malpractice action refused to answer interrogatories propounded pursuant to Rule 3134 of the CPLR on the ground that personal injury actions are statutorily excluded from disclosure. The court held that since the damages in a malpractice action are actually for personal injuries the plaintiff was not entitled to use interrogatories.

The provisions pertaining to interrogatories were enacted in the CPLR with several changes from the Advisory Committee's recommendations.[194] One of these changes forbade interrogatories in actions to recover damages for injury to property or for personal injuries resulting from negligence or wrongful death. The basis for this change was the fear of possible abuse in these actions.[195] Those who disagree with that approach state that interrogatories generally have not been abused in the federal courts,[196] and find

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187 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3126.02 (1963).
188 *Ibid.*
189 *Ibid.*
190 Schreter v. Brumer, (Sup. Ct. Queens County), 150 N.Y.L.J., Oct. 16, 1963, p. 18, col. 7.
191 *Ibid.*
192 41 Misc. 2d 1049, 47 N.Y.S.2d 419 (Sup. Ct. 1964).
193 41 Misc. 2d 972, 246 N.Y.S.2d 421 (Sup. Ct. 1964).
194 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3130.01, at 31-241 (1963).
195 See N.Y. Sess. Laws 1963, 1969 (McKinney's).
196 See Speck, *The Use of Discovery in the United States District Courts,* 60 YALE L.J. 1132, 1144 (1951).

difficult to perceive why abuses would occur more readily in negligence or wrongful death actions than in any other actions.[197]

It should be indicated that the principal case involved a malpractice action against a doctor, rather than an attorney. A malpractice suit against either one skilled in the science of medicine[198] or one proficient in the practice of law[199] is based upon a failure to exercise the skill requisite to his profession and is, therefore, tortious in nature. But the difference between these two malpractice categories (medicine as against law) lies in the basis of damages. In an action against a doctor the damages recoverable are for personal injuries;[200] against an attorney the basis of damages is the amount the plaintiff would have recovered had the action not been negligently handled.[201] Consequently, it appears that interrogatories would be permissible in a malpractice action against an attorney but not in one brought against a doctor.

Whereas interrogatories may be used in numerous actions,[202] it appears they will be used primarily in commercial cases, and transactions, especially those involving corporations.[203] Where statistical matter or detailed lists of sales or lists of articles manufactured are needed, it is more appropriate to obtain these through interrogatories, to which answers may be compiled at the answerer's leisure rather than through a deposition which is taken at a single sitting.[204]

Signing and Correcting the Deposition

In *Marine Trust Co. v. Collins*,[205] a witness, following his pretrial examination, undertook to make corrections in his deposition before signing it. He assigned as his reasons that the corrections were made "to give an accurate statement thereof and to correct

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[197] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3130.02 (1963).

[198] Colvin v. Smith, 276 App. Div. 9, 92 N.Y.S.2d 794 (3d Dep't 1949).

[199] Strauss v. New Amsterdam Cas. Co., 30 Misc. 2d 345, 347, 216 N.Y.S.2d 861, 864 (N.Y. Munic. Ct. 1961).

[200] Colvin v. Smith, *supra* note 198.

[201] See Wade, *The Attorney's Liability For Negligence*, 12 VAND. L. REV. 755, 772 (1959).

[202] Interrogatories might, perhaps, be used in defamation actions where the basis of damages is injury to reputation. See PROSSER, TORTS 574 (2d ed. 1955); SEELMAN, LAW OF LIBEL AND SLANDER IN THE STATE OF NEW YORK 1 (1933); SPRING, RISKS AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING AND THE THEATER 41 (2d ed. 1956).

[203] 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3130.05, at 31-246 (1963).

[204] *Id.* at 31-247.

[205] 19 App. Div. 2d 857, 243 N.Y.S.2d 993 (4th Dep't 1963).