Report of the **Advisory Committee** on **Civil Practice**

to the Chief Administrative Judge of the Courts of the State of New York

January 2010

Table of Contents

I. Introduction

The Advisory Committee on Civil Practice, one of the standing advisory committees established by the Chief Administrative Judge of the Courts pursuant to sections 212(1)(g) and 212(1)(q) of the Judiciary Law, annually recommends to the Chief Administrative Judge legislative proposals in the area of civil procedure that may be incorporated in the Chief Administrative Judge's legislative program. The Committee makes its recommendations on the basis of its own studies, examination of decisional law, and recommendations received from bench and bar. The Committee maintains a liaison with the New York State Judicial Conference, committees of judges and committees of bar associations, legislative committees, and such agencies as the Law Revision Commission. In addition to recommending measures for inclusion in the Chief Administrative Judge's legislative program, the Committee reviews and comments on other pending legislative measures concerning civil procedure.

In this 2010 Report, the Advisory Committee recommends a total of 22 measures for enactment by the 2010 Legislature. Of these, 16 measures previously have been endorsed in substantially the same form, two are modified measures, and four are new measures. In Parts II, III and IV, individual summaries of the proposals are followed by drafts of legislation.

Part II sets forth and summarizes the four new measures proposed for 2010. They are designed to: (1) allow service by publication, in a matrimonial matter, in a non-English newspaper and to require publication, generally, within 30 days after the order is entered (CPLR 316(a) & (c)); (2) remove the requirement that papers served by mail be mailed within the state CPLR 2103(f)(1); (3) eliminate the notice of medical malpractice action (CPLR 3406) (recommendation is made in conjunction with the Committee's recommendation for an amendment of Uniform Rule 202.56 (see, Part V. (3)) and (4) extend the judgment lien on real property and repeal the notice of levy upon real property (CPLR 5014, 5203 & 5235 (repealer)).

Part III sets forth and summarizes the modified measures proposed for 2010. These measures would (1) require pleading in a bill of particulars a defense premised upon Article

sixteen and modifying the contents of a bill of particulars to expand the categories of information that may be required (CPLR 1603, 3018(b), 3043) and (2) clarify the procedure for a motion to replead or amend and set the time for motions to dismiss for failure to state a cause of action and for summary judgment (CPLR 3211(e), 3212(a)).

Part IV summarizes the previously endorsed measures not enacted into law in 2009, but once again recommended by the Committee in substantially the same form. These measures: (1) adopt the Uniform Interstate Depositions and Discovery Act of 2007, to authorize disclosure in New York State in an action pending in another jurisdiction ((CPLR 3119) (new) & CPLR 3102(e)); (2) adopt the Uniform Mediation Act of 2001 (as amended in 2003), to address confidentiality and privileges in mediation proceedings in New York State (CPLR Article 74 (new)); (3) grant jurisdiction to entertain certain declaratory judgment actions commenced pursuant to the fee dispute resolution program (NYCCivCtAct; UDCA; UCCA; UJCA); (4) eliminate the uncertainty as to the determination of finality for the purposes of certain appeals to the Court of Appeals (CPLR 5513(e) (new), 5611(b) (new)); (5) clarify the uncertainty in the context of an appeal of either an *ex parte* temporary restraining order or an uncontested application to the court (CPLR 5701(a) and 5704(a)); (6) provide courts greater opportunity for oversight of applications for approval of transfer of a structured settlement (GOL §5-1705); (7) expand expert disclosure in commercial cases (CPLR 3101(d)(1)); (8) set a time frame for expert disclosure (CPLR 3101(d)(1)); (9) address the time of service problem when a court order extending the time for filing is granted pursuant to CPLR 304 (CPLR 306-b); (10) increase the time in which a defect in form must be raised (CPLR 2101); (11) require the moving party to attach a copy of a proposed amended pleading (CPLR 3025(b)); (12) amend CPLR 3122, governing the use of subpoenas duces tecum, to make it clear when a court may order the production of medical records (CPLR 3122(a)); (13) extend the time in which a voluntary discontinuance may be obtained without court order or stipulation (CPLR 3217(a)(1)); (14) amend the rate of interest (CPLR 5004); (15) provide for pre-judgment interest after offers to compromise in personal injury actions (CPLR 3221, 5001(a)(b)) and (16) allow a notary public to compare and certify copies of papers that will comprise a record on appeal (CPLR 2105).

Two legislative proposals recommended by the Committee were *partially* enacted during 2009 in an extraordinary session as part of a broader legislative budget initiative, clarifying the law concerning Collateral Source Payments Made in the Context of a Settlement of a Lawsuit Governed by CPLR 4545 (CPLR 4545(a), (b), (c), (e)) and Equalizing the Treatment of Collateral Sources in Tort Actions (CPLR 4111, 4213, 4545) (see, L. 2009, c. 494).

Part V sets forth the Committee's regulatory proposals. The Committee seeks approval of five regulatory measures in 2010: (1) an amendment of 22 NYCRR 202.48(b) giving the court discretion to accept an untimely submission for good cause shown or in the interest of justice; (2) a proposal requiring parties to give the court notice of discontinuance, settlement, mootness of a motion or death or bankruptcy (22 NYCRR 202.28(a), (b) (new)); (3) a recommendation encouraging the court to grant requests to appear at conference via telephonic or other electronic means (22 NYCRR 202.10 (new)); (4) a proposal eliminating the notice of medical, dental and podiatric malpractice action and tailoring the special rules for medical, dental and podiatric malpractice action and (5) a proposal for a new 22 NYCRR 202.5-c allowing proof of service by mail under CPLR 2103(b)(2) by affirmation that the attorney caused the paper to be mailed.

Part VI of the report lists and summarizes previously endorsed legislative and regulatory proposals that the Committee still feels are important, but have a lesser likelihood of legislative success and are of lower priority than those recommended for enactment. They may be resurrected if the opportune time arises.

Part VII of the Report briefly discusses important pending and future projects under Committee consideration.

Part VIII of the Report lists the current Subcommittees that are operational within the Committee.

On the basis of long experience in drafting and reviewing legislation, the Committee

would like to emphasize three general principles to the Legislature with respect to the enactment of civil procedural bills:

(1) The Committee recommends that bills be drafted, insofar as practicable, to avoid the renumbering and relettering of sections and subdivisions that are the subject of numerous judicial citations. Extensive, unnecessary renumbering and relettering of often-cited provisions are confusing to the bar and diminish the accessibility of judicial citations of those provisions.

(2) The Committee recommends that, aside from corrective or remedial bills, which become effective immediately, the effective date of bills should be deferred a sufficient time after enactment to publicize them. For example, this Committee sets the effective date of most of its legislative proposals as "the first day of January next succeeding the date on which it shall have become a law." Further, because mere designation of an effective date is often insufficient to resolve ambiguities as to when actions or claims come within its ambit (see e.g., Majewski v. Broadalbin-Perth Central School District, 91 NY2d 577 [1998], affg 231 AD2d 102 [3d Dept 1997]; Morales v. Gross, 230 AD2d 7 [2d Dept 1997] [interpreting Omnibus Workers' Compensation Reform Act of 1996]), bills that alter substantive rights or shorten statutes of limitations should specify by stating, for example, that they apply to injuries occurring, actions commenced or trials commenced after a certain date.

(3) The Committee recommends that each time a revision of an existing provision or the addition of a new provision is proposed, attention should be given to ensuring that the bill is in gender-neutral terms.

The Committee continues to solicit the comments and suggestions of bench, bar, academic community and public, and invites the sending of all observations, suggestions and inquiries to:

George F. Carpinello, Esq., Chair
Advisory Committee on Civil Practice
c/o Office of Court Administration
Counsel's Office
25 Beaver Street
New York, N. Y. 10004

II. New Measures

1. Allowing Service by Publication in a Matrimonial Matter in a non-English Newspaper, and Requiring Publication, Generally, within 30 days after the Order is Entered (CPLR 316(a) & (c))

This proposal seeks to amend the publication statute in CPLR 316(a), which requires service of a summons by publication in the form of publication most likely to give notice to the defendant. It has come to the attention of the Committee that publication in a matrimonial action in one newspaper in the English language, which is now the rule in New York, does not provide notice to a defendant in many matrimonial cases in the State, particularly in those counties where there is a large volume of uncontested divorces or in cases where more consideration should be given to language issues. The existing publication law with respect to matrimonial cases limits the court unnecessarily when ordering service by publication. Rather than add an amendment adding a second notice in a non-English paper, which would increase in costs for the plaintiff, the Committee recommends elimination of the restriction for publication in one newspaper in the English language. This amendment would allow the court to determine that publication in a non-English newspaper is most likely to give notice to the person to be served and order publication accordingly.

The Committee also considered the 30 day rule under CPLR 316(c) and concluded that there is a problem in all cases, not just matrimonial matters, with ensuring first publication within the 30 days from the date the order is granted. The Committee recommends an amendment amending the law to require first publication in all matters within 30 days after the order requiring publication is entered. Current law requires first publication of the summons within 30 days after the order is granted. The Committee believes this modest amendment will remedy the existing problem.

Proposal

AN ACT to amend the civil practice law and rules, in relation to service by publication

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivisions (a) and (c) of rule 316 of the civil practice law and rules, subdivision (a) as amended by chapter 528 of the laws of 1978 and subdivision (c) as amended by chapter 191 of the laws of 1979, are amended as follows:

(a) Contents of order; form of publication; filing. An order for service of a summons by publication shall direct that the summons be published together with the notice to the defendant, a brief statement of the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum of money for which judgment may be taken in case of default and, if the action is brought to recover a judgment affecting the title to, or the possession, use or enjoyment of, real property, a brief description of the property, in two newspapers, at least one in the English language, designated in the order as most likely to give notice to the person to be served, for a specified time, at least once in each of four successive weeks, except that in the matrimonial action publication in one newspaper [in the English language,] designated in the order as most likely to give notice to the person to be served, at least once in each of three successive weeks shall be sufficient. The summons, complaint, or summons and notice in an action for divorce or separation order and papers on which the order was based shall be filed on or before the first day of publication.

(c) Time of publication; when service complete. The first publication of the summons shall be made within thirty days after the order is [granted] entered. Service by publication is complete on the twenty-eighth day after the day of first publication, except that in a matrimonial action it is complete on the twenty-first day after the day of first publication.

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become law.

2. Removing the Requirement that Papers Served by Mail be Mailed within the State (CPLR 2103(f)(1))

This measure would repeal the language in CPLR 2103(f)(1) that requires papers served by mail be mailed within the State of New York. Subdivision (f) of rule 2103 defines "mailing" for purposes of service of papers in a pending action upon the party's attorney. This proposal also extends by one day to six days the prescribed period of time for response to a paper when service under this section by mail is made by depositing papers with the Postal Service from outside the state.

The Committee takes particular note of a recent decision by the Appellate Division, First Department, holding insufficient service by mail made *outside* the State but in every other aspect made correctly with the United States Postal Service (M. Entertainment, Inc. v. Leydier (2009 NY Slip Op 04169)(May 28, 2009)(*reversed on other grounds*, 2009 NY Slip Op 07671 (October 27, 2009)). Notably, the dissent points out that the relevant notice of appeal was served by mail by depositing it with the Postal Service in New Jersey, instead of New York.

The Committee notes that CPLR 2103(b)(6), the rule regarding service upon an attorney via dispatch by overnight delivery service (CPLR 2103(b)), does not require such dispatch to be made within the State, only that the service regularly accept items for overnight delivery within the State, as follows:

> (b) Upon an attorney. Except where otherwise prescribed by law or by order of court, papers to be served upon a party in a pending action shall be served upon the party's attorney. Where the same attorney appears for two or more parties, only one copy need be served upon the attorney. Such service upon an attorney shall be made:
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> 6. by dispatching the paper to the attorney by overnight delivery service at the address designated by the attorney for that purpose or, if none is designated, at the attorney's last known address. Service by overnight delivery service shall be complete upon deposit of the paper enclosed in a properly addressed wrapper into the custody of the overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery. Where a period of time prescribed by

law is measured from the service of a paper and service is by overnight delivery, one business day shall be added to the prescribed period. "**Overnight delivery service" means any delivery service which regularly accepts items for overnight delivery to any address in the state;** or..."(emphasis added).

The Committee believes the rule for mailing should correspond with that for a delivery service. The Committee also believes that allowing service by mail from outside the State will remove an artificial barrier to service and encourage litigation to be brought in New York. Finally, the act of removing this requirement recognizes the current realities of multi-state practice and the increased mobility of litigants and litigation.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the definition of mailing for the purposes of the rule on service of papers

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (2) of subdivision (b) of rule 2103 of the civil practice law and rules is amended to read as follows:

2. by mailing the paper to the attorney at the address designated by that attorney for that purpose or, if none is designated, at that attorney's last known address; service by mail shall be complete upon mailing; where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period [; or] if the mailing is made within the state and six days if made from outside the state; or

§ 2. Paragraph (1) of subdivision (f) of rule 2203 of such act is amended as follows:

(f) Definitions. For the purposes of this rule:

1. "Mailing" means the deposit of a paper enclosed in a first class postpaid wrapper, addressed to the address designated by a person for that purpose or, if none is designated, at that person's last known address, in a post office or official depository under the exclusive care and custody of the United States Postal Service [within the state];

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become law.

3. Eliminating the Notice of Medical Malpractice Action (CPLR 3406)

The Committee recommends eliminating the "notice of medical malpractice action", now required by CPLR 3406 and Uniform Rule 202.56 (22 NYCRR §202.56), but retaining the current requirement that, in medical malpractice and similar actions, the Request for Judicial Intervention be filed within 60 days of joinder of issue. It proposes amending both the statute and the rule to achieve this objective.

CPLR 3406 was enacted in 1985 (L. 1985, c. 294) as part of a series of reforms applicable to tort and medical malpractice actions. As subsequently amended, it requires the filing of a "notice of dental, medical or podiatric malpractice action" in those types of actions and authorizes the Chief Administrator to adopt special calendar rules for such actions. Following this mandate, the Chief Administrator has adopted Uniform Rule 202.56, which contains detailed provisions setting forth the requirements of the notice and attachments to the notice, as well as a requirement that in such cases a Request for Judicial Intervention be filed within sixty days of joinder of issue. The rule also sets forth detailed requirements for a preliminary conference to be held shortly after the filing, and provides for penalties for failure to comply.

The notice of medical malpractice action is an anachronism, serving no discernible purpose today. Its elimination will end an unnecessary burden upon attorneys without in any way affecting this type of litigation. However, requiring the early filing of a Request for Judicial Intervention assures that courts will begin to oversee and supervise these cases at an early stage. The Committee believes that this is useful, and, in fact, would like to see this early supervision extended to other cases at such time as the courts have the resources to increase their workload.

To achieve these objectives, the Committee proposes to amend CPLR 3406 to eliminate all of the provisions of that section except those that authorize that Chief Administrator to adopt special calendar rules for dental, medical or podiatric malpractice actions, to prescribe the time for filing a Request for Judicial Intervention and to provide for a preliminary conference as soon as practical following such filing. The Committee also proposes to amend the statute to grant the same authority for such other actions as the Chief Administrator may deem appropriate, thereby giving her the discretion to expand the requirements beyond the cases now covered.

Should its proposal to amend CPLR 3406 be enacted, the Committee proposes that Uniform Rule 202.56 be amended to eliminate all of the requirements for a notice of medical malpractice action and all of the rules governing the preliminary conference, leaving those rules to the more general rules contained in Rule 202.6. The amended rule would be substantially narrowed so as to provide only that, in dental, medical or podiatric malpractice actions, the Request for Judicial Intervention must be filed, as it is now, within sixty days of joinder of issue, and that this filing results in assignment to a judge. Current provisions dealing with the need for motions on missing the deadline and sanctions for late filing would be eliminated, as the Committee believes that this causes unnecessary side issues to be brought into the litigation.

In sum, the Committee proposes that the essentials of current calendar practice in dental, medical and podiatric malpractice actions be retained while those requirements that are burdensome and unnecessary be eliminated.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the notice of medical, dental or podiatric malpractice action

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Rule 3406 of the civil practice law and rules, as amended by chapter 165 of the laws of 1991, is amended as follows:

Rule 3406. [Mandatory filing and pre-calendar] Pre-calendar conference in dental, podiatric and medical malpractice actions. [(a) Mandatory filing. Not more than sixty days after issue is joined, the plaintiff in an action to recover damages for dental, medical or podiatric malpractice shall file with the clerk of the court in which the action is commenced a notice of dental, medical or podiatric malpractice action, on a form to be specified by the chief administrator of the courts. Together with such notice, the plaintiff shall file: (I) proof of service of such notice upon all other parties to the action; (ii) proof that, if demanded, authorizations to obtain medical, dental, podiatric and hospital records have been served upon the defendants in the action; and (iii) such other papers as may be required to be filed by rule of the chief administrator of the courts. The time for filing a notice of dental, medical or podiatric malpractice action may be extended by the court only upon a motion made pursuant to section two thousand four of this chapter.

(b) Pre-calendar conference.] The chief administrator of the courts, in accordance with such standards and administrative policies as may be promulgated pursuant to section twenty-eight of article six of the constitution, shall adopt special calendar control rules for actions to recover damages for dental, podiatric or medical malpractice, and for such other actions as the chief administrator may deem appropriate. Such rules shall [require a pre-calendar conference in such an action, the purpose of which shall include, but not be limited to, encouraging settlement, simplifying or limiting issues and establishing a timetable for disclosure, establishing a timetable for offers and depositions pursuant to subparagraph (ii) of paragraph one of subdivision (d) of section thirty-one hundred one of this chapter, future conferences, and trial. The timetable for disclosure shall provide for the completion of disclosure not later than twelve months after the notice of dental, podiatric or medical malpractice is filed and shall require that all parties be

ready for the trial of the case not later than eighteen months after such notice is filed. The initial pre-calendar conference shall be held after issue is joined in a case but before a note of issue is filed. To the extent feasible, the justice convening the pre-calendar conference shall hear and decide all subsequent pre-trial motions in the case and shall be assigned the trial of the case. The chief administrator of the courts also shall provide for the imposition of costs or other sanctions, including imposition of reasonable attorney's fees, dismissal of an action, claim, cross-claim, counterclaim or defense, or rendering a judgment by default for failure of a party or a party's attorney to comply with these special calendar control rules or any order of a court made thereunder. The chief administrator of the courts, in the exercise of discretion, may provide for exemption from the requirement of a pre-calendar conference in any judicial district or a county where there exists no demonstrated need for such conferences] prescribe a time for filing a request for judicial intervention and require a preliminary conference as soon as practical following such filing.

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become law.

4. Extending the Judgment Lien on Real Property in an Action Upon a Money Judgment and Repealing the Notice of Levy upon Real Property (CPLR §§ 5014, 5203, 5235(repealer))

The Committee recommends an extension of the judgment lien on real property in an action upon a money judgment from 10 years to 20 years. The Committee believes that the existing statutory 20-year enforceable life of a money judgment award and the mere 10-year viability of the lien on real property resulting from the money judgment are completely at odds and can result in a serious hardship on an original creditor with a valid judgment in a lien-gap scenario. The Committee believes that the 10-year life of a lien, while created as a matter of public policy to facilitate property conveyances, is not justified when considered in the context of the difference between the two statutes.

The Committee has followed with great interest the decisions in the case of Gletzer v. Harris, 12 N.Y.3d 468, 909 N.E.2d 1224, 882 N.Y.S.2d 386 (2009) aff'g, 51 A.D.3d 196, 854 N.Y.2d 10 (1st Dept. 2008). In that case the Court of Appeals held that a renewal lien becomes effective when granted by Supreme Court, where additional lenders relying on the public record acquired rights in the property during the lien gap that occurred during the pendency of the original creditor's action, which was brought to renew the judgment under CPLR §5014 during the tenth year to extend the lien for an additional 10 years but not decided until after the expiration of the lien. This measure is intended to resolve the lien-gap problem and addresses the situation where the lien has expired but the judgment has not.

The Committee recognizes that these amendments necessitate the repeal of CPLR §5235, since that statute was designed to eliminate the problems of execution on a judgment that arise during the second 10 years while the still valid judgment may not be a lien on real property (see, CPLR §5236(a) (preventing the sale of the realty on execution where the lien is expired). However, the remedy under §5235 allowing the sheriff to file the notice of levy must remain available for 10 years from the effective date of this measure in those situations where either the judgment has been docketed but the lien obtained on the judgment has expired prior to the effective date of this measure or where the judgment creditor issues the execution close to the expiration of the 20-year lien period to prevent the lien from expiring while the sale of the real property takes place. Thus, the Committee has included language in the effective date section of

the legislation which will ensure that §5235 remains available in those instances to provide the appropriate notice on the public record.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the judgment lien on real property in an action upon a money judgment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section one. Section 5014 of the civil practice law and rules, the opening unlettered paragraph as amended by chapter 115 of the laws of 1965, subdivision 2 as amended by chapter 485 of the laws of 1964 and the last unlettered paragraph as added by chapter 123 of the laws of 1986, are hereby repealed and the section renumbered as follows:

§ 5014. Action upon judgment. Except as permitted by section 15-102 of the general obligations law, an action upon a money judgment entered in a court of the state may only be maintained between the original parties to the judgment where:

1. [ten years have elapsed since the first docketing of the judgment; or

2.] the judgment was entered against the defendant by default for want of appearance and the summons was served other than by personal delivery to [him] the defendant or to his or her agent for service designated under rule 318, either within or without the state; or

[3.] 2. The court in which the action is sought to be brought so orders on motion with such notice to such other persons as the court may direct.

[An action may be commenced under subdivision one of this section during the year prior to the expiration of ten years since the first docketing of the judgment. The judgment in such action shall be designated a renewal judgment and shall be so docketed by the clerk. The lien of a renewal judgment shall take effect upon the expiration of ten years from the first docketing of the original judgment.]

§ 2. Section 5203 of the civil practice law and rules, subdivision (a) as amended by chapter 968 of the laws of 1972 and subdivision (b) as amended by chapter 388 of the laws of 1964, is amended to read as follows:

§ 5203. Priorities and liens upon real property. (a) Priority and lien on docketing judgment. No transfer of an interest of the judgment debtor in real property, against which property a money judgment may be enforced, is effective against the judgment creditor either from the time of the docketing of the judgment with the clerk of the county in which the property

is located until [ten] twenty years after filing of the judgment-roll, or from the time of the filing with such clerk of a notice of levy pursuant to an execution until the execution is returned, except:

1. a transfer or the payment of the proceeds of a judicial sale, which shall include an execution sale, in satisfaction either of a judgment previously so docketed or of a judgment where a notice of levy pursuant to an execution thereon was previously so filed; or

2. a transfer in satisfaction of a mortgage given to secure the payment of the purchase price of the judgment debtor's interest in the property; or

3. a transfer to a purchaser for value at a judicial sale, which shall include an execution sale; or

4. when the judgment was entered after the death of the judgment debtor; or

5. when the judgment debtor is the state, an officer, department, board or commission of the state, or a municipal corporation; or

6. when the judgment debtor is the personal representative of a decedent and the judgment was awarded in an action against [him] such judgment debtor in his or her representative capacity.

(b) Extension of lien. Upon motion of the judgment creditor, upon notice to the judgment debtor, served personally or by registered or certified mail, return receipt requested, to the last known address of the judgment debtor, the court may order that the lien of a money judgment upon real property be effective after the expiration of [ten] twenty years from the filing of the judgment-roll, for a period no longer than the time during which the judgment creditor was stayed from enforcing the judgment, or the time necessary to complete advertisement and sale of real property in accordance with section 5236, pursuant to an execution delivered to a sheriff prior to the expiration of ten years from the filing of the judgment-roll. The order shall be effective from the time it is filed with the clerk of the county in which the property is located and an appropriate entry is made upon the docket of the judgment.

§ 3. This act shall take effect on the first of January next succeeding the date on which it shall have become law.

III. Modified Measures

1. Requiring Pleading in a Bill of Particulars a Defense Premised upon Article Sixteen and Modifying the Contents of a Bill of Particulars to Expand the Categories of Information That May be Required (CPLR 1603, 3018(b), 3043)

The first part of this measure would amend CPLR 1603 and 3018(b) to resolve a technical disagreement between decisions of the Second and Fourth Departments, which continues to be problematic since those decisions of the early 1990's which continues to be problematic since the issue has never reached the Court of Appeals for resolution. This measure would require reliance on CPLR Article 16 to be pleaded as an affirmative defense.

CPLR Article 16 establishes the rule by which a defendant found liable to a plaintiff in an action for personal injury, in certain circumstances, may reduce its liability for non-economic loss by showing that its liability, if any, is fifty percent or less of the total liability assigned to all persons liable. Under this measure, CPLR 3018(b) would be amended to require a defendant to raise a CPLR 1603 reduction claim as an affirmative defense. This would be analogous to the defense of comparative negligence (*i.e.*, reduction of liability by virtue of the plaintiff's own contribution to the accident or occurrence). The primary consequence of the amendment is that the plaintiff then would be entitled to receive in advance a bill of particulars with respect to the Article 16 defense. Thus, the amendment would limit the risk of surprising the plaintiff at trial with new factual claims not asserted in any pleading.

There is a split between the Second and Fourth Departments as to whether a plaintiff is entitled to receive a bill of particulars with respect to the limitation of liability defense, despite language in current CPLR 1603 placing the burden of proving another's culpability on the party asserting the claim. In Ryan v. Beavers, 170 AD 2d 1045 (1991), the Appellate Division, Fourth Judicial Department, concluded that plaintiffs are entitled to receive such a bill of particulars. The Court reasoned that it was "well settled that a party must provide a bill of particulars on matters on which he or she bears the burden of proof." However, in Marsala v. Weinraub, 208 AD 2d 689 (1994), a divided panel of the Appellate Division, Second Judicial Department, reached the opposite conclusion. It reasoned that "[s]ince the respondents need not plead CPLR Article 16 as an affirmative defense, it follows that the respondents need not provide a bill of

particulars with regard to CPLR Article 16."

In a concurring opinion in Marsala, Justice David S. Ritter argued that CPLR Article 16 should be pleaded as an affirmative defense so as to prevent unfair surprise. At the same time, Justice Ritter wrote that a defendant seeking the benefits of CPLR Article 16 should be entitled to rely upon the factual claims pleaded and evidence adduced by the other parties (including the plaintiff) in those instances in which the defendant chose not to advance further claims or proof. In such cases, the defendant's bill of particulars merely would advise the plaintiff of such claim. Our Committee agrees with Justice Ritter's views, and urges adoption of amendments to give them effect.

Notably, the proposed amendments relate solely to limitation of liability arising under CPLR Article 16. As such, the amendments do not affect in any way the defendant's ability to defeat the claim entirely on the ground that it is not liable at all. The amendments are intended to confirm that the defendant has the burden of proof in establishing an Article 16 defense, but are not intended to require a defendant relying upon Article 16 to particularize beyond what the defendant would have to prove at trial to establish entitlement to an Article 16 set-off. The intent is to require the defendant to provide the plaintiff with fair notice of whatever factual claims the defendant intends to prove at trial.

In the interests of balance and fairness in civil practice, our Committee recommends in the second part of this measure that the categories of information required in a bill of particulars be expanded. The second part of this measure would amend CPLR 3043(a) to further and improve the statute's intended purposes: *viz.*, amplifying the pleadings, limiting the proof and scope of inquiry at trial, and preventing surprise — all while avoiding undue burdens upon any party. The measure would not alter or limit the court's discretion to deny any one or more of the particulars of CPLR 3043 or to grant other, further or different particulars in a proper case. It will serve judicial economy by curtailing motion practice regarding the nature and scope of claims and will expedite discovery by requiring parties to more clearly set forth theories of liability.

Rule 3043, governing bills of particulars in personal injury actions, has remained largely unchanged since its enactment effective September 1, 1964. Under the CPLR, interrogatories generally are not permitted in personal injury actions (CPLR 3130(1)). Unless a party waives the right to depose the adversary, a bill of particulars provides the only means for

obtaining written responses from the opposing party. Ten years after its enactment the rule was amended by adding the provisions relating to an action brought pursuant to section 673(1) of the Insurance Law for personal injuries arising out of negligence in the use or operation of a motor vehicle in the State (L. 1974, c. 575). In 1979, the Legislature added CPLR 3042(b), which allows for service of a supplemental bill of particulars, without leave of the court and at least 30 days prior to trial, subject to specific limitations (L. 1979, c. 590).

At the request of our Committee, we now urge modification of these statutes to clarify the specificity required.

First, CPLR 3043(a)(2) would be amended to require litigants to identify the location of the occurrence with sufficient specificity that parties may evaluate the claims against them. We recommend deletion of the term "approximate" as being too vague, allowing overly broad description of the location of an accident, in favor of a specific identification of the location.

Second, CPLR 3042(a)(3) would be amended to delete the term "general" and insert the requirement that a "detailed" statement of the acts or omissions constituting the negligence claimed be stated by the parties to create more meaningful discovery and avoid surprise at the time of trial.

Third, CPLR 3042(a)(5) would be amended to require parties to state the identity of the recipient of actual notice when actual notice is claimed, and to specify the manner by which the notice was given. The wide array of modes of communication now available (*e.g.*, in-person conversations, telephone or cell phone conversations, letter, email, text messages) makes equally important the identification of the means by which notice is alleged to have been given. This provision will amplify pleadings and greatly facilitate investigation of the claim of notice.

In addition, we also recommend adoption of the following five additional particulars which may be required:

1) A new CPLR 3043(a)(10) would require: "Any section 1602 provisions claimed to be applicable." This language would eliminate the frequent problem where a party may claim a CPLR 1602 exception to the Article 16 limitations of liability, but does not identify the specific subdivision. Defendants cannot effectively evaluate the claim and claimants are allowed the surprise at trial. Since the claimant knows the specific subdivision, this amendment would remedy the problem with no inconvenience to any party.

2) A new CPLR 3043(a)(11) would add: "The name, address and file number of any collateral source of payments of special damages." This addition is related in content and spirit to subdivision (a)(9), which provides that a party may be required to particularize the "[t]otal amounts claimed as special damages for physicians' services and medical supplies; loss of earnings, with name and address of the employer; hospital expenses; nurses' services." While discovery is not permitted by means of a bill of particulars and the specifics of collateral source payments have not generally been allowed pursuant to a demand for a bill of particulars, requiring the mere identification of collateral source payors with respect to special damages does not unduly burden the party providing particulars.

3) A new CPLR 3043(a)(12) as follows: "Any law, statute, rule, regulation, ordinance, or industrial or professional standard claimed to have been violated." This amendment would give parties notice of the claims against them and prevent improper surprise at trial. Further, it would codify existing law holding that, in tort actions where a statutory violation is being asserted, it is incumbent upon the suing party to identify the particular statute, law, ordinance, rule or regulation claimed to have been violated (see Liga v Long Island Rail Road, 129 AD2d 566, 514 NYS2d 61 [2d Dept 1987]; Johnson v National Railroad Passenger Corp., 83 AD2d 916, 442 NYS2d 526 [1st Dept 1981]).

4) A new CPLR 3043(a)(13) would require: "If a defective condition is claimed, a description of the alleged condition and the date and time the alleged condition arose." Currently section 3043 does not expressly authorize a party to obtain a description, where constructive notice is claimed, of the alleged condition and the date and time the alleged condition arose, despite the fact that subdivisions (a)(4) and (a)(5) require particulars on whether the plaintiff claims actual or constructive notice and further details regarding actual notice, respectively.

5) CPLR 3043(a)(14) would require a party to: "Identify the principal address of the plaintiff." Given that the plaintiff is a party to the action and identified in the pleadings, and given the insignificant burden of providing the information, this amendment is recommended to ensure that there is no confusion as to the actual identity of the plaintiff.

These new requirements will serve the statute's intended purpose of amplifying the pleadings, limiting the proof and scope of inquiry at trial, and preventing surprise, without imposing any undue burden on the parties.

Proposal

AN ACT to amend the civil practice law and rules, in relation to pleading a defense premised upon article sixteen thereof and modifying the contents of a bill of particulars to expand the categories of information that may be required

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 1603 of the civil practice law and rules, as amended by chapter 635 of the laws of 1996, is amended to read as follows:

§1603. Burdens of proof. In any action or claim for damages for personal injury a party asserting that the limitations on liability set forth in this article do not apply shall allege and prove by a preponderance of the evidence that one or more of the exemptions set forth in subdivision one of section [sixteen hundred one] 1601 or section [sixteen hundred two] 1602 applies. A party asserting limited liability pursuant to this article shall have the burden of alleging and proving by a preponderance of the evidence that its equitable share of the total liability is fifty percent or less of the total liability assigned to all persons liable.

§2. Subdivision (b) of section 3018 of the civil practice law and rules, as amended by chapter 504 of the laws of 1980, is amended to read as follows:

(b) Affirmative defenses. A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in article fourteen-A, limitation of liability pursuant to article sixteen, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated.

§3. Subdivision (a) of rule 3043 of the civil practice law and rules, as amended by chapter 805 of the laws of 1984, is amended to read as follows:

(a) Specified particulars. In actions to recover for personal injuries the following particulars may be required:

(1) The date and approximate time of day of the occurrence;

(2) [Its approximate] The location of the occurrence;

(3) [General] A detailed statement of the acts or omissions constituting the negligence claimed;

(4) Where notice of a condition is a prerequisite, whether actual or constructive notice is claimed;

(5) If actual notice is claimed, a statement of when [and] it was given, to whom it was given, and the means by which it was given;

(6) Statement of the injuries and description of those claimed to be permanent, and in an action designated in subsection (a) of section five thousand one hundred four of the insurance law, for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, in what respect plaintiff has sustained a serious injury, as defined in subsection (d) of section five thousand one hundred two of the insurance law, or economic loss greater than basic economic loss, as defined in subsection (a) of section five thousand one hundred two of the insurance law;

(7) Length of time confined to bed and to house;

(8) Length of time incapacitated from employment; [and]

(9) Total amounts claimed as special damages for physicians' services and medical supplies; loss of earnings, with name and address of the employer; hospital expenses; nurses' services;

(10) Any section 1602 provisions claimed to be applicable;

(11) The name, address and file number of any collateral source of payments of special damages;

(12) Any law, statute, rule, regulation, ordinance, or industrial or professional standard claimed to have been violated;

(13) If a defective condition is claimed, a description of the alleged condition and the date and time the alleged defective condition arose; and

(14) The principal address of the plaintiff.

§4. This act shall take effect on the first of January next succeeding the date on which it shall have become law, and apply to a bill of particulars where the demand for the bill of particulars was served on or after such effective date and shall apply to an affirmative defense where the action was commenced on or after such effective date.

2. Clarifying a Motion to Replead or Amend and Setting the Time for Motions to Dismiss for Failure to State a Cause of Action and for Summary Judgment (CPLR 3211(e), 3212(a))

A motion to dismiss, authorized by CPLR rule 3211, and a motion for summary judgment, authorized by rule 3212, are two of the most important mechanisms in civil practice for resolving those cases where a trial is not necessary or for narrowing the issues that need to be tried. They are intended to serve the important purpose of avoiding unnecessary trials, thereby benefitting both the litigants and the courts. By chapter 492 of the Laws of 1996, the Legislature amended CPLR 3212(a) to provide that a motion for summary judgment shall be made within the time set by the court or, if no such time is set, "no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." The purpose of this amendment was to prevent the late filing of motions for summary judgment, often made on the eve of trial and resulting in a delay of the scheduled trial. By chapter 616 of the Laws of 2005, the Legislature enacted an amendment to 3211(e) to eliminate highly technical provisions that could serve as a trap for a party responding to certain motions to dismiss, causing that party to lose his or her right to replead if the motion was granted.

In recent years, several court decisions, as well as the practices of some judges and courts, have demonstrated that further statutory reform, addressing problems unforeseen at the time the amendments were made, is needed to insure that motion practice does not produce unnecessary trial delays. Motion practice has been subject to abuse; some motions are being initiated for the sole purpose of seeking delay, often just prior to trial. This measure would supply the needed reform.

First, as a threshold matter, this measure addresses a motion to replead or amend under CPLR 3211(e) to respond to the recent opinion of the Second Department in Janssen v. Incorporated Village of Rockville Ctr., 59 A.D.3d 15, in which the Court considered some of the questions left open by the 2005 amendment. The Court concluded its opinion by saying, "We urge the Legislature to act without delay in addressing the matters and concerns raised herein." This measure would amend rule 3211(e) to make clear that a motion to replead or amend is not barred by the granting of a motion to dismiss for failure to state a cause of action unless the court orders otherwise. This language fills the void noted by the Second Department in that the 2005

amendment left no specific statutory authorization for a motion to replead or amend.

This measure intentionally does not include a specific time limit for making a motion to replead or amend made after dismissal, as we agree with the Court that such a motion "should be freely granted absent prejudice or surprise to the opposing party, unless the proposed amendment is devoid of merit or palpably insufficient." The measure thus offers a reasonableness standard applicable to the facts and circumstances presented on a case-by-case basis in the court's discretion. Where the entire complaint is dismissed, there is an end date and the motion there is to vacate the judgment or refile, if the statute of limitations has not run under all available rules.

The remaining proposed amendments relate to timing under rules 3211(e) and 3212. Our Committee advises that practice problems have arisen because no time limitation was imposed on motions to dismiss for failure to state a cause of action authorized by rule 3211(a)(7). In Santana v. City of New York, 6 Misc. 3d 642 (Civ. Ct., N.Y. Co. 2004), the court allowed such a motion after the time permitted for a motion for summary judgment. Currently, rule 3211(e) allows such a motion to dismiss to be made at any time, thereby authorizing motions delaying trials. In this measure, we offer this amendment to rule 3211(e) to impose a time limitation identical to that provided in rule 3212(a). This will preclude a party from making a motion to dismiss for failure to state a cause of action beyond the time a motion for summary judgment can be made. Since a party should be aware of the basis for such a motion at the pleading stage, there would be no prejudice from the timing requirement. The benefit would be eliminating such motions on the "eve of trial."

In Brill v. City of New York, 2 N.Y.3d 648 (2004)) the Court of Appeals considered whether the necessary consequence of the 1996 amendment is that a trial must be held even if there are no disputed issues of fact where a meritorious summary judgment motion is submitted, but after the time permitted. The Court noted the quandary:

> "If this practice is tolerated and condoned, the ameliorative statute is, for all intents and purposes, obliterated. If, on the other hand, the statute is applied as written and intended, an anomaly may result, in that a meritorious summary judgment motion may be denied, burdening the litigants and trial calendar with a case that in fact leaves nothing to try."

The Brill majority opted to require a trial, while the dissent would have chosen to permit the motion to be heard. As the Court recognized, neither result is satisfactory. Guided by our

Committee, we have, therefore, attempted to develop a procedure that would continue to discourage late summary judgment motions, but not necessarily require a trial where there are no disputed factual issues.

We have modeled our proposal after CPLR 306-b, where the court can excuse the late service of a summons and complaint. The critical new language authorizes a court, in its discretion, to consider a late summary judgment motion for "good cause shown" or "in the interests of justice." (see Mead v. Singleman, 24 A.D.3d 1142 (3d Dept., 2005), for a good description of the differences between the two standards.) This permits the trial court to grant a motion – even a late motion – in order to avoid the time, burden and expense of a trial where none is needed. At the same time, it will significantly discourage late motions because a party cannot be assured that a court will even consider such a motion. Since the authority given to the trial court is completely discretionary, a party will have no right to have the motion heard if it is made late. We believe that this measure continues the policy that strongly supports an end to dilatory practice while providing an alternative other than the two that the Court of Appeals found unsatisfactory in Brill.

Importantly, this measure clarifies that the 120-day deadline can be varied by "an order made in the action," providing judges with discretion to vary the statutory deadline in particular cases where it is appropriate. This would reverse a recent trend toward the setting of alternative deadlines by local rule or practice, thus avoiding substantial practice confusion and modification of the time period set by the Legislature. This amendment would also make clear that any deadline, whether set by previous court order made in the action or the statutory deadline, could be modified where all parties and the court agree. This language allows the court and the parties flexibility to effectively use summary judgment motions to their benefit without giving rise to abuses or questions as to whether deadlines, however set, can be varied.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the time for the making of motion to dismiss for failure to state a cause of action and motion for summary judgment

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision (e) of rule 3211 of the civil practice law and rules, as amended by chapter 616 of the laws of 2005, is amended to read as follows:

(e) Number, time and waiver of objections; motion to [plead over] replead or amend. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two[, seven] or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted[; an]. A motion based upon a ground specified in paragraph seven of subdivision (a) may be made in a later pleading, if one is permitted, or by a date set by the court by an order made in the action, or, if no such date is set, no later than one hundred twenty days after the filing of the note of issue; provided, however, that the deadline for making such motion may be extended by the court, upon good cause shown, in the interest of justice or with the consent of all of the parties. Unless the court orders otherwise, the granting of a motion under paragraph seven of subdivision (a) shall not bar a motion to replead or amend. An objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision

(a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading.

§2. Subdivision (a) of rule 3212 of the civil practice law and rules, as amended by chapter 492 of the laws of 1996, is amended to read as follows:

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date by an order made in the action after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court by an order made in the action, such motion shall be made no later than one hundred twenty days after the filing of the note of issue[, except with leave of court on]. The deadline for making such motion set by order of the court or pursuant to this subdivision may be extended by the court upon good cause shown, in the interest of justice or with the consent of all of the parties.

§3. This act shall take effect immediately and apply to all actions pending on or after such effective date.

IV. Previously Endorsed Measures

1. Adopting the Uniform Interstate Depositions and Discovery Act of 2007, to Authorize Disclosure in New York State in an Action Pending in Another Jurisdiction ((CPLR 3119) (new) and CPLR 3102(e))

In 2008 the Committee recommended amending the CPLR to adopt the Uniform Interstate Depositions and Discovery Act ("Act") as promulgated by the National Conference of Commissioners of Uniform State Laws in 2007. The Act sets forth an efficient and inexpensive procedure for litigants to depose out-of-state individuals and for the production of discoverable materials that may be located outside the trial state. In 2009, the Committee again endorses adoption of the Act. Further, the Committee has amended its proposal for adoption of the Act in New York by 1) adding a paragraph (b)(4) to CPLR 3119 to ensure that the law is clear regarding the ability of an attorney, licensed to practice in this State and retained by a party to an out-of-state-proceeding, to issue a subpoena under this Act, and 2) adding a reference to CPLR Article 23 in proposed new section 3119(b)(2) and a reference to CPLR Article 31 in proposed new section 3119(d) to make it explicit that these articles apply to the Act as implemented in New York.

Under the Act, litigants can submit to the county clerk of the county, located in the state where discoverable materials or individuals are sought, a subpoena issued under the authority of a court in the trial state. Once the clerk in the discovery state receives the out-of-state subpoena, the clerk will issue a subpoena for service upon the person or entity to which the original subpoena is directed. The terms of the subpoena issued in the discovery state must incorporate the same terms as the original subpoena and contain the contact information for all counsel of record and any party not represented by counsel. The Act requires minimal judicial oversight since there is no need to present the matter to a judge in the discovery state before a subpoena is issued. The procedure set forth is inexpensive because it eliminates the need for obtaining a commission or local counsel in the discovery state, letters rogatory or the filing of a miscellaneous action during the discovery phase of litigation.

Discovery authorized by the subpoena must comply with the rules of the state in which it occurs. Furthermore, motions to quash, enforce, or modify a subpoena issued pursuant to the Act

shall be brought in and governed by the rules in the discovery state. The county clerk in the discovery state acts in a purely ministerial role, but in a manner that is sufficient to invoke jurisdiction of the discovery state over the deponent. The Act recognizes that the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in another jurisdiction from unreasonable or burdensome discovery requests.

In particular, this proposal amends the CPLR to add a new section 3119, and appropriately references sections of the CPLR where particularly applicable. Notably, under subdivision (a), the term "subpoena" includes a subpoena duces tecum, and does not include a subpoena for the inspection of a person. The Committee recognizes that medical examinations in a personal injury case, for example, are separately controlled by existing discovery rules. Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena for his or her examination should never be necessary. Further, the term "court of record" is intended to exclude non-court of record proceedings to avoid expansion to arbitration proceedings. Also, the term "submit" to a county clerk is intended to include delivering to or filing. Submitting a subpoena to the clerk in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

This measure will not change or repeal the law in those states that still *require* a commission or letters rogatory to take a deposition in a foreign jurisdiction (in contrast with CPLR 3108). The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. Finally, this measure modifies existing section 3102(e), which currently governs compelling a witness found in New York to give testimony for use in a foreign jurisdiction, since the Act supersedes that section with respect to actions pending in another state, the District of Columbia, Puerto Rico, the U. S. Virgin Islands and certain territory subject to United States jurisdiction.

Proposal

AN ACT to amend the civil practice law and rules, in relation to disclosure in New York state in an action pending in another jurisdiction

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The civil practice law and rules is amended by adding a new section 3119 to read as follows:

§3119. Uniform interstate depositions and discovery act. This section may be cited as the uniform interstate depositions and discovery act.

(a) Definitions. In this section:

(1) "Out-of-state subpoena" means a subpoena issued under authority of a court of record of a state other than this state.

(2) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(3) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(4) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

I. attend and give testimony at a deposition;

ii. produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody or control of the person; or

iii. permit inspection of premises under the control of the person.

(b) Issuance of subpoena.

(1) To request issuance of a subpoena under this section, a party must submit an out-of-state subpoena to the county clerk in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this state.

(2) When a party submits an out-of-state subpoena to the county clerk, the clerk, in accordance with that court's procedure and subject to the provisions of article 23 of this chapter, shall promptly issue a subpoena for service upon the person to which the out-of-state subpoena is directed.

(3) A subpoena under paragraph two of this subdivision must:

I. incorporate the terms used in the out-of-state subpoena; and

ii. contain or be accompanied by the names, addresses and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(4) Notwithstanding paragraph (1) of this subdivision, if a party to an out-of-state-proceeding retains an attorney licensed to practice in this state, and that attorney receives the original or a true copy of an out-of-state subpoena, the attorney may issue a subpoena under this section.

(c) Service of subpoena. A subpoena issued under this section must be served in compliance with sections 2302 and 2303 of this chapter.

(d) Deposition, production and inspection. Sections 2303, 2305, 2306, 2307 and 2308 and article 31 of this chapter apply to subpoenas issued under subdivision (b) of this section.

(e) Application to court. An application to the court for a protective order or to enforce, quash, or modify a subpoena issued under this section must comply with the rules or statutes of this state and be submitted to the court in the county in which discovery is to be conducted.

(f) Uniformity of application and construction. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§2. Subdivision (e) of section 3102 of the civil practice law and rules is amended to read as follows:

(e) Action pending in another jurisdiction. [When] Except as provided in section 3119, when under any mandate, writ or commission issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon notice or agreement, it is required to take the testimony of a witness in the state, he or she may be compelled to appear and testify in the same manner and by the same process as may be employed for the purpose of taking

testimony in actions pending in the state. The supreme court or a county court shall make any appropriate order in aid of taking such a deposition.

§3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law and shall apply to requests for discovery in cases pending on or after such effective date.

2. Adopting the Uniform Mediation Act of 2001 (as amended in 2003), to Address Confidentiality and Privileges in Mediation Proceedings in New York State (CPLR Article 74 (new))

The Committee recommends amending the CPLR to adopt the Uniform Mediation Act ("UMA") as promulgated by the National Conference of Commissioners of Uniform State Laws in collaboration with the American Bar Association's Section on Dispute Resolution in 2001 and amended in 2003. The UMA provides rules on the issues of confidentiality and privileges in mediation. It establishes an evidentiary privilege for mediators and participants in mediation that applies in later legal proceedings. The UMA also provides a confidentiality obligation for mediators. Currently, there are over 2,500 separate statutes nationwide that affect mediation in some manner, resulting in troublesome complexity in the law for mediating parties, particularly in a multi-state or commercial context.

The Committee is in full agreement with the prime concern of the UMA: keeping mediation communications confidential. New York has no statewide rule applicable to the confidentiality of submissions and statements made during mediation proceedings. See, NYP Holdings, Inc., v. McClier Corp., 2007 WL 519272 (Sup. Ct., N. Y. Co.,Jan. 10, 2007) (citing ADR Program, Comm Div, Sup. Ct., N. Y. Co., Rule 5); contrast, Hauzinger v. Hauzinger, 43 A. D. 3d 1289, 842 N. Y. S. 2d 646 (4th Dept. 2007), (aff'd., 10 N.Y.3d 923, 892 N.E.2d 849, 862 N.Y.S.2d 456 (2008).

Mediation is a process by which a third party facilitates communication and negotiation between parties to a dispute to assist them in reaching a voluntary agreement resolving that dispute. The central rule of the UMA is that a mediation communication is confidential, and, if privileged, is not subject to discovery or admission into evidence in a formal proceeding. In proceedings following a mediation, a party may refuse to disclose, and prevent any other person from disclosing, a mediation communication. Mediators and non-party participants may refuse to disclose their own statements made during mediation, and may prevent others from disclosing them, as well. Waiver of these privileges must be in a record or made orally during a proceeding to be effective.

The privilege extends only to mediation communications, and not the underlying facts of the dispute. Evidence that is otherwise admissible or subject to discovery does not become

inadmissible or protected from discovery by reason of its use in a mediation. A party that discloses a mediation communication and thereby prejudices another person in a proceeding is precluded from asserting the privilege to the extent necessary for the prejudiced person to respond. A person who intentionally uses a mediation to plan or attempt to commit a crime, or to conceal an ongoing crime, cannot assert the privilege. Also, there is no assertable privilege against disclosure of a communication made during a mediation session that is open to the public, that contains a threat to inflict bodily injury, that is sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding where a child or adult protective agency is a party, that would prove or disprove a claim of professional misconduct filed against a mediator, or against a party, party representative, or non-party participant based on conduct during a mediation. If a court, administrative agency, or arbitration panel finds that the need for the information outweighs the interest in confidentiality in a felony proceeding, or a proceeding to prove a claim or defense to reform or avoid liability on a contract arising out of the mediation, there is no privilege.

The UMA allows parties to opt out of the confidentiality and privilege rules, thus ensuring party autonomy. The UM generally prohibits a mediator, other than a judicial officer, from submitting a report, assessment, evaluation, finding or other communication to a court agency, or other authority that may make a ruling on the dispute that is the subject of the mediation. The mediator may report the bare facts that a mediation is ongoing or has concluded, who participated, and mediation communications evidencing abuse, neglect, or abandonment, or, other non-privileged mediation matters.

The UMA does not prescribe qualifications or other professional standards for mediators. It requires a mediator to disclose conflicts of interest before accepting a mediation or as soon as practicable after discovery of the conflict. His or her qualifications as a mediator must be disclosed to any requesting party to the dispute.

The Committee recognizes the efforts of the New York State Bar Association in promoting adoption of the Uniform Mediation Act. It is pleased to join with it in its efforts to further the goal of fostering prompt, economical, and amicable resolution of disputes, and provide a certainty in the law of mediation confidentiality in New York.

Proposal

AN ACT to amend the civil practice law and rules, in relation to establishing the uniform mediation act

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Short title. This act shall be known and may be cited as the "Uniform Mediation Act."

§ 2. The civil practice law and rules is amended by adding a new article 74 to read as follows:

ARTICLE 74

UNIFORM MEDIATION ACT

§ 7401. Definitions. As used in this article the following terms shall have the following meanings:

(a) "Mediation" means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.

(b) "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

(c) “Mediator” means an individual who conducts a mediation.

(d) “Mediation Party” means a person who participates in a mediation and whose agreement is necessary to resolve the dispute.

(e) “Nonparty participant” means a person, other than a party or mediator, that participates in a mediation.

(f) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency or instrumentality, public corporation, or any other legal or commercial entity.

(g) “Proceeding” means:

(1) a judicial, administrative, arbitral, or other adjudicative process, including related pre-hearing and post-hearing motions, conferences and discovery; or

(2) a legislative hearing or similar process.

(h) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(i) “Sign” means:

(1) to execute or adopt a tangible symbol with the present intent to authenticate a record; or

(2) to attach or logically associate an electronic symbol, sound or process to or with a record with the present intent to authenticate a record.

§ 7402. Scope. (a) Except as otherwise provided in subdivision (b) or (c) of this section, this article applies to a mediation in which:

(1) the mediation parties are required to mediate by statute or court or administrative agency rule or referred to mediation by a court, administrative agency, or arbitrator;

(2) the mediation parties and the mediator agree to mediate in a record that demonstrates an expectation that mediation communications will be privileged against disclosure; or

(3) the mediation parties use as a mediator an individual who holds himself or herself out as a mediator, or the mediation is provided by a person who holds himself or herself out as providing mediation.

(b) This article does not apply to a mediation:

(1) relating to the establishment, negotiation, administration, or termination of a collective bargaining relationship;

(2) relating to a dispute that is pending under or is part of the processes established by a collective bargaining agreement, except that this article shall apply to a mediation arising out of a dispute that has been filed with an administrative agency or court;

(3) conducted by a judge who might make a ruling on the case; or

(4) conducted under the auspices of:

(i) a primary or secondary school if all the parties are students; or

(ii) a correctional institution for youths if all the parties are residents of that institution.

(c) If the parties agree in advance in a signed record, or a record of a proceeding so reflects, that all or part of a mediation is not privileged, the privileges under sections 7403, 7404, and 7405 do not apply to the mediation or part agreed upon. However, section 7403 applies to a mediation communication made by a person who has not received actual notice of the agreement before the communication is made.

§ 7403. Privilege against disclosure; admissibility; discovery. (a) Except as otherwise provided in section 7405, a mediation communication is privileged as provided in subdivision (b) and is not subject to discovery or admissible in evidence in a proceeding unless waived or precluded as provided in section 7404.

(b) In a proceeding, the following privileges apply:

(1) A mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication.

(2) A mediator may refuse to disclose a mediation communication, and may prevent any other person from disclosing a mediation communication of the mediator.

(3) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a mediation communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely by reason of its disclosure or use in a mediation.

§ 7404. Waiver and preclusion of privilege. (a) A privilege under section 7403 may be waived in a record or orally during a proceeding if it is expressly waived by all parties to the mediation; and:

(1) in the case of the privilege of a mediator, it is expressly waived by the mediator; and

(2) in the case of the privilege of a nonparty participant, it is expressly waived by the nonparty participant.

(b) A person who discloses or makes a representation about a mediation communication which prejudices another person in a proceeding is precluded from asserting a privilege under section 7403, but only to the extent necessary for the person prejudiced to respond to the representation or disclosure.

(c) A person that intentionally uses a mediation to plan, to attempt to commit, or to commit a crime, or to conceal an ongoing crime or ongoing criminal activity, is precluded from asserting a privilege under section 7403.

§ 7405. Exceptions to privilege. (a) There is no privilege under section 7403 for a mediation communication that is:

(1) in an agreement evidenced by a record signed by all parties to the agreement;

(2) available to the public under article six or seven of the public officers law, or made during a session of a mediation which is open, or is required by law to be open, to the public;

(3) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(4) intentionally used to plan a crime, attempt to commit a crime, or to conceal an ongoing crime or ongoing criminal activity;

(5) later sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator;

(6) except as otherwise provided in subdivision (c) of this section, later sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation; or

(7) later sought or offered in a proceeding in which a child or adult protective services agency is a party to prove or disprove abuse, neglect, abandonment, or exploitation, unless the child or adult protective services agency participated in the mediation.

(b) There is no privilege under section 7403 if a court, administrative agency, or arbitrator finds, after a hearing held in camera, that the party seeking discovery or the proponent of the evidence has shown that the evidence is not otherwise available, that there is a need for the evidence that substantially outweighs the interest in protecting confidentiality and that the mediation communication is sought or offered in:

(1) a court proceeding involving a felony; or

(2) except as otherwise provided in subdivision (c) of this section, a proceeding (i) to prove a claim to rescind or reform, or (ii) to establish a defense to avoid liability on, a contract arising out of the mediation.

(c) A mediator may not be compelled to provide evidence of a mediation communication referred to in paragraph six of subdivision (a) or paragraph two of subdivision (b) of this section.

(d) If a mediation communication is not privileged under subdivision (a) or (b) of this section, only that portion of the communication necessary for the application of the exception from nondisclosure may be admitted. Admission of evidence under subdivision (a) or (b) does not render the evidence, or any other mediation communication, discoverable or admissible for any other purpose.

§ 7406. Prohibited mediator reports. (a) Except as required in subdivision (b) of this section, a mediator may not make a report, assessment, evaluation, recommendation, finding, or other communication regarding a mediation to a court, administrative agency, or other authority that may make a ruling on the dispute that is the subject of the mediation.

(b) A mediator may disclose:

(1) whether the mediation occurred or has terminated, or whether a settlement was reached, and attendance;

(2) a mediation communication as permitted under section 7405; or

(3) a mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against such mistreatment.

(c) A communication made in violation of subdivision (a) of this section may not be considered by a court, administrative agency, or arbitrator.

§ 7407. Confidentiality. Unless subject to article six or seven of the public officers law, mediation communications are confidential to the greatest extent agreed to by the parties or provided by this article or other law or rule of this state.

§ 7408. Mediator's disclosure of conflicts of interest; background. (a) Before accepting a mediation, an individual who is requested to serve as a mediator shall:

(1) make an inquiry that is reasonable under the circumstances to determine whether there are any known facts that a reasonable individual would consider likely to affect the impartiality of the mediator, including a financial or personal interest in the outcome of the mediation and an existing or past relationship with a mediation party or foreseeable participant in the mediation; and

(2) disclose any such known fact to the mediation parties as soon as is practical before accepting a mediation.

(b) If a mediator learns any fact described in paragraph one of subdivision (a) of this section after accepting a mediation, the mediator shall disclose it as soon as is practicable.

(c) At the request of the mediation party, an individual who is requested to serve as a mediator shall disclose the mediator's qualifications to mediate a dispute.

(d) A person who violates subdivision (a) or (b) of this section is precluded by the violation from asserting a privilege as to his or her own statements under section 7403.

(e) Subdivisions (a), (b), and (c) of this section do not apply to an individual acting as a judge.

(f) No provision of this article requires that a mediator have a special qualification by background or profession.

§ 7409. Participation in mediation. An attorney may represent a party, or another individual designated by a party may accompany the party to, and participate in, a mediation. A waiver of representation or participation given before the mediation may be rescinded.

§ 7410. Relation to electronic signatures in global and national commerce. This article modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U. S. C. § 7001 et seq., but this article does not modify, limit or supersede § 101(c) of such Act or authorize electronic delivery of any of the notices described in § 103(b) of such Act.

§ 7411. Uniformity of application and construction. In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

§ 3. Severability clause. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

§ 4. This act shall take effect on the first of January next succeeding the date on which it shall become law and shall apply to all agreements to mediate and mediations pursuant to a referral entered into on or after such effective date.

3. Granting Jurisdiction to Entertain Certain Declaratory Judgment Actions Commenced Pursuant to the Fee Dispute Resolution Program
(NYCCivCt Act; UDCA; UCCA; UJCA)

The Committee recommends the amendment of the New York City Civil Court Act, the Uniform District Court Act, the Uniform City Court Act and the Uniform Justice Court Act to grant jurisdiction to the courts governed by those Acts to entertain a declaratory judgment action commenced by a party aggrieved by an arbitration award rendered solely pursuant to the fee dispute resolution program (22 NYCRR Part 137). Part 137 allows a party aggrieved by a fee arbitration award to "commence an action on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed." 22 NYCRR 137.8(a). If an aggrieved party timely commences an action, the arbitration award shall not be admitted in evidence at the trial de novo. 22 NYCRR 137.8(c). "If no action is commenced within 30 days of the mailing of the arbitration award, the award shall be become final and binding." 22 NYCRR 137.8(a); see, Tray v. Thaler & Gertler, LLP, 17 Misc.3d 617, 842 N.Y.S.2d 713 (District Court, Nassau Co. 2007); Borgus v. Marianetti, 7 Misc.3d 1003(A), 2005 WL 742300 (City Ct., Rochester 2005).

Currently, a procedural vacuum exists where a party to a Part 137 arbitration may be aggrieved by an award rendered in favor of the adverse party, but the aggrieved party is not seeking affirmative monetary relief. In Tray, for example, the arbitration proceeding resulted in an award granting the defendant law firm a judgment against the plaintiff in the sum of $6,538.79. The client then commenced an action for trial de novo in district court, seeking an order declaring that the arbitrator in the Part 137 arbitration made a mistake and should not have determined that she owed her former attorneys any money. The court classified the action as one for declaratory relief and dismissed it for lack of jurisdiction. Citing several other decisions, the court observed "the need for a review of the 22 NYCRR Part 137 Rules with a mind toward the articulation of specific procedures to bring these actions before the court for judicial review when such review is warranted. It is clear from the instant case and the cases cited herein that the failure to address this issue has imposed undue burdens on the parties involved in these fee disputes and the courts and has frustrated the objectives of the Fee Dispute Resolution Program."

In Pruzan v. Levine, 18 Misc.3d 70, 852 N.Y.S.2d 584 (App. Term, NY Co. 2007), the client commenced arbitration under Part 137 to recover a $5,000 fee that he had paid to his attorney. Upon the arbitrator's award of $2,500 to the client, the attorney commenced a special proceeding in civil court seeking de novo review, purportedly pursuant to Article 75 of the CPLR. The Civil Court dismissed the petition and concluded that the petitioner attorney required declaratory relief, which was not available in the Civil Court (CCA art.2; CPLR 3001; see Zuckermann v. Spector, 287 A.D.2d 402, 731 N.Y.S.2d 715[2001][a declaration that an attorney was discharged for cause and is not entitled to compensation is not within the Civil Court's jurisdiction]).

As Tray and Pruzan vividly demonstrate, the aforementioned court acts do not grant jurisdiction to the lower courts to entertain a declaratory judgment action to challenge arbitration awards rendered pursuant to Part 137. The aggrieved party must, therefore, seek declaratory relief in the Supreme Court. This measure would remedy this procedural vacuum. Further, the Committee believes that, while there should not be an additional burden on the lawyer who seeks to be paid his or her fees in favor of a possibly recalcitrant client, limiting the venue only to a Supreme Court venue more often than not in these cases places a greater, more expensive and inconvenient burden on the client. This measure would remedy any unfairness to either party and increase access to the courts by providing jurisdiction for a declaratory judgment action in this very limited circumstance.

Proposal

AN ACT to amend the New York city civil court act, the uniform district court act, the uniform city court act and the uniform justice court act, in relation to granting jurisdiction to entertain certain declaratory judgment actions commenced pursuant to the fee dispute resolution program

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 212-a of the New York city civil court act, as amended by chapter 11 of the laws of 1984, is amended to read as follows:

§212-a. Declaratory judgments involving obligations of insurers and de novo review under part 137 of the rules of the chief administrator of the courts (22 NYCRR Part 137). The court shall have the jurisdiction defined in section 3001 of the CPLR to make a declaratory judgment with respect to: (1) any controversy involving the obligation of an insurer to indemnify or defend a defendant in an action in which the amount sought to be recovered does not exceed $25,000, and (2) actions commenced by a party aggrieved by an arbitration award rendered pursuant to part 137 of the rules of the chief administrator in which the amount in dispute does not exceed $25,000.

§2. Section 1801 of the New York city civil court act, as amended by chapter 601 of the laws of 2003, is amended to read as follows:

§ 1801. Small claims defined. The term "small claim" or "small claims" as used in this act shall mean and include any cause of action for money only not in excess of five thousand dollars exclusive of interest and costs, or any action commenced by a party aggrieved by an arbitration award rendered pursuant to part 137 of the rules of the chief administrator of the courts (22 NYCRR Part 137) in which the amount in dispute does not exceed $5,000, provided that the defendant either resides, or has an office for the transaction of business or a regular employment, within the city of New York.

§3. Section 1805 of the New York city civil court act is amended by adding a new subdivision (f) to read as follows:

(f) The court shall have the jurisdiction defined in section 3001 of the CPLR to make a declaratory judgment with respect to actions commenced by a party aggrieved by an arbitration

award rendered pursuant to part 137 of the rules of the chief administrator of the courts (22 NYCRR Part 137) in which the amount in dispute does not exceed $5,000.

§4. The uniform district court act is amended to add a new section 212-a to read as follows:

§ 212-a. Declaratory judgments involving de novo review under part 137 of the rules of the chief administrator of the courts (22 NYCRR Part 137). The court shall have the jurisdiction defined in section 3001 of the CPLR to make a declaratory judgment with respect to actions commenced by a party aggrieved by an arbitration award rendered pursuant to part 137 of the rules of the chief administrator in which the amount in dispute does not exceed $15,000.

§5. Section 1801 of the uniform district court act, as amended by chapter 601 of the laws of 3002, is amended to read as follows:

§1801. Small claims defined. The term "small claim" or "small claims" as used in this act shall mean and include any cause of action for money only not in excess of five thousand dollars exclusive of interest and costs, or any action commenced by a party aggrieved by an arbitration award rendered pursuant to part 137 of the rules of the chief administrator of the courts (22 NYCRR Part 137) in which the amount in dispute does not exceed $5,000, provided that the defendant either resides, or has an office for the transaction of business or a regular employment, within a district of the court in the county.

§6. Section 1805 of the uniform district court act is amended by adding a new subdivision (f) to read as follows:

(f) The court shall have the jurisdiction defined in section 3001 of the civil practice law and rules to make a declaratory judgment with respect to actions commenced by a party aggrieved by an arbitration award rendered pursuant to part 137 of the rules of the chief administrator of the courts (22 NYCRR Part 137) in which the amount in dispute does not exceed $5,000.

§7. The uniform city court act is amended by adding a new section 212-a to read as follows:

§ 212-a. Declaratory judgments involving de novo review under part 137 of the rules of the chief administrator of the courts (22 NYCRR Part 137). The court shall have the jurisdiction defined in section 3001 of the CPLR to make a declaratory judgment with respect to actions

commenced by a party aggrieved by an arbitration award rendered pursuant to part 137 of the rules of the chief administrator in which the amount in dispute does not exceed $15,000.

§8. Section 1801 of the uniform city court act, as amended by chapter 601 of the laws of 2003, is amended to read as follows:

§ 1801. Small claims defined. The term "small claim" or "small claims" as used in this act shall mean and include any cause of action for money only not in excess of five thousand dollars exclusive of interest and costs, or any action commenced by a party aggrieved by an arbitration award rendered pursuant to part 137 of the rules of the chief administrator of the courts (22 NYCRR Part 137) in which the amount in dispute does not exceed $5,000, provided that the defendant either resides, or has an office for the transaction of business or a regular employment, within the county.

§9. Section 1805 of the uniform city court act is amended by adding a new subdivision (f) to read as follows:

(f) The court shall have the jurisdiction defined in section 3001 of the CPLR to make a declaratory judgment with respect to actions commenced by a party aggrieved by an arbitration award rendered pursuant to part 137 of the rules of the chief administrator of the courts (22 NYCRR Part 137) in which the amount in dispute does not exceed $5,000.

§10. The uniform justice court act is amended by adding a new section 212-a to read as follows:

§ 212-a. Declaratory judgments involving de novo review under part 137 of the rules of the chief administrator of the courts (22 NYCRR Part 137). The court shall have the jurisdiction defined in section 3001 of the CPLR to make a declaratory judgment with respect to actions commenced by a party aggrieved by an arbitration award rendered pursuant to part 137 of the rules of the chief administrator in which the amount in dispute does not exceed $3,000.

§ 11. This act shall take effect on the first of January next succeeding the date on which it shall become law and shall apply to actions commenced on or after such effective date.

4. Eliminating the Uncertainty as to the Determination of Finality for the Purposes of Certain Appeals to the Court of Appeals (CPLR 5513(e)(new), 5611(b) (new))

The Committee recommends the amendment of CPLR sections 5611 and 5513 to eliminate uncertainty as to the timing and manner of taking appeals to the Court of Appeals or moving for permission to appeal to the Court of Appeals in those cases where the Appellate Division orders a new trial unless a party stipulates to a remittance or addition to the jury verdict. Under current decisional law, the time within which to take such an appeal or move for permission to appeal varies depending upon semantic, non-substantive distinctions in the language used by the Appellate Division.

The Court of Appeals held in Whitfield v. City of New York, 90 N.Y.2d 777 (1997), that if an order conditionally reduces the damages and does not expressly call for amendment of the current judgment in the plaintiff's favor, then the appeal must be taken from the stipulation and the time for the defendant to appeal or seek leave to appeal runs from the plaintiff's service of the stipulation with notice of entry. If, however, the Appellate Division expressly directs the plaintiff to effect amendment of the judgment after accepting the reduction of damages, then the appeal must be taken from the amended judgment and the time for the taking of the appeal or seeking leave to appeal is measured from service of the amended judgment with notice of entry. If the Appellate Division goes a step further and says that the judgment will be deemed affirmed as modified after the amendment is effected, then appeal must be taken from the Appellate Division order and the time for taking of the appeal or seeking leave to appeal runs from the later of a) service with notice of entry of the Appellate Division order, or b) service with notice of entry of the amended judgment.

The Committee believes that the time to take an appeal should, in all circumstances, be definite. Under the proposed amendment, in any case in which the Appellate Division directs a new trial unless a party stipulates to accept a modification of the damages or the judgment, there would be only one appealable paper and only one deadline for taking of the appeal or seeking leave to appeal; this supposing that the party given the choice to do so accepts the modification rather than undergoing a new trial. The deadline for the taking of the appeal or seeking leave to appeal would in all instances run from the later of 1) service of the Appellate Division order with written notice of its entry, or 2) service of the stipulation with written notice of its entry.

There are two reasons why that date rather than some later date (*e.g.*, service of the amended judgment with notice of entry) is deemed preferable as the starting point for the time to appeal or seek leave to appeal. First, there are sometimes delays in amending the judgment and it is generally preferable that Court of Appeals review occur sooner rather than later, especially since the cases in issue will almost always be cases that have been litigated for many years. Second, while such disputes do not often arise, the parties sometimes have disputes specifically concerning the manner in which the judgment is amended (*e.g.*, a dispute as to the applicable interest rate). In such an instance, it would be unfortunate if the basic appeal concerning the contested liability and damages issues had to be tabled while the lower courts first passed on ministerial post-judgment issues. Selection of the stipulation as the triggering event (as is currently the case in one of the three Whitfield scenarios) would avoid such ministerial delays.

The proposed amendment would also make the Appellate Division order the appealable paper in all cases involving Appellate Division orders that are final but for conditional modifications. Here, the main point is that the appealable paper be the same in all such cases. The choice as to what that paper should be is less important. The reason for selection of the Appellate Division order as the appealable paper rather than the stipulation is merely that this better comports with the reality of the appeal. It is, after all, the Appellate Division order with which the would-be appellant takes issue.

Proposal

AN ACT to amend the civil practice law and rules, in relation to determination of finality for the purposes of certain appeals to the court of appeals

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 5513 of the civil practice law and rules is amended by adding a new subdivision (e) to read as follows:

(e) Computation of time for appeal to the court of appeals where an order of the appellate division directs a new trial unless a party stipulates to modification. Where an order of the appellate division directs a new trial unless a party stipulates to a modification of an order or judgment, and the party so stipulates, the time within which an appeal must be taken or a motion for permission to appeal made shall be computed from the later of the service of the order appealed from with notice of entry or the service of the stipulation of modification with notice of entry.

§ 2. Section 5611 of the civil practice law and rules is amended to read as follows:

§ 5611. When appellate division order deemed final. (a) If the appellate division disposes of all the issues in the action its order shall be considered a final one, and a subsequent appeal may be taken only from that order and not from any judgment or order entered pursuant to it. If the aggrieved party is granted leave to replead or to perform some other act which would defeat the finality of the order, it shall not take effect as a final order until the expiration of the time limited for such act without his or her having performed it.

(b) An order of the appellate division that finally determines an action except for directing a new trial unless a party stipulates to a modification of an order or judgment shall be final upon filing of a stipulation accepting such modification. The appellate division order shall constitute the paper from which the appeal is to be taken.

§ 3. This act shall take effect on the first of January next succeeding the date on which it shall become law and shall apply to appeals from appellate division orders rendered on or after such effective date.

5. Clarifying the Uncertainty in the Context of an Appeal of Either an *Ex Parte* Temporary Restraining Order or an Uncontested Application to the Court (CPLR 5701(a) and 5704(a))

The Committee recommends two changes respecting appellate procedure relating to the interplay between CPLR §§ 5701 and 5704. CPLR § 5701 generally provides for appeals to the Appellate Division from orders of the Supreme and County Courts. However, there are two species of applications that have presented problems: those in which by the nature of the application there is no adverse party and applications relating to provisional remedies in which there is an urgent need for appellate review.

Section 1 of the proposal seeks to add a new paragraph 4 to CPLR § 5701(a) to provide for the availability of an appeal in circumstances in which, due to the nature of the application, there is no adverse party. The problem arises as a result of existing sections 5701(a) (2) and (3), which require that the appealable order shall have been "made upon notice." There are certain applications, such as an application for a legal name change, which do not by their nature provide for an adverse party upon whom notice would be served. While such applications are not routinely denied in whole or in part, the Committee believes that the Appellate Division should not be constrained on jurisdictional grounds from reviewing such an appeal.

The second proposed amendment also relates to ex parte applications. CPLR § 5704 provides for review by the Appellate Division or the Appellate Term of certain ex parte orders. At present, the granting of any provisional remedy, such as a temporary restraining order (TRO), without notice is immediately reviewable in the Appellate Division under CPLR § 5704.

However, it has come to the attention of the Committee that the present wording of subdivisions (a) and (b) of section 5704 has been construed to limit the authority of an individual justice from granting a provisional remedy that was denied in the court below. The Committee believes that the denial of a provisional remedy often gives rise to emergency conditions, necessitating immediate relief from a justice of the Appellate Division. The Committee, therefore, recommends an amendment of section 5704 to add language allowing a single Appellate Division or Appellate Term justice to grant an order or provisional remedy applied for without notice to the adverse party and refused by the court below.

Under prevailing case law, a TRO that is granted after informal notice to the opposing party is still considered to be an ex parte order for purposes of CPLR § 5704. With the adoption of 22 NYCRR § 202.7(f), which this Committee recommended, it is likely that more temporary restraining orders will be granted after informal notice. This proposal does not in any way affect the current rule that such TRO(s) are considered to be *ex parte* for purposes of section 5704, unless they are made after service of a formal notice of motion or an order to show cause

Proposal

AN ACT to amend the civil practice law and rules, in relation to appellate review of an ex parte order or applications for provisional remedies

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph 3 of subdivision (a) of section 5701 of the civil practice law and rules is amended and a new paragraph 4 is added to such subdivision to read as follows:

3. from an order, where the motion it decided was based upon notice, refusing to vacate or modify a prior order, if the prior order would have been appealable as of right under paragraph two had it decided a motion made upon notice; or

4. from an order denying in whole or in part an application for which, by its nature, there is not an adverse party.

§2. Section 5704 of the civil practice law and rules, as amended by chapter 435 of the laws of 1972, is amended to read as follows:

§ 5704. Review of ex parte orders or ex parte applications for provisional remedies. (a) By appellate division. The appellate division or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division; and the appellate division or a justice thereof may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate division.

(b) By appellate term. The appellate term in the first or second judicial department or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate term; and such appellate term or a justice thereof may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate term.

§3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

6. Providing Courts Greater Opportunity for Oversight of Applications for Approval of Transfer of a Structured Settlement (GOL 5-1705)

The Committee recommends the amendment of New York's General Obligations Law Title 17, enacted in 2002, insofar as it governs the procedure for obtaining court approval for the transfer of a structured settlement.

By way of background, in a structured settlement the recipient does not receive all the proceeds at the time of settlement. Rather, all or a portion are paid out in scheduled periodic payments over a course of time.

Usually a structured settlement agreement restricts the recipient from transferring the rights to the future payments. Nonetheless, a market has developed whereby entities – commonly referred to as structured settlement factoring companies – purchase the rights to future payments for a present cash payment. (See generally, Daniel W. Hindert and Craig H. Ulman, Transfers of Structured Settlement Payment Rights: What Judges Should Know About Structured Settlement Protection Acts, A.B.A. Judges' Journal, Spring 2005.)

The structured settlement recipient (referred to in GOL Title 17 as the "payee") is typically charged a high discount rate by the factoring company in exchange for the present cash payment. In order to assist the Court in determining whether the transfer is "in the best interests of the payee," [GOL §5-1706(b)] the following amendments to section 5-1705 are recommended:

First: Section 5-1705(a) would add the requirement that the action for approval of a transfer be initiated only by order to show cause.

This addition would aid in assigning the action, particularly in counties where one judge handles all such applications. Requiring that the action be brought on by order to show cause does not reduce the minimum notice period of 20 days specified in section 5-1705(c).

Second: Section 5-1705(d)(iv) would be added to provide that the petition for approval of a transfer include: a statement setting forth whether there have been any previous transfers or applications for transfer of the structured settlement and giving details of all such transfers or applications for transfer.

This information is obviously useful to the Court, but hopefully will also have the effect of deterring the practice of filing a petition seeking a transfer in one venue after it has already

been denied in a different venue. (See, e.g., In re: Angel L. Claudio, Jr., Index #7063/2006, Supreme Court, Dutchess County, Order of Hon. Christine A. Sproat, J.S.C. 01/18/07.)

Third: Section 5-1705(e) would be added: On the hearing, the payee shall attend before the court unless attendance is excused for good cause.

This new language is adopted from CPLR 1208(d). It is not intended that the "hearing" described in new subdivision (e) must necessarily be a formal hearing that is "on the record" and involves the reception of evidence, but the term is used in the broader sense with the expectation that the court will direct such formalities as it deems advisable.

Proposal

AN ACT to amend the general obligations law, in relation to court approvals of transfers of structured settlements

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 5-1705 of the general obligations law, as added by chapter 537 of the laws of 2002, is amended to read as follows:

§ 5-1705. Procedure for approval of transfers. (a) An action for approval of a transfer of a structured settlement shall be by a special proceeding brought on only by order to show cause.

(b) Such proceeding shall be commenced to obtain approval of a transfer of structured settlement payment rights. Such proceeding shall be commenced:

(I) in the supreme court of the county in which the payee resides; or

(ii) in any court which approved the structured settlement agreement.

(c) A copy of the [notice of petition and petition or] order to show cause and petition shall be served upon all interested parties at least twenty days before the time at which the petition is noticed to be heard. A response shall be served at least seven days before the petition is noticed to be heard.

(d) A petition for approval of a transfer of structured settlement payment rights shall include:

(I) a copy of the transfer agreement;

(ii) a copy of the disclosure statement and proof of notice of that statement required under section 5-1703 of this title; [and]

(iii) a listing of each of the payee's dependents, together with each dependent's age; and

(iv) a statement setting forth whether there have been any previous transfers or applications for transfer of the structured settlement payment rights and giving details of all such transfers or applications for transfer.

(e) On the hearing, the payee shall attend before the court unless attendance is excused for good cause.

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall become law.

7. Expanding Expert Disclosure in Commercial Cases (CPLR 3101(d)(1))

One of the main objectives of the Supreme Court's commercial division is to provide "[a] world class forum for the resolution of commercial disputes." Chief Judge Kaye, Commercial Litigation in New York State Courts § 1.7, at p.16 (Haig 4B West's NY Prac Series). In furtherance of that objective, a priority of several groups charged with studying the commercial division is to relax certain restrictions on expert disclosure imposed by the CPLR (see id. at pp. 3-4) to address the special needs of substantial commercial cases. The Committee believes that limited amendments to the expert disclosure statute, CPLR 3101, would promote more efficient and thorough preparation by attorneys in commercial actions and speedier resolution of those actions, thereby encouraging commercial litigants to use our court system. Thus, the Committee supports an amendment to CPLR 3101(d)(1)(I) that would allow for greater expert disclosure in commercial actions.

CPLR 3101(d)(1)(I) provides for the furnishing, upon request of a party, of a statement regarding an expert whom the adversary intends to call at trial. That provision authorizes further disclosure concerning the expected testimony of an expert only by court order "upon a showing of special circumstances." The courts have interpreted "special circumstances" narrowly, generally confining it to instances in which the critical physical evidence in a case has been destroyed after its inspection by an expert for one side but before its inspection by the expert for the other, and certain other, similarly limited situations. E.g., Adams Lighting Corp. v First Central Ins. Co., 230 AD2d 757 (2d Dept. 1996); The Hartford v Black & Decker, 221 AD2d 986 (4th Dept. 1995); Rosario v General Motors Corp., 148 AD2d 108 (1st Dept. 1989); Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C:3101:29A.

The Committee believes that, on balance, the current rules governing expert disclosure work reasonably well in cases other than commercial cases. The issue of expert disclosure, generally, raises diverse opinions in the bar. Therefore, the Committee recommends that CPLR 3101(d)(1)(I) should be modified to permit additional expert disclosure in substantial commercial cases only. The issues addressed by experts in commercial cases are often complex, touching on nuanced economic, financial and corporate principles, such as how stock or other securities should be valued; how a business should be valued; or whether the financial analysis of a board of directors was sound under the circumstances. In addition to presenting difficult legal and factual

issues, commercial cases often involve substantial sums of money or impact corporate governance. Generous expert disclosure is available in virtually all other forums, including all other state courts and the federal courts, *see* Federal Rules Civil Procedure 26. A modern forum for the resolution of commercial disputes is essential for New York to maintain its prominence as an international financial center; unless meaningful expert disclosure is routinely available in commercial actions, New York's efforts to maintain its financial dominance may be seriously compromised. Accordingly, we believe that additional expert disclosure in commercial cases should be permitted to provide the world class forum for the resolution of commercial disputes the State needs.

Under the Committee's proposal, subdivision (d)(1)(iii) would be divided into two subparts. The first subpart, (A), would retain the existing provisions of (d)(1)(iii), which would apply to most cases, including smaller commercial cases. These commercial cases are usually less complex than those involving larger sums, and more extensive disclosure of experts would be disproportionately costly. However, in commercial cases in which $250,000 or more is found by the court to be in controversy, the amendment, in the form of a new subpart (B), would expressly authorize the court to allow further disclosure of experts expected to testify at trial. Under this proposal, the applicant would be obliged to show that the need for that disclosure outweighs the concomitant expense and delay to any party. The applicant would be required to demonstrate that traditional expert discovery as provided for by subdivision (d)(1)(I) would not suffice. However, the applicant would not have to demonstrate "special circumstances" as currently construed by the case law, which would remain the standard for all cases other than this group of substantial commercial cases. Because the proposal would require the court to weigh the risk that the proposed disclosure might be unduly expensive or cause unreasonable delay, the court should normally inquire, if further disclosure is found necessary, whether a particular form of disclosure would be more appropriate, including less expensive and time-consuming, than another.

"Commercial action" is defined so as to include the most common forms of such disputes, and a measure of flexibility is provided for. The definition expressly excludes personal injury, wrongful death, matrimonial and certain other matters. The Committee wishes to emphasize that the proposed amendment would not alter expert disclosure practice outside commercial cases. To

be sure, the proposed amendment expressly states that it is inapplicable to "personal injury, wrongful death, matrimonial, or foreclosure actions."

Under the proposal, if the court determined that a deposition was in order, it could set reasonable boundaries on the breadth of the matters to be inquired into and the length of the deposition. The proposal provides that unless it is unreasonable, the court shall require that the inquiring party pay a reasonable fee to the expert in the case of deposition disclosure, since this seems the fairest approach in most instances.

The proposal provides that the further disclosure of experts authorized by the court shall take place at such time as the court deems appropriate. In contrast with the practice in most personal injury matters, experts in commercial cases are often retained at an early point. In large commercial cases, many of which are litigated in the Commercial Division around the state, the court is expected to, and does, engage in extensive supervision of disclosure proceedings and establish a comprehensive disclosure schedule, which would include an appropriate deadline for further expert disclosure, if ordered.

The Committee's proposal for the establishment of a time frame for expert disclosure, set forth below, would have a broader application than those that would be governed by this new subdivision (d)(1)(iii)(B).

Proposal

AN ACT to amend the civil practice law and rules, in relation to broadening expert disclosure in commercial cases

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subparagraph (iii) of paragraph 1 of subdivision (d) of section 3101 of the civil practice law and rules, as renumbered by chapter 184 of the laws of 1988, is amended to read as follows:

(iii) (A) Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to such restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, a party, without court order, may take the testimony of a person authorized to practice medicine, dentistry or podiatry who is the party's treating or retained expert, as described in paragraph three of subdivision (a) of this section, in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order.

(B) Notwithstanding any other provision of this section, in any commercial action in which the amount in controversy appears to the court to be $250,000 or more, the court, without requiring a showing of special circumstances but upon a showing by any party that the need outweighs the resulting expense and delay to any party, may authorize such further disclosure of an expert, including a deposition, subject to such restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. For purposes of this subparagraph, a "commercial action" is an action alleging breach of contract, breach of fiduciary duty, or misrepresentation or other tort, arising out of, or relating to, business transactions or the affairs of business organizations; or involving other business claims determined by the court to be commercial, but shall not include personal injury, wrongful death, matrimonial, or foreclosure actions, or landlord-tenant matters not involving business leases.

§2. This act shall take effect immediately.

8. Setting a Time frame for Expert Witness Disclosure (CPLR 3101(d)(1))

The measure recommends that CPLR 3101(d)(1) be amended to provide a minimal deadline for expert disclosure (i.e., sixty days before trial), a time frame which could be modified by the court to give earlier or later expert disclosure depending on the needs of the case.

Currently, section 3101(d)(1) of the CPLR requires that only the following information be exchanged upon request: identification of trial expert witnesses; the subject matter on which they expect to testify; the substance of the facts and opinions on which they are expected to testify; their qualifications; and a summary of the grounds for their opinion. Further disclosure of an expert can be obtained by court order upon a showing of special circumstances, which permits a court to require additional discovery, such as a written report or deposition of experts, if necessary. However, no time frame within which to provide expert discovery is mandated.

This is in contrast to the federal system, where the Federal Rules of Civil Procedure require that *all disclosure* be made "at the times and in the sequence directed by the court," which is actively involved in requiring that timely expert disclosure take place. In the absence of directives from the court, Rule 26(a)(2)(c) generally requires that *all disclosures* be made at least 90 days before the trial date or the date the case is set to be ready for trial. Rebuttal or contradictory disclosure must be made within 30 days after disclosure by the other party. Many states have adopted some part of the Federal Rules' liberal expert disclosure requirements, including a specific deadline for expert disclosure prior to trial.

The need for this amendment is further highlighted by the recent decision in Construction by Singletree, Inc. v. Lowe, 55 A.D.3d 861, 866 N.Y.S.2d 702, 2008 N.Y. Slip Op. 08287. The Second Department ruled that it was proper for the trial court to decline to consider the affidavits of experts provided in opposition to a motion for summary judgment, where those experts were not identified in pretrial disclosure and the affidavits were served after the note of issue and certificate of readiness were filed. The dissent argued that the application of CPLR 3101(d)(1) to use of experts in opposition to a summary judgment motion is against the express language of the statute and not within its clear legislative intent.

The Committee feels that specific time frames for expert disclosure would 1) avoid "trial by ambush"; 2) permit more efficient preparation for trial and management of cases; 3) provide

consistency between the law and practice in this area (court discovery orders often mandate disclosure of expert testimony either 30 or 60 days before trial, not pre-note of issue); and 4) discourage application of section 3101(d)(1) to motions for summary judgment.

Subparagraph (iv) of CPLR 3101(d)(1) has therefore been added to provide that "Unless otherwise provided by a rule of the chief administrative judge or by order of the court," the expert disclosure shall be made no later than 60 days before trial by the party who bears the burden of proof. Within 30 days of service of the expert response, any opposing party shall serve its expert response. Within 15 days after service of such response, any party may serve an amended or supplemental response limited to issues raised in the answering response. The term "expert" does not include a treating physician or health care provider whose records or reports have been timely provided.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the time of disclosure of expert witness information

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph 1 of subdivision (d) of section 3101 of the civil practice law and rules is amended by adding two new subparagraphs (iv) and (v) to read as follows:

(iv) Unless otherwise provided by a rule of the chief administrator of the courts or by order of the court, disclosure of expert information shall be made as follows: the party who has the burden of proof on a claim, cause of action, damage or defense shall serve its response to an expert demand served pursuant to this subdivision at least sixty days before the date on which the trial is scheduled to commence; within thirty days after service of such response, any opposing party shall serve its answering response pursuant to this subdivision; within fifteen days after service of such response, any party may serve an amended or supplemental response limited to issues raised in the answering response. Unless the court orders otherwise, a party who fails to comply with this subparagraph shall be precluded from offering the testimony and opinions of the expert for whom a timely response has not been given.

(v) The term "expert" shall include any person who will testify with respect to his or her qualifications and give opinions relating to the issues in the case that could not be given by a layperson. However, the term "expert" shall not include a treating physician or other treating health care provider whose records and reports have been timely provided.

§2. This act shall take effect immediately, and shall apply to all rules or orders requiring the service of expert responses issued prior to, on or after such effective date.

9. Addressing the Time of Service Problem When a Court Order Extending the Time For Filing is Granted Pursuant to CPLR 304 (CPLR 306-b)

The Committee recommends the amendment of CPLR 306-b to correct a time of service problem that can occur when a court order extending time for filing is granted pursuant to CPLR 304.

CPLR 306-b now requires service of the summons and complaint, summons with notice, third-party summons and complaint, petition with notice of petition or order to show cause within 120 days after filing, with appropriate modifications where the statute of limitations is four months or less. With but one exception, this is fully consistent with the provision of section 304 that an action or proceeding is commenced by filing, since valid service cannot be made until the action has been commenced and that occurs upon filing.

The exception occurs when, pursuant to section 304, a court finds that circumstances prevent immediate filing and signs an order requiring the subsequent filing at a specific time and date not later than five days thereafter. In this instance it is the signing of the order, and not the filing of the pleading that commences the action or proceeding.

The section 304 exception can be and often is utilized in situations where a party requires a restraining order to prevent the occurrence of an event on a holiday, weekend or after business hours, when filing cannot occur but immediate service is critical. In this limited situation, although the action or proceeding has been commenced, service often must be made before the order can be filed. At least one court has held that under these circumstances service was ineffective because section 306-b mandates service after filing, not after commencement of the action.

A simple amendment to section 306-b to provide that service be made within 120 days "after commencement of the action or proceeding" should rectify the problem created by the section 304 exception, without having any adverse effect upon the more usual situation where the action is commenced by filing of the pleading. In either event, whether the action is commenced by filing or by the signing of an order which extends the time for filing, post commencement service will occur.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the time of service

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 306-b of the civil practice law and rules, as amended by chapter 473 of the laws of 2001, is amended to read as follows:

§306-b. Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause. Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the [filing of the summons and complaint, summons with notice, third-party summons and complaint, or petition] commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

§2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

10. Increasing the Time in Which a Defect in Form Must be Raised (CPLR 2101(f))

The Committee recommends an amendment to rule 2101(f) of the CPLR to increase the time for raising objections to defects in form. Currently, the time in which objection to a defect in form must be raised is only two days from receipt of the paper objected to. The Committee believes that two days is an unreasonably short period of time for counsel to review a paper served and raise objections to it where necessary. Instead, the Committee recommends that the period of time be amended from "two" to "fifteen" days. The effect of the change will be that the focus of any debate over the form of a paper will concern solely the proper form and the underlying facts, not the number of days allowed for objection. The Committee extends its gratitude to the Nassau County Bar Association Appellate Practice Committee for the opportunity to review this procedural practice issue, which it raised in the context of a notice of appeal.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the time allowed for objections to defects in form of a paper

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision (f) of rule 2101 of the civil practice law and rules is amended to read as follows:

(f) Defects in form; waiver. A defect in the form of a paper, if a substantial right of a party is not prejudiced, shall be disregarded by the court, and leave to correct shall be freely given. The party on whom a paper is served shall be deemed to have waived objection to any defect in form unless, within [two] fifteen days after the receipt thereof, [he] the party on whom the paper is served returns the paper to the party serving it with a statement of particular objections.

§ 2. This act shall take effect on the first day of January next succeeding the date on which it shall have become law.

11. Requiring the Moving Party to Attach a Copy of a Proposed Amended Pleading (CPLR 3025(b))

The Committee proposes the amendment of subdivision (b) of rule 3025 of the CPLR to require the moving party to attach a copy of the proposed amended pleading to any motion to amend that pleading, clearly showing the proposed changes to the pleading. Many federal courts by local rule require the movant to attach the proposed pleading and to show by redline the changes in the complaint or answer that the movant proposes.

Proposal

AN ACT to amend the civil practice law and rules, in relation to requiring a party to attach a copy of a proposed amended pleading

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision (b) of rule 3025 of the civil practice law and rules is amended to read as follows:

(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

§ 2. This act shall take effect on the first of January next succeeding the date on which it shall have become law.

12. Amending CPLR 3122, Governing the Use of Subpoenas Duces Tecum, To Make It Clear When a Court May Order the Production of Medical Records (CPLR 3122(a))

The Committee recommends an amendment to CPLR 3122(a) to clarify the authority of a court to order the production of medical records. In 2002, on the Committee's recommendation, CPLR 3122 was amended, together with several other related CPLR provisions, CPLR 2305(b), 3120, and 3122-a (L. 2002, c. 575), to make it easier to obtain discovery documents from a non-party witness and admit them into evidence. Designed to become effective on September 1, 2003, the legislation eliminated the requirement that a party seeking documents from a non-party witness obtain a court order and a new, less cumbersome procedure was substituted. Among the changes made to CPLR 3122, which governs the use of *subpoenas duces tecum*, was the inclusion of language at the request of the Medical Society to protect non-party physicians who were served with disclosure subpoenas seeking medical records. Language was inserted in CPLR 3122 in 2002 to help protect medical providers from unwittingly violating the physician-patient privilege by releasing medical records sought by a subpoena without a patient's approval. The new language provided:

> A medical provider served with a subpoena duces tecum requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by written authorization by the patient . . . .

Shortly thereafter, a judge in Richmond Civil Court in Campos v. Payne, 2 Misc.3d 921,766 N.Y.S.2d 535 (2003), held that the limitations imposed by CPLR 3122 left him without authority to order the production of medical records pursuant to a trial subpoena on the eve of trial without the patient's signed authorization. That was not the Committee's intent in recommending the amendment of CPLR 3122 and we do not believe the Legislature had that intent in adopting the Committee's recommendation then. The Committee believes the result in Campos is inadvisable since courts must always have the authority to order the production of records (including medical records) to resolve litigation.

The proposed amendment also distinguishes the court's authority from requirements under the federal privacy law, the Health Insurance Portability and Accountability Act ("HIPAA"). The HIPAA "Privacy Rule" was designed to provide national standards for the protection of certain health information. 45 C.F.R. Parts 160 and 164. The basic principle of the Privacy Rule was that "covered entities" – health insurance plans, health care clearinghouses, and medical providers who transmit health information in electronic form governed by federal standards, as defined in 45 C.F.R. §164.104 - - may not use or disclose "protected health information" ("PHI") without an authorization from the patient, unless the request for the information falls within a specific exception articulated by the rule. 45 C.F.R. §§164.502(d)(2), 164.514(a)(b). PHI is essentially information received or created by a covered entity which relates to health status of an individual whose identity can be deciphered by the reader of the information. 45 C.F.R. §160.103.

The Privacy Rule enumerates 12 "public interest and benefit" exceptions to the rule, and one of them is judicial and administrative proceedings. 45 C.F.R. 3164.512(e). Under that section, covered entities may disclose PHI if the request is made pursuant to an order from a court or administrative tribunal. PHI may also be disclosed in response to a subpoena or other lawful process if certain assurances regarding notice to the individual or a protective order are provided. However, the provisions are complicated, and most medical providers in New York State have indicated that if the party seeking the records is unable to get the patient to sign an authorization permitting the provider to produce the records, they would prefer to receive an actual court order before releasing medical records to a court.

The language inserted in CPLR 3122 in 2002 was designed to help protect medical providers from unwittingly violating the physician-patient privilege by releasing medical records sought by a subpoena without a patient's approval. It has now become problematic since it is more stringent than HIPAA. According to the pre-emption provisions of the statute, HIPAA pre-empts state law, except where the state law is more stringent in its protections. 45 C.F.R. §160.202. Here, state law is more restrictive.

Thus, in a situation where the person whose medical information is being sought refuses to authorize its release, or the provider itself is afraid that it has not received sufficient authorization to release the records, and the court needs the records to adjudicate a claim, there is some question whether a court order will suffice, given the terms of CPLR 3122 and the ruling in

Campos v. Payne. The recent Court of Appeals decision in Arons v. Jutkowitz, 9 N.Y.3d 393, 880 N.E.2d 831, 850 N.Y.S.2d 343(2007), has no impact on this problem, other than to once again call attention to the uncertainty. The proposed amendment to CPLR 3122(a) resolves that uncertainty by providing that a medical provider served with a *subpoena duces tecum* must respond if served with a demand and either an accompanying authorization for the release of the medical record or a court order.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the federal health records privacy protection law

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision (a) of rule 3122 of the civil practice law and rules, as amended by chapter 575 of the laws of 2002, is amended to read as follows:

(a) 1. Within twenty days of service of a notice or subpoena duces tecum under rule 3120 or section 3121, the party or person to whom the notice or subpoena duces tecum is directed, if that party or person objects to the disclosure, inspection or examination, shall serve a response which shall state with reasonable particularity the reasons for each objection. If objection is made to part of an item or category, the part shall be specified. [A medical provider served with a subpoena duces tecum requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient.] The party seeking disclosure under rule 3120 or section 3121 may move for an order under rule 3124 or section 2308 with respect to any objection to, or other failure to respond to or permit inspection as requested by, the notice or subpoena duces tecum, respectively, or any part thereof.

2. A medical provider served with a subpoena duces tecum requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient, or a court order directing the production of the documents. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient, or a court order directing the production of the documents.

§2. This act shall take effect immediately.

13. Extending the Time in Which a Voluntary Discontinuance May be Obtained Without Court Order or Stipulation (CPLR 3217(a)(1))

The Committee recommends that CPLR 3217(a)(1) be amended to extend the time period in which a voluntary discontinuance may be obtained without the need for a court order or a stipulation of settlement. This change would give maximum flexibility to parties who may want to settle claims very early in the litigation process.

Currently, paragraph (1) of subdivision (a) of CPLR 3217 provides the standards for obtaining a voluntary discontinuance without a court order at the outset of a case. Paragraphs (2) and (3) set forth the rules for discontinuing a case after disclosure has been completed, but before the case has been submitted to the jury.

The need for flexibility becomes particularly acute in the early stage of a case. At present, a party alleging a cause of action in a complaint, counterclaim, cross-claim, or petition may only unilaterally discontinue it without court order or stipulation by serving and filing the requisite notice on all parties "at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier . . . " CPLR 3217(a)(1). The proponent of the claim has a very limited period of time to exercise his or her unlimited right to discontinue the cause of action. The 20-day limitation applies even: (1) if the responsive pleading has not yet been served; and (2) if the time to respond is 30 days. See CPLR 3012(c). In addition, the service of an amended pleading pursuant to CPLR 3012(c) will not preclude the application of the 20-day period. See Fox v. Fox, 85 A.D.2d 653 (2d Dept. 1981). Effectively, no party may unilaterally discontinue an action by notice beyond 20 days after service of the pleading asserting the claim.

The Committee recommends that CPLR 3217(a)(1) be amended to permit a voluntary discontinuance without court order or stipulation before the responsive pleading is served or within 20 days after service of the pleading of the claim, whichever is later.

This modification will also bring the CPLR into line with the Federal Rules of Civil Procedure, which permit a party to discontinue any time before an answer is due. See Federal Rules of Civil Procedure 41(a). Apparently, when the Civil Practice Act in New York was modified by the enactment in 1962 of the CPLR the flexibility of the prior practice was eliminated. That flexibility should be reinstated.

It is necessary to retain the provision of the rule which permits a voluntary discontinuance without court order or stipulation ". . . within 20 days after service of a pleading asserting a claim" to address the scenario reflected in CPLR 3011 by which a cross-claim may be asserted, the defendant/proponent does not demand a reply and no responsive pleading is required. Without the 20 day language, there would be no provision for the voluntary discontinuance of a cross-claim.

Proposal

AN ACT to amend the civil practice law and rules, in relation to voluntary discontinuances

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph 1 of subdivision (a) of rule 3217 of the civil practice law and rules, such rule as amended by chapter 736 of the laws of 1989, is amended to read as follows:

1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim[, whichever is earlier,] and filing the notice with proof of service with the clerk of the court; or

§2. This act shall take effect on the first of January next succeeding the date on which it shall have become a law.

14. Amending the Rate of Interest (CPLR 5004)

The Committee recommends that CPLR 5004 be amended to replace the current interest rate -- which is set at a fixed 9% per annum -- with a variable rate that would be the rate of return on one-year Treasury bills plus 3%. The Committee also recommends that section 5004 be amended to override all other interest provisions in New York law so as to make the interest rate for all actions uniform.

The amendment would not alter the circumstances in which interest is paid or not paid. It would merely alter the rate of interest in those instances in which the parties have not agreed on a different rate. However, in contrast to the current statute, which defers to other statutes that set different rates for different entities, the amended statute would govern all municipal and non-municipal entities. Indeed, the desire for uniformity is one reason for the proposed change.

Reasons For The Amendment

There are three principal reasons for the proposed amendment. First, the Committee believes that an unchanging, fixed rate is both illogical and unfair. A fixed rate does not reflect the changing economic reality of the cost of money. Many states have jettisoned fixed rates in favor of variable interest rates. Such is also the norm in the Federal courts, where 28 U.S.C. §1961 ties the interest rate to the one-year Treasury bill rate. The Committee believes that a variable rate is inherently fairer to both plaintiffs and defendants.

Second, the Committee believes that it is inappropriate to have widely varying rates for different payors. Currently, some municipal defendants, including the City of New York, and the State have rates that "shall not exceed" 9%. Some, like the Water Authority of Southeastern Nassau County, have rates that "shall not exceed six per centum per annum." Some municipal defendants, like the Metropolitan Transportation Authority and the New York City Transit Authority, have rates capped at 4% or 3% per annum.

Third, a uniform, easily calculated rate will avoid unnecessary and wasteful litigation. As matters now stand, where the applicable statute provides for a municipal rate that "shall not exceed 9%," the parties are forced to litigate what is appropriate on a case-by-case basis. See Denio v. State, 7 N.Y.3d 159 (2006).

Reasons For The Specific Variable Rate That Is Proposed

Some states that have variable interest rates use a rate tied to prime lending rates. Other states follow various Treasury bill rates. The "one-year United States Treasury bill rate" in the proposed statute is the same exact rate, word for word, as is currently used in federal courts under 28 U.S.C. § 1961. The difference is that the Committee proposes an addition of 3%.

The reason for the 3% addition is that the federal rate is very low as compared to 1) the real cost of money (including, most notably, the prime rate that a bank would charge a "blue chip" corporate borrower); 2) the interest rates (both fixed or variable) in all or virtually every other state; and 3) our current, statutorily fixed rate of 9%. The other states that already use the federal rate as a base include an addition that ranges from a low of 2% to a high of 6%.

The federal rate exceeded 5% at different points during 2006, but dropped below 1% in December, 2008. The rate has dropped below 2% at various times this decade. The Committee believes that this recent history underscores the need for the 3% additur. Yet, even with the 3% additur, enactment of this proposal would currently effect a significant decrease in the legal interest rate as compared to the current 9% fixed rate.

Under the proposed bill, the rate in any particular action would be 3% higher than the published one-year Treasury rate for the week preceding the entry of judgment in that action. That rate would remain in place throughout the course of the post-judgment proceedings and would also govern the assessment of pre-judgment interest in those actions in which pre-judgment interest is awarded. This one-rate-per-action feature strikes a balance between the competing goals of accuracy and simplicity.

Pre-Verdict Interest

Currently, CPLR 5001 dictates that pre-verdict interest "shall" be recovered upon awards in *certain* actions. CPLR 5002 states that interest "shall" be awarded from date of verdict until date of judgment upon any sum awarded. CPLR 5003 dictates that every judgment "shall" bear interest from date of entry. Yet, at least with respect to non-municipal defendants, there is one rate of interest regardless of whether interest is assessed pre-verdict or post-verdict: the legal rate of interest specified in CPLR 5004. The proposal would change the legal rate of interest, but it would not change the rule that the same rate applies to pre-judgment interest as to post-judgment interest.

In contract actions, the parties may agree among themselves as to the (non-usurious) interest rate that will govern in the event that damages must be paid, at least with regard to pre-judgment interest and arguably with regard to post-judgment interest as well. This bill would not change the existing law with regard to contract rates of interest in any respect.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the rate of interest

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 5004 of the civil practice law and rules, as amended by chapter 258 of the laws of 1981, is amended to read as follows:

§5004. Rate of Interest. [Interest shall be at the rate of nine per centum per annum, except where otherwise provided by statute] Notwithstanding any statute or other law that may provide a different rate for any particular municipal or non-municipal entity, interest shall be at the one-year United States Treasury bill rate plus three per centum. For the purposes of this section, the "one-year United States Treasury bill rate" means the weekly average one-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.

§2. This act shall take effect on the first of January next succeeding the date on which it shall become law and it shall apply to any action commenced on or after such effective date.

15. Prejudgment Interest After Offers to Compromise and in Personal Injury Actions (CPLR 3221, 5001(a)(b))

The Committee recommends that CPLR 3221 be amended to provide that where an offer to compromise is proffered in any action by a party against whom a claim is asserted, but is not accepted by the claimant, if the claimant fails to obtain a more favorable judgment, the claimant's recovery of interest as well as costs shall be limited to the period preceding the offer. The amendment of CPLR 3221 is designed to encourage parties to settle claims at an early stage by potentially affecting the amount of interest as well as costs recoverable upon judgment.

The Committee also recommends that subdivisions (a) and (b) of CPLR 5001, relating to prejudgment interest, be amended to provide for the prejudgment accrual of interest in a personal injury action. CPLR 5001(a) designates the types of actions in which prejudgment interest now is accruable, and CPLR 5001(b) fixes the date from which interest accrues in those actions. This measure would add personal injury actions to those which are now included in subdivision (a). It also would specify in subdivision (b) that such interest shall commence to run one year from the date of the commencement of the action to the date of verdict, report or decision, exclusively on special and general damages incurred to the date of such verdict, report or decision. Both subdivisions (a) and (b) of CPLR 5001 would be restructured to achieve greater order and cohesiveness.

The amendment to CPLR 3221 gives an incentive to plaintiffs to settle or proceed expeditiously to trial; the amendment to CPLR 5001 gives the same incentive to defendants.

The proposal, based on considerations of equity and effective case disposition, reflects a growing national trend. At least 27 states, as opposed to five in 1965, now require an award of prejudgment interest in personal injury and wrongful death actions. New York's EPTL §5-4.3 already provides for such interest in a wrongful death action. The proposal, by selecting one year from the date the action is commenced as the point at which interest begins to accrue, is designed to strike a balance of equities between plaintiff and defendant while fostering disposition. Such balance discourages undue delay by a plaintiff who might be tempted to seek accumulation of interest from an earlier accrual date, and discourages excessive reticence in settling by a defendant who might be prompted to delay settlement if the accrual date were later. Interest

would be computed on awards only, since settlements are concluded with interest in mind, and the imposition of additional interest where settlements are achieved would be inequitable.

Several stylistic changes of a non-substantive nature also are recommended by the Committee in these provisions.

The proposal would allow for prejudgment interest for compensatory damages already incurred. Prejudgment interest would not accrue for punitive or future damages.

Proposal

AN ACT to amend the civil practice law and rules, in relation to offers to compromise and in relation to computation of interest in personal injury actions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Rule 3221 of the civil practice law and rules is amended to read as follows:

Rule 3221. Offer to compromise. Except in a matrimonial action, at any time not later than ten days before trial, any party against whom a claim is asserted, and against whom a separate judgment may be taken, may serve upon the claimant a written offer to allow judgment to be taken against [him] that party for a sum or property or to the effect therein specified, with costs then accrued. If within ten days thereafter the claimant serves a written notice [that he accepts] accepting the offer, either party may file the summons, complaint and offer, with proof of acceptance, and thereupon the clerk shall enter judgment accordingly. If the offer is not accepted and the claimant fails to obtain a more favorable judgment, [he] the claimant shall not recover costs or interest from the time of the offer, but shall pay costs from that time. An offer of judgment shall not be made known to the jury.

§2. Subdivisions (a) and (b) of section 5001 of the civil practice law and rules, as amended by chapter 55 of the laws of 1992, are amended to read as follows:

(a) Actions in which recoverable. 1. Interest to verdict, report or decision shall be recovered upon a sum awarded [because of a breach of performance of a] in an action based on personal injury, contract, or [because of] an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property [, except that].

2. Interest may be awarded in the court's discretion in an action of an equitable nature[, interest and the] at a rate [and date from which it shall be] computed [shall be] in the court's discretion.

(b) Date from which computed; type of damage on which computed. Interest recoverable in the actions specified in subdivision (a) of this section shall be computed as follows:

1. in an action for personal injury, interest on the sum awarded shall be computed from a date one year after the date on which the action was commenced, but shall be based exclusively on special and general damages incurred to the date of such verdict, report or decision;

2. in an action based upon contract, or an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date; and

3. in an action of an equitable nature, interest shall be computed from a date fixed in the court's discretion.

§3. This act shall take effect on the first of January next succeeding the date on which it shall have become a law, except that: (1) section one shall apply only to actions in which the offer to compromise was made on or after such effective date, and (2) section two shall apply only to actions commenced on or after such effective date.

16. Allowing a Notary Public to Compare and Certify Copies of Papers that Will Comprise a Record on Appeal (CPLR 2105)

The Committee proposes an amendment to CPLR 2105 to allow the certification of the copy of a record on appeal by a notary public. Currently, the law provides that "Where a certified copy of a paper is required by law, an attorney admitted to practice in the courts of the state may certify that it has been compared by him with the original and found to be a true and complete copy. Such a certificate, when subscribed by such attorney, has the same effect as if made by a clerk" (CPLR 2105). This proposal is not intended to replace the attorney who wishes to review and certify the record with a notary public, rather, it is intended to extend authorization to a notary public, who is often in fact the paralegal most familiar with the file, to compare and certify the papers in the record on appeal. The Committee proposes a new subdivision (b) to section 2105 to accomplish this amendment.

The powers of a notary public are specified in Executive Law § 135, which states, in pertinent part, that:

"Every notary public duly qualified is hereby authorized and empowered within and throughout the state to administer oaths and affirmations, to take affidavits and depositions, to receive and certify acknowledgments or proof of deeds, mortgages and powers of attorney and other instruments in writing"...

An amendment to CPLR 2105 would be sufficient to authorize notaries to compare and certify copies of papers (see 1 NYJur 2d Acknowl. § 71, at 296 ["A notary public has only such powers as he or she may lawfully derive from the statutes of the state"]; see Turtle v Turtle, 31 App Div 49 [1898]). For the sake of completeness and consistency, however, Executive Law § 135 should also be amended to authorize notaries to perform that function. Presently, Executive Law § 135 is the main -- if not sole -- source of power of a notary public. It would therefore be inappropriate to have a statute in the CPLR authorizing a notary to perform a function that Executive Law § 135 did not authorize. Thus, the Committee includes in its proposal an amendment to Executive Law § 135 to authorize a notary public to compare and certify copies of papers pursuant to CPLR 2105(b).

This proposal does not address the issue of the fees of a notary public. The fees to which a notary public is entitled for performing his or her statutorily-authorized functions are set forth in

Executive Law § 136. An amendment to this statute prescribing the fee to which a notary is entitled for comparing and certifying a copy of a paper may be appropriate, but is beyond the jurisdictional purview of the Committee.

Proposal

AN ACT to amend the civil practice law and rules, in relation to authorizing a notary public to certify a record on appeal

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 2105 of the civil practice law and rules, as amended by chapter 307 of the laws of 1970, is amended to read as follows:

§ 2105. Certification of Papers. (a) Certification by attorney. Where a certified copy of a paper is required by law, an attorney admitted to practice in the courts of the state may certify that it has been compared by [him] such attorney with the original and found to be a true and complete copy. Such a certificate, when subscribed by such attorney, has the same effect as if made by a clerk.

(b) Certification by notary public of copies in a record on appeal. A notary public licensed in the state may certify that the copies of the papers contained in a record on appeal have been compared by such notary with the original papers on file with the clerk of the court and found to be true and complete copies of such originals. Such a certificate, when subscribed by such notary public, has the same effect as if made by a clerk or an attorney.

§ 2. Section 135 of the executive law is amended to read as follows:

§ 135. Powers and duties; in general; of notaries public who are attorneys at law. Every notary public duly qualified is hereby authorized and empowered within and throughout the state to administer oaths and affirmations, to take affidavits and depositions, to receive and certify acknowledgments or proof of deeds, mortgages and powers of attorney and other instruments in writing; to compare and certify copies of papers pursuant to subdivision (b) of section two thousand one hundred five of the civil practice law and rules; to demand acceptance or payment of foreign and inland bills of exchange, promissory notes and obligations in writing, and to protest the same for non-acceptance or non-payment, as the case may require, and, for use in another jurisdiction, to exercise such other powers and duties as by the laws of nations and according to commercial usage, or by the laws of any other government or country may be

exercised and performed by notaries public, provided that when exercising such powers he or she shall set forth the name of such other jurisdiction.

A notary public who is an attorney at law regularly admitted to practice in this state may, in his or her discretion, administer an oath or affirmation to or take the affidavit or acknowledgment of his or her client in respect of any matter, claim, action or proceeding.

For any misconduct by a notary public in the performance of any of his or her powers such notary public shall be liable to the parties injured for all damages sustained by them. A notary public shall not, directly or indirectly, demand or receive for the protest for the non-payment of any note, or for the non-acceptance or non-payment of any bill of exchange, check or draft and giving the requisite notices and certificates of such protest, including his or her notarial seal, if affixed thereto, any greater fee or reward than seventy-five cents for such protest, and ten cents for each notice, not exceeding five, on any bill or note. Every notary public having a seal shall, except as otherwise provided, and when requested, affix his or her seal to such protest free of expense.

§ 3. This act shall take effect on the first of January next succeeding the date on which it shall have become law.

V. Recommendations for Amendments to Certain Regulations

The Chief Administrative Judge has the authority to regulate practice and procedure in the courts through delegation from the Legislature, (State Const., Art. VI, §30), and the Legislature has delegated this power to the Chief Administrative Judge. Judiciary Law, §211(1)(b) [Providing the Chief Judge with the power to adopt rules and orders regulating practice and procedure in the courts subject to the reserved power of the Legislature]; Judiciary Law, §212(2)(d) [Providing the Chief Administrator with the power to adopt rules regulating practice in the courts as authorized by statute]; CPLR Rule 3401 [providing the Chief Administrator with the power to adopt rules regulating the hearing of causes]. See also, Matter of A.G. Ship Maintenance Co. v. Lezak, 69 N.Y.2d 1 (1986) [Holding that the courts have been delegated, through section 211(1)(b), the power to authorize by rule the imposition of sanctions upon parties and attorneys appearing in the courts]. The Committee is proposing rules that are consistent with this delegation and are not in conflict with existing law.

Of course, no set of rules can address precisely every conceivable circumstance. The proposed rules as the Committee envisions them, however, are fair and reasonable and provide bright lines to guide counsel.

1. Giving the Court Discretion to Accept an Untimely Submission for Good Cause Shown or in the Interests of Justice (22 NYCRR 202.48)

The Committee recommends that the Uniform Rules for the Supreme Court and the County Court (22 NYCRR 202.48) be amended to answer questions raised by recent case law examining the excuse of law office failure. In May, 2007, the Supreme Court, Appellate Division, First Department, held that the failure to submit judgment to the court for signature within 60 days did not meet the requirement of a showing of good cause. Farkas v. Farkas, 40 A.D.3d 207, 835 N.Y.S.2d 118 (1st Dept. 2007) (*aff'd in part, rev'd in part*, 11 N.Y.3d 300, 898 N.E.2d 563, 869N.Y.S.2d 380 (2008). In the Farkas divorce action, the court vacated the judgment and the claim underlying the judgment was dismissed as abandoned pursuant to 22 NYCRR 202.48(b). The court reasoned in part that the ex-wife failed to show "good cause" for delay even though the ex-husband could show no prejudice from the delay and even though the result of the court's decision resulted in loss of a substantial judgment in the ex-wife's favor.

Inclusion of the alternative "interest of justice" basis for an extension will give the court greater flexibility to consider all the circumstances surrounding the failure to timely submit the proposed judgment. As the Court of Appeals has stated, "The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties." Leader v. Moroney, Ponzini & Spencer, 97 N.Y.2d 95, 105 (2001). The court may consider "any factor relevant to the exercise of its discretion." Id. at 106. The Committee believes that an "interest of justice" standard would allow the courts to weigh the facts and interests and excuse inadvertently late submissions of judgment that cause no serious prejudice to the opposing party - even where the late submission is due to law office failure or other neglect.

Proposal

§ 202.48. Submission of Orders, Judgments and Decrees for Signature. § 202.48(b) [Failure to submit the order of judgment timely shall be deemed an abandonment of the motion or action, unless] The court may accept an untimely submission of a proposed order, judgment or decree for good cause shown or in the interest of justice.

2. Requiring Parties to Give the Court Notice of Discontinuance, Settlement, Mootness of a Motion or Death or Bankruptcy of a Party (22 NYCRR 202.28(a), (b)(new))

The Advisory Committee on Civil Practice recommends that the Uniform Rules for the Supreme Court and the County Court (22 NYCRR 202.00 *et seq*.) be amended to require the parties to a pending action to notify the assigned justice of the court when the action is wholly or partially settled by stipulation, or a motion has become wholly or partially moot, or a party has died or become a debtor in bankruptcy. It has been brought to the attention of the Committee that it is not uncommon that an assigned justice is not informed of the disposition by settlement between the parties, which frequently occurs while a difficult motion is *sub judice*. Time and effort becomes wasted while the judge and law clerk are busy in chambers, or amongst the pool clerks, preparing a decision or opinion on a moot issue or settled case.

Currently, there are similar rules in Section II of the General rules, Rule 2(a) of the Justices of the Supreme Court, Civil Branch, New York County and §670.2(g) of Part 670, Procedure in the Appellate Division, Second Department. Also, the Court of Appeals has ruled that parties must disclose the existence of a hi-low agreement and its terms to the court and any non-agreeing defendants (Matter of Eighth Jud. Dist. Asbestos Litig., 8 N.Y. 3d 717 (2007)). Currently, many practitioners voluntarily adopt a similar procedure in practice. However, the Committee believes that the matter is sufficiently serious that the parties' obligation under CPLR 2104 to notify chambers should be mandatory. The Committee also believes that adoption of the proposed rule will assist judges in getting out timely decisions and improving access to judicial resources.

Finally, the Committee believes it appropriate to include this requirement with the existing rule governing discontinuance of civil actions, and to make a distinction between the required filing with the county clerk and the additional notification of the judge.

Proposal

§ 202.28. Discontinuance of Civil Actions and Notice to the Court. (a) In any discontinued action, the attorney for the defendant shall file a stipulation or statement of discontinuance with the county clerk within 20 days of such discontinuance. If the action has been noticed for judicial activity within 20 days of such discontinuance, the stipulation or statement shall be filed before the date scheduled for such activity.

(b) If an action is discontinued under paragraph (a), or wholly or partially settled by stipulation pursuant to CPLR 2104, or a motion has become wholly or partially moot, or a party has died or become a debtor in bankruptcy, the parties promptly shall notify the assigned judge in writing of such an event.

3. Encouraging the Court to Grant Requests to Appear at Conference via Telephonic or Other Electronic Means (22 NYCRR 202.10 (new))

The Committee recommends that the Uniform Rules for the Supreme Court and the County Court (22 NYCRR 200 *et seq*.) be amended to add a new rule 202.10 encouraging the trial court to grant requests to appear at conference via telephonic or other electronic means. It has come to the attention of the Committee that many practitioners would prefer to appear at conferences via electronic means rather than travel to the court for many types of conferences. Often the time and expense of travel and the time spent at the court far outweigh the need for an in-person appearance. Further, the conference may be very abbreviated, preliminary conferences where little or no disagreement exists between the parties. The Committee acknowledges that the court or a party may, in fact, desire the opportunity for an in-person conference with the court or his or her adversary, so recommends that the court only grant such requests where it is both feasible and appropriate.

Proposal

§ 202.10. Appearance at Conferences. Any party may request to appear at a conference by telephonic or other electronic means. Where feasible and appropriate, the court is encouraged to grant such requests.

4. Eliminating the Notice of Medical, Dental and Podiatric Malpractice Action and Requiring a Request for Judicial Intervention within Sixty Days as Special Rules for Medical, Dental and Podiatric Malpractice Action (22 NYCRR 202.56)

The Committee proposes that, *upon enactment* of its proposal to amend CPLR 3406 (see, instant Report I.(2), New Measures (p. 10), Uniform Rule 202.56 of the Uniform Rules for the Supreme Court and the County Court (22 NYCRR 200 *et seq*.) be amended to eliminate all of the requirements for a notice of medical malpractice action and all of the rules governing the preliminary conference, leaving those rules to the more general rules contained in 22 NYCRR 202.6. The amended rule would be substantially narrowed so as to provide only that in dental, medical or podiatric malpractice actions, the Request for Judicial Intervention must be filed, as it is now, within sixty days of joinder of issue, and that this filing results in assignment to a judge. The Committee proposes amending both the statute and the rule to achieve this objective.

The notice of medical malpractice action is an anachronism, serving no discernable purpose today. Its elimination will end an unnecessary burden upon attorneys without in any way affecting this type of litigation. However, requiring the early filing of a Request for Judicial Intervention assures that courts will begin to oversee and supervise these cases at an early stage. The Committee believes that this is useful, and, in fact, would like to see this early supervision extended to other cases at such time as the courts have the resources to increase their workload.

The Committee also recommends the elimination of paragraph (b) of rule 202.56 because these current provisions dealing with the need for motions on missing the deadline and sanctions for late filing, cause unnecessary side issues to be brought into the litigation.

Proposal

§ 202.56. Medical, Dental and Podiatric Malpractice Actions; Special Rules. [(a) Notice of Medical, Dental or Podiatric Malpractice Actions.

(1)] Within sixty days after joinder of issue by all defendants named in the complaint in an action for medical, dental or podiatric malpractice, or after the time for a defaulting party to appear, answer or move with respect to a pleading has expired, the plaintiff shall obtain an index number and file a request for judicial intervention, pursuant to section 202.6 of this Part, which shall cause the assignment of the action to a judge. [a notice of such medical, dental or podiatric malpractice action with the appropriate clerk of the county of venue, together with: (I) proof of service of the notice upon all other parties to the action; (ii) proof that, if demanded, authorizations to obtain medical, dental and hospital records have been served upon the defendants in the action; (iii) copies of the summons, notice of appearance and all pleadings, including the certificate of merit, if required by CPLR 3012-a; (iv) a copy of the bill of particulars, if one has been served; (v) a copy of any arbitration demand, election of arbitration or concession of liability served pursuant to CPLR 3045; (vi) if requested and available, all information required by CPLR 3101(d)(1)(I). The notice shall be served simultaneously upon all such parties. If the bill of particulars, papers served pursuant to CPLR 3045, and information required by CPLR 3101(d)(1)(I) are not available, but later become available, they shall be filed with the court simultaneously when served on other parties. The notice shall be in substantially the following form:]

[NOTICE OF MEDICAL, DENTAL OR PODIATRIC MALPRACTICE ACTION] (*form and instructions deleted)*

* * *

[(b) Medical, Dental and Podiatric Malpractice Preliminary Conference.

(1) The judge, assigned to the medical dental or podiatric malpractice action, as soon as practicable after the filing of the notice of medical, dental or podiatric malpractice action, shall order and conduct a preliminary conference and shall take whatever action is warranted to expedite the final disposition of the case, including but not limited to:

(I) directing any party to utilize or comply forthwith with any pretrial disclosure procedure authorized by the Civil Practice Law and Rules;

(ii) fixing the date and time for such procedures provided that all such procedures must be completed within 12 months of the filing of the notice of medical, dental or podiatric malpractice action unless otherwise ordered by the court;

(iii) establishing a timetable for offers and depositions pursuant to CPLR 3101(d)(I);

(iv) directing the filing of a note of issue and a certificate of readiness when the action otherwise is ready for trial, provided that the filing of the note of issue and certificate of readiness, to the extent feasible, be no later than 18 months after the notice of medical, dental or podiatric malpractice action is filed;

(v) fixing a date for trial;

(vi) signing any order required;

(vii) discussing and encouraging settlement, including use of the arbitration procedures set forth in CPLR 3045;

(viii) limiting issues and recording stipulations of counsel; and

(ix) scheduling and conducting any additional conferences as may be appropriate.

(2) A party failing to comply with a directive of the court authorized by the provisions of this subdivision shall be subject to appropriate sanctions, including costs, imposition of appropriate attorney's fees, dismissal of an action, claim, cross-claim, counterclaim or defense, or rendering a judgment by default. A certificate of readiness and a note of issue may not be filed until a precalendar conference has been held pursuant to this subdivision.

(3) Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations or commitments, or accompanied by a person empowered to act on behalf of the party represented, shall appear at the conference.]

5. Allowing Proof of Service by Mail under CPLR 2103(b)(2) by Affirmation that the Attorney Caused the Paper to be Mailed (22 NYCRR 202.5-c)(new))

The Committee recommends that the Uniform Rules for the Supreme Court and the County Court (22 NYCRR 200 *et seq*.) be amended to add a new rule 202.5-c to allow CPLR 2103(b)(2) proof of service by mail to a party's attorney to include an affirmation of an attorney, authorized under CPLR 2106, that the attorney caused the paper to be mailed under the regular office procedures generally used for mail service of papers. While inspired by an analysis of the decision in Peter-MacIntyre v. Lynch Intern., Inc., 52 A.D.3d 424, 862 N.Y.S.2d 351(1st Dept. 2008), the Committee also believes that this new rule is necessary to correct the widespread use of affidavits that are not technically correct in New York practice. Because current law is unclear as to what is needed to be able to demonstrate that a paper was mailed, affidavits used today can be imprecise as to the facts or may not be sufficient to meet legal requirements. This proposal will make clear exactly which facts need to be recited to comply with the statute. The new section 202.5-c does not preclude the execution of a separate affidavit of mailing by a person, other than the attorney, who may be responsible for placing the paper in the custody of the United States Postal Service. However, the new 202.5-c is limited in scope to the mail service of papers to a party's attorney to avoid any use of such an affirmation by a process server.

Proposal

§ 202.5-c. Proof of Service by Mail. Proof of service by mail under paragraph 2 of subdivision (b) of CPLR 2103 may be made by affirmation in accordance with CPLR 2106 that the attorney making such affirmation caused the paper to be mailed by the regular office procedures generally used for mail service of papers.

VI. Table of Contents and Summaries of Other Previously Endorsed Recommendations

A. Legislative Proposals — Page

A. Legislative Proposals

1. Creation of a "Learned Treatise" Exception to the Hearsay Rule (CPLR 4549)

This proposal seeks to have New York State adopt a "learned treatise" rule, an evidentiary rule long followed in the Federal courts. While last recommended in its 2008 Report, the Committee takes special note of the Court of Appeals decision in Hinlicky v. Dreyfuss, 6 N.Y.3d 636 (2006), and continues to recommend this measure.

In Federal courts and in all states that follow the Federal Rules of Evidence, a party can buttress his or her expert's opinion testimony by showing that the opinion offered by the expert witness is in fact consistent with published, authoritative literature. The same rule, rule 803(18) of the Federal Rules of Evidence, also allows a party to show that the opinion of the adversary's expert is inconsistent with published, authoritative literature. Whether used to support or to impeach an expert's testimony, such "Learned Treatise" proof is admitted under the federal rule only if the party presenting the authoritative treatise demonstrates to the court's satisfaction that the treatise or other publication in issue is accepted as "reliable" within the profession or field in issue. Where appropriate, the trial court is permitted to take judicial notice of the reliability of the source.

However, the rules in New York's courts differ appreciably. Under current New York law, a party can impeach the adversary's expert if that expert admits that the material in issue is "authoritative." Mark v. Colgate University, 53 A.D.2d 884, 886 (2nd Dep't 1976). Also, there are certain kinds of "treatises," such as ANSI (American National Safety Institute) standards, that constitute sui generis exceptions to the general rule, and that are admitted in evidence. Sawyer v. Dreis & Krump Mfg. Co., 67 N.Y.2d 328 (1986). Further, the Hinlicky decision makes clear that it is within the court's discretion to allow into evidence an algorithm (American Heart Association/American College of Cardiology clinical guidelines) offered as demonstrative, not substantive, evidence. There are also instances in which an expert's opinion is deemed so speculative or outlandish that the court will simply exclude the testimony and not allow it in evidence. Romano v. Stanley, 90 N.Y.2d 444 (1997).

Yet, with the above-noted exceptions, New York common law excludes "learned treatise" proof as hearsay.

The New York rules thus present an anomaly. The rules allow a party to present expert opinion that was developed solely for the purpose of the litigation by an expert who is being compensated by a party, but the rules generally excluded "learned treatises" that pre-dated the case and were written by people with no axe to grind. The rules also frustrate the search for truth by excluding what may well be the most telling and powerful evidence in the case, i.e., that one side's expert is saying exactly what the authorities say, and that the opposing expert is contradicted by all of the authorities.

Finally, it should be noted that this provision is not intended to overturn the result in Spensieri v. Lasky, 94 N.Y.2d 231, 701 N.Y.S.2d 689 (1999). In Spensieri, which some attorneys have construed as possibly constituting a first step towards judicial adoption of a learned treatise rule, the Court ruled that the PDR (Physician's Desk Reference) was inadmissible, not because it was hearsay, but instead because it was not deemed sufficiently reliable or authoritative for the purposes for which it was offered. Because proposed section 4549 would make admission contingent on the court's acceptance of the "treatise" as a "reliable authority," treatises and similar materials would still be excluded where they were not deemed "reliable." Under the new provision, those materials would now be admitted, albeit in oral form only, where the materials are deemed reliable.

The Committee's proposal closely tracks the current federal rule, with a few small exceptions, notably "in other form" is intended to emphasize that substance should control over form in this Internet age.

2. Clarifying When a Claim Against a Public Authority Accrues (Public Authorities Law § 2881)

This proposal was included in the 2008 Committee Report. Under section 1744(2) of the Public Authorities Law, a notice of claim must be served upon the authority within three (3) months after the accrual of the claim. Such notice of claim is a condition precedent to maintaining an action against the authority. Other provisions of the Public Authorities Law provide similar notice of claim requirements. In C.S.A. Contracting Corp. v. New York City School Construction Auth., 5 N.Y.3d 189 (2005), the Court of Appeals held that a contract claim accrued for purposes of § 1744(2) upon the completion of the work or the presentation of a detailed invoice of the work to the Authority. The Court further held that C.S.A.'s claim accrued before C.S.A. was aware of the fact that there was a dispute with regard to its invoice. C.S.A. argued that the claim should not be construed to have accrued until it was aware there was a dispute. The Court noted that the Public Authorities Law, unlike the Education Law (in § 3813(1)), does not have a provision which specifically provided that a claim would accrue on the date payment for the amount claimed is denied. The Court noted that the Legislature specifically added such a provision to the Education Law in Chapter 387 of the Laws of 1992, but did not make such an amendment to the Public Authorities Law. This proposal is designed to fill that gap and to extend this principle to the Public Authorities Law generally, so that contract claims against all public authorities would accrue only when the claims are denied.

3. Unsworn Affirmation of Truth Under Penalty of Perjury (CPLR 2106)

The Committee continues to recommend the amendment of CPLR 2106 to replace the use of an affidavit for all purposes in a civil action by the use of an affirmation – a procedure modeled upon the federal declaration procedure (See 28 USCA §1746; unsworn declarations under penalty of perjury). Recently, demands of commercial litigants give added impetus for a change in practice. The Committee last included this proposal in its 2008 Report.

Within the state, it is increasingly difficult to find a notary outside of central business districts, and when found, usually in banks, they often refuse to notarize for anyone not known to a branch officer. The significant needs of pro se litigants for notary services has resulted in heavy demand upon the county and court clerks' offices, particularly in the City of New York, resulting in an untenable burden upon an unrepresented party. For the poor, especially, this often results in unnecessary cost and delay. Frequently, notary services may be necessary outside business hours. In the era of electronic filing, an impediment caused by lack of a notary is an absurd result. Also, New York notarial fees have increased (L. 1991, c. 143), adding to increased fees for litigants generally. In addition, the Committee is advised that some persons have religious objections to swearing but have no such objections to affirming. Most recently, commercial litigants with international cases in the Commercial Division of State Supreme Court increasingly must go to extraordinary lengths to get affidavits notarized overseas. It is important to maintain the courts of New York as a forum for international commercial disputes.

Currently, under New York law an affidavit must be sworn to before a person "authorized to take acknowledgments of deeds by the real property law" (CPLR 2309(a)). (Where the oath of the affiant is administered in another American state, see , Real Property L §299; also compare, Discover Bank v. Kagen, 8 Misc.3d 134(A) (N.Y. Sup.Ct., App. Term, 2005) with Citibank (South Dakota) N. A. v. Santiago, 4 Misc.3d 138(A)(N.Y. Sup. Ct., App. Term, 2004))

It is far more burdensome to execute an affidavit abroad. (See Real Property L §§301, 301-a.) Questions arise as to the equivalence of a person administering the oath to a New York notary and whether an affidavit obtained in a foreign country may be unusable in New York litigation. (See Matter of Eggers, 122 Misc.2d 793, 471 N.Y.S.2d 570 (Surr. Ct., Nassau Co., 1984)

Rule 2106 currently allows only specified professional persons (by attorney, physician, osteopath or dentist) to substitute an affirmation for an affidavit in judicial proceedings. This measure broadens the statute to replace the use of an affidavit for all purposes in a civil action by the use of an affirmation.

In addition, current case law suggests that, to be considered the equivalent of an oath, an affirmation should "be administered in a form calculated to awaken the conscience and impress the mind" (See People v. Coles, 141 Misc.2d 965, 535 N.Y.S.2d 897(N.Y. Sup. Ct., Kings Co., 1988); People v. Lennox, 94 Misc.2d 730, 405 N.Y.S.2d 581(N.Y. Sup. Ct., Westchester Co., 1978)). Accordingly, the proposed form reads:

> " I affirm this ____day of ____, ____, under the penalties of perjury, which may include a fine or imprisonment, that the forgoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.
> (Signature)"

Finally, the Committee recommends the amendment of Penal Law section 210.00(1) to clarify that prosecution lies for the filing of a false affirmation as perjury in the second degree, currently an E felony, the same as for filing a false affidavit. (See Pen. L §210.10). (A class E Felony is punishable by up to four years imprisonment, Pen. L §70.00(2)(b)). The Penal Law defines "oath" to include "...an affirmation and every other mode authorized by law of attesting to the truth of that which is stated." Pen. L §210.00(1). Arguably, prosecution for perjury in the second degree could be brought currently for the filing of a material, false, written affirmation before a judge or other public official made with intent to mislead that official in the performance of his official functions. (See Pen. L §210.00(4) and (5); § 210.10) However, there is no case law on a prosecution for filing a false affirmation.

Moreover, case law suggests that the "affirmation" described by current Penal Law section 210.00(1) must be the equivalent of an oath sworn to an officer or a notary to be considered eligible for perjury charges. (See People v. McAndris, 300 A.D.2d 1 (1st Dept., 2002); People v. Grier, 42 A.D.2d 803 (3d Dept., 1973); People v. Lieberman, 57 Misc.2d 1070, 294 N.Y.S.2d 117 (N.Y. Sup., Queens County, 1968)). Notably, the federal statute allows prosecution for a violation of 28 USCA §1746 by imprisonment for not more than five years. (See 28 USCA §1621).

For the foregoing reasons, the Committee recommends this amendment to the Penal law to clarify the ambiguity in the law and to insure that there will be no difference between the outcome of a prosecution for filing a false affidavit and a prosecution for filing a false affirmation pursuant to CPLR 2106.

4. Settlement in Tort Actions (GOL §15-108)

This measure, a long-standing proposal of the Committee, seeks to amend section 15-108 of the General Obligations Law to permit it to achieve its original purpose in the encouragement of speedy and equitable settlements in multi-party tort actions. It was last proffered by the Committee in its 2004 report.

Section 15-108 of the General Obligations Law prescribes the consequences which ensue when a personal injury or wrongful death plaintiff releases from liability one or more, but fewer than all, of the alleged tortfeasors. Although the statue was enacted to encourage settlements, most commentators have concluded that it actually rewards non-settlers at the expense of settlers and that, by doing so, it generally discourages settlement.

The key feature of the statute, and the feature most criticized by its detractors, is that it rewards those defendants who do not settle and can penalize plaintiffs and defendants who do. It does this by allowing the non-settlor to reduce its liability to the plaintiff by the greatest of 1) the amount which plaintiff received in settlement, 2) the amount that plaintiff was stipulated to receive in settlement, and 3) the settling tortfeasor's "equitable share" of the damages. The first two alternatives are almost always equivalent, usually leaving the non-settlor with the choice of an "amount paid" reduction or an "equitable share" reduction.

This benefits the non-settlor in two ways. First, in those instances in which the settling tortfeasor's payment turns out to exceed what the trier of fact later determines to be the settlor's equitable share of the damages, the non-settler benefits by the difference between those two sums. The second benefit accorded to the non-settlor is that the risk of settlor's insolvency, formerly borne by the non-settlor, is now eliminated. The non-settlor is able to deduct the settlor's equitable share whether or not settlor actually could have paid such sums. By virtue of these features, the non-settlor often obtains windfall reductions of liability, usually, but not invariably, at the plaintiff's expense.

A simpler proposal addressing one of the critical problems generated by GOL 15-108 was signed into law during the 2007 Legislative Session (see, L. 2007, c. 70). That statute will now exclude certain releases from its scope for which no monetary consideration has been paid.

This more comprehensive proposal would allow the non-settlor the same alternatives as currently exist, but require that the choice be made before, rather than after, the trial. The non-settlor still would get to choose whether it will reduce its liability to plaintiff by the amount of the settlor's payment to plaintiff or by the amount of the settlor's equitable share of the damages. The difference is that because the non-settlor would have to make the choice before the verdict was rendered, there would be an added incentive to defendants to settle, rather than to wait and choose the "best of both worlds." So as to avoid disputes, selection would be effective only if made in writing or on the record in open court. If the non-settlor failed to timely make an election and thus "defaulted," he or she thereby would be presumed to have elected an "equitable share" credit.

The Committee's proposal would also resolve other problems and ambiguities in the current statute, such as which agreements would trigger its operation, and its relationship with CPLR Article 16, among others.

5. Stay of Enforcement on Appeal Available to Municipal Corporations and Municipalities (CPLR 5519(a))

This proposal, last recommended by the Committee in its 2004 report, seeks to amend CPLR 5519(a) to provide that the automatic stay granted to municipal corporations and municipalities, when appealing from a judgment or order, be limited to stay only the enforcement of the order that was the subject of appeal.

This measure is designed to clarify the scope of the stay available upon appeal to municipal corporations and municipalities given the lack of consensus interpretation of CPLR 5519(a)(1) among the four Departments of the Appellate Division. The Second, Third, and Fourth Departments have held that municipal appeal merely stays enforcement of the judgment or order appealed from (see, e.g., Pokoik v. Department of Health Services, County of Suffolk, 220 A.D. 13 (2d Dept. 1996); Walker v. Delaware & Hudson Railroad Co., Inc., 120 A.D.2d 919 (3rd Dept. 1986); Spillman v. City of Rochester, 132 A.D.2d 1008 (4th Dept. 1987), while the First Department has held that the taking of an appeal stays all lower court proceedings until the resolution of the appeal. (See, Eastern Paralyzed Veterans Association, Inc. v. Metropolitan Transportation Authority, 79 A.D.2d 516 (1st Dept. 1980)).

By incorporating into the CPLR the approach applied outside of the First Department, the Committee believes that the proposed amendment will promote more rapid resolution of disputes by permitting lower court proceedings not affected by the appeal order to continue until the interlocutory appeal is resolved. Furthermore, it will insure a uniform standard upon which municipal corporations, municipalities, and litigants against them may rely.

The Committee proposes a legislative resolution of this issue because of the unlikelihood of judicial resolution of the split of authority. Normally, a split of authority between or among the Appellate Divisions would be resolved ultimately by the Court of Appeals. The Committee believes there is little chance of this occurring in this instance since an order denying or granting a stay, being neither a final order nor involving any constitutional considerations, would invariably be outside of the jurisdiction of the Court of Appeals.

6. Clarifying the Need for Expedited Relief When Submitting an Order to Show Cause (CPLR 2214(d))

This proposal seeks to amend CPLR 2214(d) to require a party seeking an order to show cause to clearly specify why he or she is proceeding via an order to show cause, and not another less urgent method. Practitioners have informed the Committee of their concern that some parties have applied for and been granted an order to show cause when expedited relief was not really needed. Even though the current statute states that "[a] court may grant an order to show cause in a proper case" (emphasis added), the Committee felt that it would be desirable to modify the statute to require a showing of why expedited relief is necessary. It recommends the insertion of a new sentence after the first sentence of CPLR 2214(d) stating: "[t]he party seeking the order to show cause shall state in the application why such expedited relief is necessary." This proposal was last recommended in its 2004 report.

7. Enactment of a Comprehensive Court-Annexed Alternative Dispute Resolution Program (Judiciary Law §39-c; Public Officers Law §17(1)(n); CPLR 4510-a) (See also Temporarily Tabled Regulatory Recommendations Nos. 1-4)

This proposal, last recommended by the Committee in its 2004 report, recommends several legislative changes to expand the use of alternative dispute resolution ("ADR") in New York State. These initiatives would provide immunity for those who serve as mediators and other neutrals in court-annexed ADR programs (Judiciary Law §39-c); ensure legal representation to such neutrals in the event that legal action were to be commenced against them arising out of their work as such (Public Officers Law §17(1)(n)); and provide for confidentiality in certain court-annexed ADR proceedings (CPLR 4510-a).

The proposal would add a new section 39-c to the Judiciary Law to provide that ADR neutrals would be protected by immunity from civil suit to the same extent as a Justice of the Supreme Court. The proposal would also amend section 17 of the Public Officers Law to ensure that neutrals serving in ADR programs would be represented by the Attorney General in lawsuits brought against them relating to their service and that they would be indemnified by the State where necessary. It is not anticipated that any significant number of such lawsuits would be commenced. However, the Committee is of the view that these safeguards are necessary to encourage qualified persons to serve as neutrals in court-annexed ADR programs and thus expand the benefit to the public from such programs.

The Committee also believes that there is clear need for other legislative action to foster the use of court-annexed ADR in this state. In particular, the Committee believes that legislation to ensure the confidentiality of court-annexed mediation and neutral evaluation is needed if ADR is to achieve the fullest possible benefit to litigants. In New York, in contrast with many other jurisdictions, there currently is no statutory provision for confidentiality in the broad range of court-annexed mediations and evaluations.

Lastly, the Committee recommends the issuance of four rules of the Chief Administrator to provide the operational underpinnings for a broad-based court-annexed ADR program. The Committee recommends additions to the Uniform Rules for the Supreme and County Courts which deal with the following: (1) ADR by appointment of a referee to hear and determine; (2) ADR by court-annexed mediation and neutral evaluation; (3) ADR by court-annexed voluntary

arbitration; and (4) the institution of a mandatory settlement conference. A more complete description of these proposed rules can be found below in the Temporarily Tabled Regulatory Proposals section below.

8. Neglect to Proceed (CPLR 3216, 3404)

This proposal would modernize rules 3216 and 3404 of the CPLR — provisions which permit the court to remove inactive or abandoned cases from its inventory. Promulgated at a time when case management was not considered the responsibility of the courts, these rules have become cumbersome and ineffective in assisting the courts to manage their large case inventories. This proposal was last recommended in the Committee's 2004 report.

Rule 3216 is addressed to cases which, after at least one year from joinder of issue (but generally prior to filing of a note of issue), remain inactive. It permits a court to dismiss such a case provided: (I) the offering party or the court first serves upon the inactive party a notice demanding that the latter serve and file a note of issue placing the case on the trial calendar within 90 days and (ii) the plaintiff then fails to comply with this demand. Rule 3404, by contrast, is addressed to cases that have reached the trial calendar but thereafter have been struck from that calendar and not been restored within one year. Moreover, unlike rule 3216, rule 3404 calls for automatic dismissal of the cases to which it applies — without need for action by the court or another party.

This measure would revise rules 3216 and 3404 to make them more flexible, practical, and effective. As revised, rule 3216 would provide that if a party unreasonably neglects to proceed in an action in which no note of issue has been filed, the court may take any of several steps to address the problem — striking the offending party's pleadings in whole or in part, dismissing the action in whole or in part, issuing a default judgment, or directing an inquest — rather than the sole step of dismissal available under the current statute. Second, revised rule 3216 would permit the 90-day demand to be served by regular mail, a change that should make it practical for courts to initiate the process rather than having to depend upon the parties to do so.

Third, proposed rule 3216 also would broaden the options available to the sender of the 90-day notice. The court or the demanding party may request the service and filing of either a note of issue or a written request for a conference. The availability of the latter option should preserve the parties' right to complete disclosure in the event the inactive party indicates an interest in proceeding with the case, while eliminating the potentially awkward situation faced by defendants under the current statute.

As revised, rule 3404 would provide for a greater variety of possible responses by the court to instances of neglect to proceed or of failure to answer a calendar call after the filing of a note of issue, thereby enhancing effective case management.

If the neglect or failure is unreasonable, the court may strike the pleadings in whole or in part, dismiss the action in whole or in part, render a judgment by default, or direct an inquest. If the neglect to prosecute is due to an unexpected and extraordinary need for additional disclosure (disclosure supposedly having been completed), the court may issue an order requiring completion of discovery within 90 days. The court also would enjoy several additional options. It could treat the case as inactive and mark it off the trial calendar, impose costs or sanctions, or issue such order as may be just. If the case is marked off the trial calendar, it must be restored in 90 days or else be deemed abandoned.

9. Insuring the Continued Legality of the Settlement of Matrimonial Actions by Oral Stipulation in Open Court (Domestic Relations Law §236(B)(3))

This proposal, last recommended by the Committee in its 2004 report, seeks to amend Domestic Relations Law §236(B)(3) to insure the continued legality of the settlement of matrimonial matters in open court, and provide a uniform rule concerning the validity of oral stipulations settling matrimonial cases in open court throughout the state. Section 236(B)(3) of the Domestic Relations Law now provides that any agreement permitting spouses to opt out of the strict statutory guidelines governing the equitable distribution of a couple's assets upon divorce, must be "in writing, subscribed by the parties, and acknowledged or proven in the matter required to entitle a deed to be recorded."

Various Appellate Divisions have adopted conflicting positions as to whether an oral agreement entered upon the record in open court is governed by section 236(B)(3). The Third and Fourth Departments have consistently held that an oral in-court stipulation is not a valid "opting out" agreement, and is therefore unenforceable. To permit some type of flexibility to encourage the resolution of a matrimonial case by settlement during the course of a hearing or trial, the Third and Fourth Departments have developed "ratification agreement" forms, which are used after an oral agreement is reached in open court. The parties then confirm the terms of the stipulation in writing in court, with the requisite formalities.

The First and Second Departments have taken the opposite view: holding that stipulations made in open court are fully enforceable dispositions of matrimonial actions, without the need of written agreements executed with the requisite formalities prescribed by DRL §236(B)(3). Thus, in the First and Second Departments, for the last decade, in-court stipulations have been fully enforceable without the necessity of a written agreement pursuant to DRL §236(B)(3).

Because oral stipulations in open court are valid and binding in all other types of litigation, the Committee believes that the First and Second Departments' practice is the preferable one. The Committee also believes that the conflict should be resolved statutorily. It

therefore recommends §236(B)(3) of the DRL be revised by adding to the end of the first sentence of subdivision (B) the phrase "or if such an agreement is made orally in open court, and transcribed by a stenographer and approved by the court." This recommendation is endorsed by the Chief Administrative Judge's Committee on Matrimonial Practice.

10. Amendment of Election Law §16-116 to Provide the Commencement of an Election Law Proceeding Shall be by Service of Papers Upon the Respondent, Not by the Filing of Papers with the County Clerk (Election Law §16-116)

This proposal seeks to amend Election Law §16-116 to specify that a proceeding brought pursuant to Article 16 of the Election Law is commenced by service of the initial papers upon the respondents, thereby making it clear that CPLR 304, providing for the commencement of an action or proceeding by the filing of papers, is inapplicable to such actions. It was last recommended in the Committee's 2004 report.

When CPLR 304 was amended in 1992 to require that an action or proceeding be commenced by filing rather than by serving the initial papers, the question arose as to whether the filing requirement applied to proceedings brought under Article 16 of the Election Law. As these proceedings are, in some ways, unique, the courts have wrestled with this question, and have rendered decisions that are inconsistent and confusing. There is a need for clarification, as attorneys, judges and parties must have knowledge of the appropriate method of commencing such a proceeding.

Because Article 16 proceedings often raise issues that must be decided prior to the holding of an election, the usual CPLR timetables are modified by the Election Law and substantially shortened. For example, the statute of limitations for commencing a proceeding challenging the decision of a board of elections rejecting the petition of a potential candidate is effectively three days. In this environment, the requirement that papers be filed prior to being served creates difficulties. Given the very short time within which to serve, every hour can be significant.

The Committee therefore proposes that, rather than adding an exception to CPLR 304, thereby making the fundamental statute more complex, Election Law §16-116 be amended to provide that proceedings brought pursuant to Article 16 are not subject to the provision requiring commencement by filing. The amendment also provides that the papers be filed within two days of service on the first respondent served.

11. Authorizing Extra-State Service of a Subpoena on a Party Wherever Located (Judiciary Law §2-b)

This proposal would amend section 2-b of the Judiciary Law to permit extra-state service of a subpoena upon a party.

Section 2-b of the Judiciary Law limits the courts of New York State to issuing subpoenas upon persons found "in the state." This limitation has been held to apply to parties in an action. Thus, a New York court is powerless to compel a defendant to attend trial or even to force a judgment debtor to respond to an information subpoena or deposition notice, if the defendant is not found in the State. See, DuPont v. Bronston, 46 A.D.2d 369 (1st Dept. 1974); DeLeonardis v. Subway Sandwich Shops Inc., NYLJ March 30, 1998, p. 28. Col. 3 (Sup. Ct. N.Y. Cty. 1998); Israel Discount Bank Ltd. v. P. S. Sao Paulo S.A. v. Mendes Junior International Co., NYLJ Nov. 24, 1997, p.29, col.4 (Sup. Ct. N.Y. Cty.); see generally, Siegel, Practice Commentaries, McKinney's Consolidated Laws of New York, Book 7B, CPLR C.5224:2 at 243).

There is no question that, under well-recognized principles of due process, New York courts can require parties to an action (over whom the court otherwise has personal jurisdiction) to appear for trial or to produce anyone under its control, such as an employee, officer or director of a corporation. (see Standard Fruit & Steamship Company v. Waterfront Commission of New York Harbor, 43 N.Y.2d 11 (1977), or a member of a partnership, or even to answer questions by information subpoena. Thus, the Committee recommends the amendment of section 2-b of the Judiciary Law set forth above.

12. Elimination of the Deadman's Statute (CPLR 4519)

This proposal, which was included in the Committee's 2004 report, seeks to repeal CPLR 4519, commonly known as the "Deadman's Statute."

The Deadman's Statute is the last vestige of an ancient common law rule that parties were not competent to testify in their own behalf because of the potential for perjury. That rule, now generally abrogated, foresaw an even greater risk of perjury when the other party to a transaction was dead or mentally incapacitated. CPLR 4519 is identical to former Civil Practice Act §347, which was, in turn, derived from New York's Field Code of 1848.

The Deadman's Statute prohibits persons who have a financial interest in a lawsuit involving a decedent's estate from testifying about personal transactions or conversations with the decedent. This prohibition is predicated upon the rationale that if the decedent (or incompetent) cannot provide his or her version of the transaction or conversation, living persons who have a financial interest in that transaction or conversation should not be permitted to do so. The converse is also true. Representatives of a decedent's estate defending, for example, the decedent's will, from a charge of undue influence or lack of testamentary capacity, are also prohibited from producing evidence or testimony at trial concerning transactions or communications with the decedent.

New York's Deadman's Statute has long been the subject of withering criticism. In 1940, Dean Wigmore, in his treatise on evidence, after noting that the defenders of the rule are usually content to invoke vague metaphors in place of reason, found it to be seriously flawed, and Fisch, in his treatise in New York Evidence stated:

> Besides affording only limited protection against unjust claims, the statue has led to endless litigation ever since its enactment . . . The statute has been violently condemned for many years, and bar associations, legal scholars, and research groups have urged its elimination or modification, pointing out that judicial powers for investigating truth, such as cross-examination, and scrutiny of the testimony of interested witnesses by the court and jury, afford adequate protection against unjust claims. . . Modification, if not complete elimination, of this obstacle to just administration of the law is long overdue. Id. §302, p.198.

The Committee feels that the time has finally come to repeal this relic of another age and impediment to the search for truth in civil litigation. The threat of criminal penalties for perjury and the pursuit of vigorous cross-examination provide adequate safeguards both for decedent's estate, and for those proclaiming interests adverse to it.

The repeal of the Dead Man's Statute would not mean that otherwise inadmissible hearsay evidence would be admissible. If the decedent's statements, like any other decedent's statements, constituted hearsay, they would be inadmissible. Further, the Committee recommends that the trial courts consider cautionary instructions to the effect that the jury, in weighing the evidence, should take into account the inability of the deceased (or incompetent) person to contradict the statement imputed to him and the fact that such a person is not there to be cross-examined.

13. Permitting Plaintiff to Obtain an Indirect Tort Recovery Against a Third Party Defendant in Certain Cases When the Third Party Plaintiff is Insolvent (CPLR 1405)

This proposal recommends enactment of a new CPLR 1405 to permit a plaintiff in tort cases to recover directly against a third-party defendant found liable to the third-party plaintiff, where the third-party plaintiff is insolvent. This proposal is made to address several divergent New York State Court of Appeals decisions, which have led to an uncertain state of the law. It was last included in the Committee's 2004 report.

The first case, Klinger v. Dudley, 41 N.Y.2d 362 (1977), barred a recovery by a plaintiff against a third-party defendant found liable for a portion of the damages owed plaintiff by the original defendant, where the original defendant was insolvent. The court required the judgment, or at least the original defendant's proportionate share, to be paid in full before this could happen. Several years later, however, in a similar case, Feldman v. N.Y.C. Health and Hospitals Corp., 56 N.Y.2d 1011 (1982), the court permitted a circumventive loan to get around the problem where the third party defendant was not an employer. More recently, in Reich v. Manhattan Boiler & Equipment Corp., 91 N.Y.2d 772 (1998), it held such a loan device to be ineffective when the third party defendant was an employer, stating that such a loan agreement would conflict with the public policy considerations which mandate exclusivity of the workers' compensation remedy.

The Committee believes that a plaintiff's recovery of a judgment which ultimately comes from a third-party defendant should not depend on the fortuity of the solvency of the third-party plaintiff. This proposal would allow the plaintiff to recover on a judgment for contribution against the third-party defendant, whether or not the third-party plaintiff has satisfied the underlying judgment for which contributions or indemnification is sought. Thus, in the case where a third-party plaintiff, directly liable to the plaintiff, is insolvent and is unable to pay the judgment, the plaintiff will recover that portion of the judgment owed by the third-party defendant from that defendant directly.

This proposal would not alter in any way the substantive law of workers' compensation. The 1996 Omnibus Workers' Compensation Reform Act already limits claims for contribution and indemnification against an employer to only those cases involving "grave injuries." In cases where there are not grave injuries, the employer is not liable as a matter of substantive law, and

therefore this provision would not affect such employers at all. In those cases involving grave injury, the Legislature has made a policy determination that the employer should be subject to potential third-party liability. This provision would ensure that the employer's share of liability would not be dependent upon the fortuity of the solvency of the third-party plaintiff. This provision would therefore more fully effectuate the legislative judgment that employers should be subject to third-party liability in those cases involving grave injury.

14. Clarifying Pleadings in Article 78 Proceedings
(CPLR 307(2), 7804(c))

This proposal, recommended by the Office of the New York State Attorney General and the Office of Court Administration, seeks to amend Article 78 of the CPLR to address a current practice that often distorts proceedings brought pursuant to the Article. Some petitioners file a bare-bones petition — with no memorandum of law, no affidavits, and no supporting documents — leaving the respondent to guess as to the actual focus of the case. In some cases, after the respondent has made a motion to dismiss or has submitted a complete set of answering papers, the petitioner, in its reply, submits additional documents raising a new or different legal theory.

This practice, which results in additional briefs and affidavits, with further replies and responses, unnecessarily delays the resolution of legal proceedings and results in inefficiencies and unproductive expenditures of resources, time and effort. Proceedings which are intended to be expedited become unduly lengthy, resulting in increases in expenditures by state and local agencies and the court system.

The proposed amendments to CPLR 7804(c) would prevent surprise and delay by permitting a respondent to demand that the petitioner serve the papers on which it will rely before the respondent answers or moves.

Through this mechanism, the respondent will be able to answer the petitioner's substantive claims. Requests for extra time or the opportunity to submit papers after the reply will be avoided. This procedure would enhance the likelihood that all papers are before the court on the return day, thereby permitting more rapid resolution.

The amendment to CPLR 307(2) is for clarification only. It alerts all petitioners bringing a proceeding against a state officer, sued officially, or a state agency, that service upon the Attorney General is required in all instances in order to commence the proceeding.

This proposal was last included in the Committee's 2004 report.

15. Preserving the Testimony of a Party's Own Medical Witnesses for Use at Trial (CPLR 3101(d)(1)(iii)), (3117(a)(4)) (See also Temporarily Tabled Regulatory Recommendation No. 6)

This proposal, last recommended by the Committee in its 2004 report, seeks to amend CPLR 3101(d)(1)(iii) to clearly state that a party may, without court order, take the testimony by videotape or otherwise of its own treating physician, dentist, or podiatrist or retained medical expert for the purpose of preserving his or her testimony for use at trial.

The Committee was informed that the bar was experiencing increasing difficulty in obtaining the trial testimony of medical providers, both as treating physicians and medical experts, because the experts' schedules were extremely busy and unpredictable. Recognizing the difficulties that medical providers do have in controlling their schedules, the Committee recommends that CPLR 3101(d)(1), governing the scope of disclosure for expert testimony in preparation for trial, be expressly amended to permit the party offering the medical provider's testimony to take the deposition by videotape or audiotape of the witness in advance in order to preserve his or her testimony for trial in case the witness subsequently becomes unavailable.

The New York rules involving expert disclosure are quite restrictive, providing that "[u]pon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion." CPLR 3101(d)(1)(I). While the provision then provides slightly more elaborate rules for medical, dental, or podiatric malpractice actions, subparagraph (iii) of CPLR 3101(d)(1) goes on to state that any further disclosure concerning the testimony of experts may be had only upon court order, with one important exception, which is relevant here. It permits a party to take the deposition without a court order of "a person authorized to practice medicine, dentistry, or podiatry who is the party's treating or retained expert, . . . in which event any other party shall be entitled to the full disclosure authorized by this article with respect to that expert without court order."

However, this paragraph might be read to provide permission to take a deposition of the medical witness only for purposes of discovery. Read in this way, courts might preclude the

taking of such a medical deposition after the note of issue is filed. The Committee believes that the intent of CPLR 3101(d)(1)(iii) is to allow the parties to preserve the testimony of medical witnesses whose schedules often result in unavailability and therefore delay in trial. This reading is consistent with CPLR 3117(a)(4), which allows for the use of a deposition of a person authorized to practice medicine for any purpose without a showing of unavailability. It is also consistent with CPLR 3101(a)(3), which provides that there shall be full disclosure of all matters material and necessary in any action by, among other persons, a "person authorized to practice medicine, dentistry, or podiatry . . . who provided . . . care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness."

The Committee therefore recommends that CPLR 3101(d)(1)(iii) be amended to expressly provide that the purpose of conducting such depositions is to preserve the testimony for trial. Since there is no reason why such depositions should not take place at any convenient time prior to trial, or even during trial if necessary, the Committee also recommends an amendment to section 202.21(7) of the Uniform Rules for the Supreme and County Courts, making it clear that such depositions need not be completed before filing of the note of issue. The text of this second proposal can be found in the Temporarily Tabled Regulatory Recommendations set forth below.

Finally, the Committee also proposes amending CPLR 3117(a)(4) to conform to CPLR 3101(d)(1)(iii) by allowing the deposition of a person practicing "medicine, dentistry or podiatry" to be used for any purpose.

16. Insuring That All Persons Having an Interest in a Banking or Brokerage Account Receive Notice of a Restraining Order or Attachment Sent by a Banking Institution or Brokerage House (CPLR 5222(b), 5232(a))

This proposal recommends that CPLR 5222, dealing with restraining notices served in aid of enforcement of a money judgment, and CPLR 5232, addressing levies on personal property to enforce a money judgment, be amended to require notification to all persons having an interest in an account in a bank or brokerage house before the account can be garnished or levied upon.

It was brought to the Committee's attention that there are circumstances in which persons with an interest in a bank or brokerage account suffer restraint of their funds (or the turnover of the funds to a creditor) as a result of enforcement of a judgment against a co-owner of the account. While there are a number of enforcement procedures set forth in Article 52 of the CPLR that require the debtor to be given notice, there are no requirements for notice to be given by a bank or brokerage house to other persons having an interest in the account. As a result, those persons may be deprived of the opportunity to prove that some or all of the funds at issue are theirs rather than those of the judgment debtor. The Committee therefore recommends that new language be added to CPLR 5222(b) and 5232(a) to require such notification. This would effectuate a modest change in existing procedures to increase the probability that all persons, including a non-judgment debtor with an interest in a bank or brokerage account, will receive notice of a garnishment or attachment of the account, and will be able to take appropriate action to protect their rights.

This proposal was most recently recommended in the Committee's 2004 report.

17. Clarifying the Timing of Disclosure of Films, Photographs, Video Tapes or Audio Tapes (CPLR 3101(I))

This proposal seeks to amend CPLR 3101(i) relating to the timing of the disclosure of films, photographs, video tapes or audio tapes, often called "surveillance evidence." The proposed amendment would add a new phrase in subdivision (i) of section 3101, which would expressly limit the timing of the disclosure of surveillance evidence until after the party against whom the evidence is proffered has been deposed. Disclosure must be made within 30 days of the deposition or the creation of such material, whichever is later.

Prior to the enactment of CPLR 3101(i), in DiMichel v. South Buffalo Railway Company, 80 N.Y.2d 184 (1992), the Court of Appeals held that disclosure of surveillance evidence was to be made after the deposition of the party who was the subject of surveillance, in order to safeguard the truth-finding process by avoiding tailor-made responses to deposition examination regarding surveillance evidence. However, the subsequent CPLR provision, which passed in 1993, was silent concerning the timing of disclosure of surveillance evidence.

This generated substantial litigation, and until 2003, the courts were divided in their interpretation of CPLR 3101(i). The Second, Third and Fourth Departments had ruled that surveillance materials must be disclosed upon demand, even if it is before the scheduled deposition of the party who was subject to surveillance. See, Falk v. Inzinna, 299 A.D.2d 120 (2d Dept. 2002); Rotundi v. Massachusetts Mutual Life Insurance Co., 263 A.D.2d 84 (3d Dept. 2000); and DiNardo v. Koronowski, 252 A.D. 2d 69 (4th Dept. 1998). However, the First Department had taken a different view, holding in Tran v. New Rochelle Hospital Medical Center, 291 A.D.2d 121 (1st Dept. 2002) that to prevent fraud, the disclosure of surveillance evidence should not be made until after the party subject to surveillance was deposed.

In the spring of 2003, the Court of Appeals issued its decision in the Tran appeal. 99 N.Y.2d 383 (2003). It overruled the First Department. Siding with the Second, Third, and Fourth Departments, the Court held that the amendment to CPLR 3101(i) requiring "full disclosure of any films, photographs, videotapes or audiotapes . . . " of a party to the action meant that such items should be turned over as soon as they were requested - - even if it was before the party surveilled could be deposed. The court acknowledged that such a policy might increase the potential for tailored testimony, but felt constrained to adhere to a "plain meaning"

interpretation of the legislation enacted in 1993. However, the Committee believes that the view articulated by the First Department is the better policy since it is more likely to prevent fraudulent claims. Thus, the amendment proposed would expressly limit a court's discretion regarding the sequence of discovery. Such a step would minimize the potential of tailor-made testimony and support New York's preference for more in-depth discovery and honest and forthright explanations of the evidence, rather than gamesmanship.

18. Creation of a Statutory Parent-Child Privilege
(CPLR 4502-a)(Family Court Act §1046(vii))

This proposal, last recommended by the Committee in its 2005 report, seeks to establish a formal parent-child privilege. This then would become applicable to criminal cases through the provisions of section 60.10 of the Criminal Procedure Law, which state that unless otherwise provided, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings. Similarly, it would become applicable to Family Court cases through section 165 of the Family Court Act which states: "where the method of procedure in any proceeding in which the Family Court has jurisdiction is not prescribed, the provisions of the civil practice law and rules still apply to the extent that they are appropriate to the proceedings involved." However, because of the special nature of some Family Court proceedings, this proposal would amend section 1046(a)(vii) of the Family Court Act to exempt child abuse and neglect cases from the ambit of the privilege.

Although there is currently no statutory privilege for confidential communications between parent and child, New York courts have recognized a common-law parent-child privilege, principally in criminal cases. In In re Matter of A and M (61 A.D.2d 426, 1978), for example, the Fourth Department upheld the application of the privilege in a case where the parents of a 16 year-old boy suspected of arson had been subpoenaed to testify as to alleged admissions made to them by the boy.

The Court in Matter of A and M recognized that "[t]he State has a legitimate interest in the process of fact-finding necessary to discovery, try, and punish criminal behavior [citations omitted]" (Id, at 433). "Nevertheless," the Court stated,

> if it is determined that the information sought ... [in this case] was divulged by the boy in the context of the familial setting for the purpose of obtaining support, advice or guidance, we believe that the interest of society in protecting and nurturing the parent-child relationship is of such overwhelming significance that the State's interest in fact-finding must give way. 61 A.D.2d at 433-434.

Other courts have followed Matter of A and M in recognizing a parent-child privilege under similar circumstances (i.e., where a minor child under arrest or investigation for a serious crime seeks the guidance and advice of a parent). See, People v. Edwards, 135 A.D.2d 556;

People v. Harrell, 87 A.D.2d 21, 26, aff'd 59 N.Y.2d 620, People v. Tesh, 124 A.D.2d 843, lv. denied 69 N.Y.2d 750; But see, People v. Gloskey, 105 A.D.2d 871; and Matter of Mark G., 65 A.D.2d 917.

This measure would fill the current statutory void and provide much needed uniformity by establishing explicit parameters for the application of the parent-child privilege in civil, criminal, and family court cases. Under the Committee's proposal, the general evidentiary rule would be stated in a newly added CPLR section 4502-a as follows: "[I]n an action or proceeding a child and his or her parent shall not be compelled to disclose a confidential communication between them." Under enumerated exceptions to the rule, the privilege would not apply to: (1) a confidential communication made in furtherance of the commission of any offense or with the intent to perpetrate a fraud; (2) a confidential communication that relates to an offense alleged to have been committed by any family or household member against any member of the same family or household; and (3) general business communications. It would only include those exchanges which would not have been made but for the parent-child relationship. The proposal also includes an exception for proceedings under section 1046 of the Family Court Act involving child abuse or neglect.

Under the proposal, a person is deemed a child regardless of age and the definition of a parent includes a natural or adoptive parent, a step-parent, a foster parent, a legal guardian, or "a person whose relationship with the child is the functional equivalent of any of the foregoing." Although the measure defines "communication" broadly to include any verbal or nonverbal expression (including written expressions) directed to another person and intended to convey a meaning to such other person, it provides that a communication may be considered "confidential" (and thus potentially covered by the privilege) only if it: (1) was not intended to be disclosed to third persons other than another parent or a sibling of the child; and (2) was expressly or impliedly induced by the parent-child relationship.

The measure does not provide, as in the case of the spousal privilege under CPLR 4502, that one of the participants in the confidential communication can prevent the disclosure by the other. Rather, the proposed language merely restricts compelled disclosure for qualified communications. Either party to the confidential communication may reveal it if they choose. Thus, in sensitive matters such as matrimonial cases, support proceedings, and proceedings under

Article 81 of the Mental Hygiene Law for the appointment of a guardian, either parent or child could decide to testify, even if the other party chooses to invoke his or her privilege.

19. Clarifying Options Available to a Plaintiff When, in a Case Involving Multiple Defendants, One Defaults and One or More Answers (CPLR 3215(d))

This proposal to amend CPLR 3215, governing default judgments, is designed to clarify the options available to a plaintiff when, in a case involving multiple defendants, one party defaults and one or more answers.

It was brought to the Committee's attention that the provisions of section 3215(d), addressing default judgments in cases where there are multiple defendants, were ambiguous. That subdivision provides:

> (d) Multiple defendants. Whenever a defendant has answered and one or more other defendants have failed to appear, plead, or proceed to trial of an action reached and called for trial, notwithstanding the provisions of subdivision (c) of this section, upon application to the court within one year after the default of any such defendant, the court may enter an ex parte order directing that proceedings for the entry of a judgment or the making of an assessment, the taking of an account or proof, or the direction of a reference be conducted at the time of or following the trial or other disposition of the action against the defendant who has answered. Such order shall be served on the defaulting defendant in such manner as shall be directed by the court.

Subdivision (c) of section 3215 provides that the plaintiff must enter a default judgment within one year after the default, or the court will dismiss the complaint as abandoned. Subdivision (d), enacted in 1992, was designed to give the plaintiff some relief in cases involving multiple defendants, since more than a year may pass between the default of one of the defendants and the time that the remaining defendants actually go to trial. This subdivision enables a court to defer further proceedings against the defaulting defendants so long as a motion for such deferral is made within a year of default.

Thus, CPLR 3215(d) would seem to indicate that where at least one defendant has answered, and one or more have failed to appear, plead, or proceed to trial, the plaintiff must apply to the court within one year after the default, and the court may issue an order permitting the plaintiff to take one of several steps (entering judgment, making an assessment, taking of an account, directing a reference), but only following the conclusion of the trial or other disposition of the action against the defendant who has answered.

In fact, pursuant to case law and practice, a plaintiff eager to obtain an immediate default judgment has another option. The plaintiff may make a motion requesting the court, by ex parte order, to sever the action against the defaulting defendants and then proceed to secure a default judgment pursuant to one of the provisions of CPLR 3215. To be sure that a plaintiff understands that this option is available, the Committee proposes that CPLR 3215(d) be amended to expressly provide this option.

20. Revision of the Contempt Law (Judiciary Law, Article 19)

This proposal seeks the amendment of Article 19 of the Judiciary Law to effect comprehensive reform of the law governing contempt. This measure was originally proposed in 2000, and last appeared in revised form in our 2005 Report to the Chief Administrative Judge, after endorsement by the Chief Administrative Judge's Advisory Committee on Criminal Law and Procedure, and Family Court Advisory and Rules Committee.

A full explanation of the parameters of the proposal can be found in the CPLR Committee's 2005 Report. The discussion set forth below merely provides a brief summary of the terms of the proposal. The measure repeals Article 19 of the Judiciary Law in its entirety, replacing the largely outdated and often confusing language of that Article with more modern terminology, and eliminating provisions that are duplicative or have outlived their usefulness. At the same time, the measure retains, albeit in a more comprehensible form, virtually all of the concepts traditionally associated with a court's exercise of the contempt power, including "summary" contempt (section 753(1)), the ability to impose fines and/or jail as sanctions for contemptuous conduct, and the ability to apply these sanctions either as a punishment for such conduct (section 751), or as a remedy where the conduct interferes with or otherwise prejudices the rights or remedies of a party to an action or proceeding (section 752).

In defining contempt under proposed section 750, the measure eliminates all references to "civil" and "criminal" contempt — concepts that have generated substantial litigation and confusion in the past — and replaces them with a more "generic" contempt definition that, despite its brevity, encompasses nearly all of the conduct constituting "civil" and "criminal" contempt under existing Judiciary Law sections 750 and 753.

To conform with the Penal Law, which utilizes the term "intentional" instead of "willful," the proposal has been amended to refer to "intentional" conduct in the section 750 definition of contempt, instead of "willful." It should be noted, however, that no change in the substantive requirement for "*mens rea*" is intended, simply a harmonization of the two sets of statutes.

Where a person is found to have engaged in conduct constituting contempt under proposed section 750, the court, under proposed sections 751 and 752, may "punish" or "remedy"

the contempt, through the imposition of a fine or imprisonment, or both, in accordance with the applicable provisions of those sections.

Thus, for example, under proposed section 751 ("Punitive contempt; sanctions"), where the court makes a finding of contempt and seeks to *punish* the contemnor, it may do so by imposing a fine or a jail sanction of up to six months, or both. Where the contempt involves willful conduct that disrupts or threatens to disrupt court proceedings, or that "undermines or tends to undermine the dignity and authority of the court," the fine imposed under that section may not exceed $5,000 "for each such contempt." In fixing the amount of the fine or period of imprisonment, the court, under proposed section 751(2), must consider "all the facts and circumstances directly related to the contempt," including the nature and extent of the contempt, the amount of gain or loss caused thereby, the financial resources of the contemnor and the effect of the contempt "upon the court, the public, litigants or others." The measure also directs that, where a punitive sanction of a fine or imprisonment is imposed, the underlying contempt finding must be based "upon proof beyond a reasonable doubt" (section 753(5)).

The court, however, also has the authority, under proposed section 752 ("Remedial contempt; sanctions"), to impose a *remedial* sanction for a contempt in order to "protect or enforce a right or remedy of a party to an action or proceeding or to enforce an order or judgment." As with the punitive contempt sanction, this remedial sanction would be in the form of a fine (including successive fines) or imprisonment, or both (section 752). The measure requires, however, that in imposing a remedial fine or term of imprisonment, the court must direct that the imprisonment, and the cumulation of any successive fines imposed, "continue only so long as is necessary to protect or enforce such right, remedy, order or judgment" (section 752). Where a remedial sanction for contempt is imposed, the underlying contempt finding must be supported by "clear and convincing" evidence (section 753(5)).

The measure provides that where a court makes a finding of contempt, the finding must be in writing and must "state the facts which constitute the offense" (section 754). Similarly, where a sanction is imposed on the finding, the order imposing it must also be in writing, and "shall plainly and specifically prescribe the punishment or remedy ordered therefor" (section 754). The measure also provides, however, that where a contempt is summarily punished pursuant to proposed section 753(1), the facts supporting the contempt finding, and the specific punishment

imposed thereon, shall be placed on the record, to be followed "as soon thereafter as is practicable" by a written finding and order (proposed section 754).

The procedures governing contempt proceedings, including the summary adjudication and punishment of contempt, are set forth in proposed section 753 ("Procedure"). With regard to summary contempt, the measure provides, in substance, that where the contempt is

> committed in the immediate view and presence of the court [it] may be punished summarily where the conduct disrupts proceedings in progress, or undermines or threatens to undermine the dignity and authority of the court in a manner and to the extent that it reasonably appears that the court will be unable to continue to conduct its normal business in an appropriate way. Proposed section 753(1).

The measure also provides that, before a person may be summarily found in contempt and punished therefor, the court must give a person "a reasonable opportunity to make a statement on the record in his or her defense or in extenuation of his or her conduct" (section 753(1)).

Where the contempt is not summarily punished, the court, under proposed section 753(2), must provide the alleged contemnor with written notice of the contempt charge, an opportunity to be heard and to "prepare and produce evidence and witnesses in his or her defense," the right to assistance of counsel and the right to cross-examine witnesses. Where the contemptuous conduct involves "primarily personal disrespect or vituperative criticism of the judge," and the conduct is not summarily punished, the alleged contemnor is entitled to a "plenary hearing in front of another judge designated by the administrative judge of the court in which the conduct occurred" (section 753(3)). This judicial disqualification provision, which has no analogue in existing Judiciary Law Article 19, is modeled after the Rules of the Appellate Division (see, section 604.2(d) of the Rules of the First Department and section 701.5 of the Rules of the Second Department), and is intended to insure that due process is satisfied in cases where the contemptuous conduct involves a particularly egregious personal attack on the judge (see, generally, Mayberry v. Pennsylvania (400 U.S. 455 [1971])).

Proposed section 753 includes an additional provision not found in existing Article 19 that would allow for the appointment by an Administrative Judge (or the appellate court on an appeal of a contempt adjudication) of a "disinterested member of the bar" to prosecute a contempt charge or respond to a contempt appeal (section 753(4)). This provision is intended to address the

situation in which, due to the nature of the alleged contempt or the circumstances of its commission, there is no advocate to pursue the contempt charge in the trial court, or to argue in favor of upholding the contempt finding on appeal. Where, for example, a contempt is committed by a non-party to a civil or criminal case (e.g., a reporter violates a Trial Judge's order prohibiting the taking of photographs in court), or involves misconduct by a party that does not affect the opposing party's rights or remedies, the court may be forced to either pursue the contempt charge itself, or forgo prosecution altogether. By allowing for the appointment in these situations of a disinterested attorney to pursue the contempt charge, and to argue in support of any resulting contempt ruling on appeal, this provision fills a critical gap in existing Article 19 and insures that the fundamental nature of the adversarial process remains intact.

The measure provides that where a person charged with contempt is financially unable to obtain counsel, and the court determines that it may, upon a finding of contempt, impose a sanction of imprisonment, it must, unless it punishes the contempt summarily under proposed section 753(1), assign counsel pursuant to Article 18-B of the County Law (section 753(6)). The requirement that the court, before assigning counsel, make a preliminary determination that it may impose jail as a sanction if a contempt is found, is intended to eliminate the need to assign counsel in every single contempt case involving an indigent contemnor (see, existing Judiciary Law section 770 [providing, in pertinent part, that where it appears that a contemnor is financially unable to obtain counsel, "the court *may in its discretion* assign counsel to represent him or her"], emphasis added). Notably, the measure requires that counsel be assigned *regardless* of whether the indigent contemnor is facing a "punitive" jail sanction under proposed section 751, or a "remedial" jail sanction under proposed section 752 (see, generally, People ex rel Lobenthal v. Koehler (129 AD2d 28, 29 [(1st Dept. 1987)] [holding that, under U.S. Supreme Court precedent, an indigent alleged contemnor facing possible jail as a sanction has the right to assigned counsel, regardless of whether the charged contempt is "civil" or "criminal" in nature]; see also, Hickland v. Hickland, 56 AD2d 978, 980 [3d Dept. 1977]).

Similarly, the measure requires that, where an adjudicated contemnor who is financially unable to obtain counsel appeals a contempt ruling that includes a sanction of imprisonment, the appellate court must assign counsel pursuant to Article 18-B (section 755(2)). Because existing Article 18-B of the County Law contains no express reference to the assignment of counsel to

indigent persons charged with contempt under the Judiciary Law, the measure makes conforming changes to County Law section 722-a to include these Judiciary Law contempt proceedings (other than summary proceedings) and appeals within the scope of proceedings to which Article 18-B applies (see, section 5 of the measure).

21. Addressing Current Deficiencies in CPLR Article 65 Dealing With Notices of Pendency (CPLR Article 65)

This proposal, first offered in 2004, is designed to reform certain shortcomings in CPLR Article 65, which addresses notices of pendency.

Together with the New York State Bar Association, the Committee proposes a number of amendments to CPLR Article 65 to reform current shortcomings. Some of the provisions of Article 65 are out of place in the context of modern civil practice. In particular, Article 65 fails to provide a means by which to restore a notice of pendency that has been inadvertently vacated for some reason not on the merits. At the same time, it provides a means by which a litigant may obtain something tantamount to a preliminary injunction, but with no judicial review of the case on the merits of the relative equities of the parties as a predicate therefore.

CPLR Article 65 authorizes the filing of a written notice of the pendency of any action in which a judgment demanded would affect real property. Once filed, such a notice of pendency constitutes constructive notice of the action to any prospective transferee of the real property, and has the practical effect of making that property unmarketable. If an action relates to the protection or enforcement of an existing recorded interest in the real property — such as a mortgage in a foreclosure action — a notice of pendency does not impose a significant additional burden on the property owner, whose ability to transfer or encumber the property already is restricted by the pre-existing recorded interest. But a notice of pendency also can be filed where a plaintiff claims a new interest in property — for example, in an action to impose a constructive trust on the property — in which case the notice of pendency has the same effect on the property owner as a grant of a preliminary injunction or order of attachment would have. Unlike these other provisional remedies, however, the notice of pendency is obtained without any judicial review of the merits of plaintiff's claim to the property, and, in most cases, without plaintiff having to provide an undertaking with respect to, or compensation for, damages suffered by the property owner in the event that his or her claim to the property ultimately is determined to have been without merit.

Although it is relatively easy for a plaintiff to obtain and maintain the benefits of this potentially powerful restraining device, it also is easy for the plaintiff to lose these benefits. The courts have sought to provide compensatory protection for property owners by insisting that

plaintiffs strictly comply with the statutory requirements for filing and maintaining notices of pendency. As a general matter, there are no second chances for plaintiffs who fail to seek timely extension of a notice of pendency prior to expiration of its three-year term. This prohibition against filing a second notice of pendency recently was reaffirmed in Matter of Sakow, 97 N.Y. 2d 438 (2002), where the Court of Appeals rejected an attempt to file a second notice of pendency after an initial notice was vacated and no stay of the order vacating it was obtained pending the outcome of what ultimately was a successful appeal.

The amendments to CPLR Article 65 proposed in this measure would achieve that more rational balance, primarily by making two changes in existing law. First, they would eliminate the current prohibition against filing subsequent notices of pendency. This will serve to protect the interests of plaintiffs whose meritorious property claims might otherwise be defeated because of failure to comply with technical requirements for filing or maintaining their notice of pendency.

Second, to counterbalance the resulting ease with which plaintiffs would be able to maintain notices of pendency, this measure also would create a procedure for preliminary judicial review of a limited class of notices of pendency; viz, those that have the effect of subjecting real property to a new encumbrance not otherwise reflected on its title. As noted, this occurs where a plaintiff claims a new interest in the property (such as pursuant to a constructive trust) not reflected by a pre-existing recorded interest (such as a mortgage). In such circumstances, the notice of pendency operates like a preliminary injunction or order of attachment, but it is obtained without judicial scrutiny of the merits of the plaintiff's claimed interest in the property. Under this measure, persons potentially aggrieved by such a notice of pendency would have an opportunity to seek a preliminary hearing on the merits of the property claim to which the notice relates. The burden would be on the plaintiff to demonstrate that the claim has sufficient merit to justify the hardship that continuation of the notice of pendency will impose upon the property owner. Under this measure, the plaintiff whose claim passes such review will no longer be subject to the risk of losing the notice of pendency as a result of a procedural technicality.

The proposal adjusts current practice as to posting of bonds by expressly prohibiting any requirement of a bond from defendant as part of an order vacating the notice after a preliminary hearing (proposed CPLR 6514(f)), in that such an order will issue only after a finding that neither the merits nor the equities of plaintiff's situation can justify a notice of pendency under any

circumstances. The proposal would amend CPLR 6515 to permit a defendant to seek an order vacating the notice upon posting a bond without regard to the merits of plaintiff's claim, enabling the court to vacate a notice even if there is some merit to plaintiff's claim, but only if plaintiff's interests can be adequately protected with a bond.

The measure also adds a new section 6516 to the CPLR, to resolve confusing caselaw on the effect of a canceled notice of pendency by clarifying that, once canceled, a notice of pendency has no effect on any other interest, whether filed before or after cancellation of the notice.

22. Addressing the Deficiencies of the Structured Verdict Provisions of CPLR Article 50-A (CPLR 50-A; CPLR 4111, 5031)

This proposal, last offered in 2005, is designed to address the deficiencies of the structured verdict provisions of CPLR Article 50-A.

In 1985 and 1986, when the Legislature enacted CPLR Articles 50-A and 50-B dealing with periodic payments of medical and dental malpractice awards (Article 50-A) and personal injury, injury to property and wrongful death judgments (Article 50-B), the statutes required that all future damages in excess of $250,000 be paid over time rather than in a lump sum. The legislative history indicates that the provisions were intended to avoid payment of unwarranted "windfall" damages and to thereby reduce the liability costs of the defendants found liable, but without depriving victorious plaintiffs of fair compensation.

In years past, the Committee has recommended wholesale repeal of these periodic payment provisions. The Committee felt that, after some 15 years of experience with the provisions, it was clear that they greatly complicated the trial and post-trial proceedings without achieving the goals that the Legislature had hoped to achieve.

The Legislature instead responded in 2003 by replacing the complicated provisions of the "old" CPLR Article 50-A with new provisions that are, in several notable respects, even more complicated. See, L. 2003, c. 86. Among other changes, instead of returning with a total award for each of the elements of future damages, a "50-A" jury is now required to specify the annual amount of the loss or expense and its "growth rate," findings which the trial judge would then use to create a payment scheme. In addition, the new provisions require multiple awards for a single element of future damages in those instances in which the plaintiff's future needs are projected to change. Yet, while greatly altering the provisions of CPLR Article 50-A, the Legislature made no change at all to CPLR Article 50-B.

It appears that the Legislature rejected the alternative of outright repeal in favor of modifying Article 50-A, at least in part because it felt that malpractice defendants should be entitled to the savings that would arise when a malpractice plaintiff dies sooner than the jury had anticipated. In any event the Legislature was resistant to the alternative of repeal. The Committee accordingly reset its focus in light of this changed landscape, and submitted a new proposal early in the 2004 legislative session. The Committee's proposed amendment of the

periodic payment schemes was predicated on the template set forth in newly enacted CPLR 5031. In essence, the Committee recommended that the same basic scheme that was devised for malpractice actions be extended to all personal injury and wrongful death actions, but that certain changes be made in the process. The most significant features of this second proposal were that: (1) the "new" CPLR Article 50-A, which only applied to medical malpractice actions, would be amended to apply to all actions for personal injury, wrongful death, and property damages, and the current CPLR Article 50-B would be repealed; (2) the old $250,000 future damages threshold would be restored; (3) the statute would be amended to provide that the parties could settle a case on such terms as they wished; and (4) the new CPLR Article 50-A would be amended to provide that, when a lump sum payment is made in wrongful death actions for the plaintiff's future damages, the payment should be made in the present value.

After discussing this second proposal with legislative staff, it became clear that the amendments the Committee proposed would be difficult to achieve since legislative leadership were not eager to tackle a large scale revision of CPLR Article 50-A and a repeal of 50-B, absent strong pressure from interested parties who could show that the existing statutory provisions were not working.

Thus, in recognition of this reality, towards the end of the 2004 session the Committee pared down its proposed recommendations to simply address the current deficiencies in Article 50-A, and decided not to touch Article 50-B. It presented the same proposal in 2005.

The key features of the Committee's proposal are set forth below:

1. The "old" $250,000 future damage threshold would be restored.

Under the "old" CPLR 50-A and current 50-B, the periodic payments provisions are applied only when the plaintiff's total future damages exceed $250,000. This threshold was sound. It meant that in the comparatively smaller cases where it might not be cost-effective to call economists or actuaries or to wrestle with annuity contracts, the damages would be assessed and paid in a lump sum.

The Legislature's initial view was that the complications of CPLR Articles 50-A and 50-B should not be visited upon smaller cases and that the line would be drawn at $250,000. This meant that the parties in such an action would not have to think about present value tables or monthly payments, and the judgment could be entered that much quicker.

The CPLR Article 50-A eliminates the threshold. Yet, this may well have been inadvertent. It is common knowledge that, in the wake of Desiderio v. Ochs, 100 N.Y.2d 159 (2003) the Legislature's focus was, understandably, on the multi-million dollar recoveries that hospitals were then saying could bankrupt them unless something were done to reduce the awards for economic loss. The Legislature was looking at the upper end of the spectrum at the extremely large recoveries that were comparatively few in number, but that could of themselves constitute an enormous burden on even the largest hospital. There were no complaints about the manner of computing damages in those cases in which the verdict was not large enough to trigger Article 50-A.

The new CPLR 50-A deals with the Desiderio problem by eliminating the 4% additur that was previously used in structuring the plaintiff's economic damages. The ostensible trade-off was that the Desiderio-type plaintiff would now obtain even more money than before in lump sum.

The proposed bill would make no change as compared to the current 50-A with respect to the amount of percentage of the verdict that is paid in lump sum in those instances in which the total future damages exceeds $250,000. However, CPLR 5031 would be amended to wholly exclude cases with lesser recoveries from the scope of the statute, as is still true of CPLR Article 50-B. A related amendment of CPLR 4111 would enable the plaintiff to obtain a simplified lump sum verdict if the plaintiff stipulates to a $250,000 ceiling on all future damages.

2. The statute would be amended to expressly provide that the parties can settle the case on such terms as they wish.

CPLR 5041(f) and "old" CPLR 5031(f) expressly permit the parties to settle without going through the periodic payment provisions. New CPLR 5031 does not have a comparable provision. Although the Committee believes that this was an inadvertent omission on the Legislature's part, it is concerned that a court might regard the absence of that provision, particularly in light of the fact that the previous statute had such a provision, as precluding settlement. The wording of proposed CPLR 5031(I) is taken directly from current CPLR 5041(f).

The Committee also proposes a related amendment of CPLR 4111(d) that would allow the parties to stipulate to the jury charge and interrogatories, contingent upon the trial court's approval of such course.

3. The new CPLR Article 50-A would be amended so as to expressly provide that, when lump sum payment is made in wrongful death actions for the plaintiff's future damages, the payment shall be made in present value.

The new CPLR 50-A excludes wrongful death actions from its scope. Payments in wrongful death actions are now to be made in lump sum, and will not be structured. But the statute does not say whether the payment is first reduced to present value. This is therefore likely to be a cause for litigation.

The Committee is not sure what the Legislature intended, but feels that there is no economic justification for a present payment of future value and that, where the future damages exceed the $250,000 threshold, the lump sum award should be reduced to present value. The proposal reflects this.

B. Temporarily Tabled Regulatory Proposals

1. Alternative Dispute Resolution by Reference to Hear and Determine (22 NYCRR 202.20)

Under this proposed addition to the Uniform Rules for the Supreme and the County Courts, submission of actions to a referee to hear and determine would occur on consent of the parties and the compensation of the referees would be borne by the parties. Panels of referees would be designated for each judicial district by the District Administrative Judge and the stipulation of the parties to refer an action, with all procedural provisions agreed upon would be court-ordered. Parties would select the referee and the final judgment of the referee would be appealable directly to the appropriate appellate court. Although parties and the referee would determine their own procedures, the substantive law of New York would be preserved by the appellate process. The Committee believes that, once familiar with this program, attorneys will submit significant numbers of matters to this expedited system, especially large and complex ones, which can be protracted and extremely expensive to try.

2. Alternative Dispute Resolution by Court-Annexed Mediation and Neutral Evaluation (22 NYCRR 202.20-a)

Pursuant to this proposed rule, programs of mediation and neutral evaluation also would be established by the Administrative Judge for each judicial district and each Administrative Judge would adopt detailed local rules not inconsistent with the general rules or the CPLR. Neutrals would be attorneys with a minimum of five years experience or persons of comparable qualification. While participation in these programs would be largely by consent, the court could require parties to attend one session. This is modeled on current practice in New York County, and the value of one mandatory session is demonstrated by the national experience with such programs. The outcome of these processes in the end would not be binding unless the parties agree.

3. Alternate Dispute Resolution by Court-Annexed Voluntary Arbitration (22 NYCRR 202.20-b)

This proposed rule would permit the Administrative Judge of a judicial district to establish a court-annexed program of voluntary arbitration under Article 75 of the CPLR. The rule sets forth basic procedures to provide a framework with which parties can be comfortable and in which they can have confidence.

4. Mandatory Settlement Conference (22 NYCRR 202-c)

This proposed rule was to establish a mandatory settlement conference, to address cases in which other ADR options are, for a variety of reasons, not pursued. In many cases, parties may not be able to or wish to proceed by referee to determine. In a given district, perhaps because of concerns about compensation, there may not be a sizeable, or perhaps even any, panel of mediators, neutral evaluators or voluntary arbitrators. Even if there is a panel, a judge may not order parties in a given case into mediation or neutral evaluation and they may not consent to go on their own.

The Uniform Rules provide for pretrial conferences in general (Rule 202.26) and in cases subject to Differentiated Case Management (Rule 202.19). Many judges, however, do not have the time to conduct extensive settlement conferences. Detailed settlement discussions are, of course, problematic if the assigned judge may be trying the case without a jury. Thus, the Committee's view was that it would be beneficial to provide for a mandatory settlement conference before some person, other than the judge — a court attorney, a JHO or a member of a panel of attorneys. The conference would take place no later than 60 days before trial. The aim would be to achieve settlement prior to jury selection.

5. Amending the Certificate of Readiness for Trial to Permit Post Note of Issue Preservation of Medical Witness Testimony for Use at Trial (22 NYCRR 202.21(b)(7))

Having recommended that CPLR 3101(d)(1)(iii) be amended to clarify that the testimony of a treating physician, dentist, or podiatrist, or other retained expert can be preserved by a videotape or audiotape deposition for use at trial especially if the expert suddenly becomes unavailable (See Temporarily Tabled Legislative Proposal 20), the Committee felt that the form for the Certificate of Readiness for Trial contained in section 202.21 of the Uniform Rules for the Trial Courts should also be amended.

Thus, it recommends that subdivision (7) of the form be amended to state that "[d]iscovery proceedings now known to be necessary completed" should contain the qualifying phrase "except the taking of a deposition for the purpose of preserving testimony of medical witnesses pursuant to CPLR 3101(d)(1)(iiii)."

VII. Pending and Future Matters

Several interrelated matters now are under consideration by the Advisory Committee on Civil Practice, working largely through one or more subcommittees, with a view toward recommending legislation and rule changes. Among these matters are the following:

1. The Committee, in its entirety and through its new standing Sub-Committee on Electronic Discovery, continues to examine proposals and issues pertaining to electronic discovery. In particular, the Committee is considering the Report by the Association of the Bar of the City of New York, Joint Committee on Electronic Discovery, recommending changes to the CPLR to address e-Discovery "Explosion of Electronic Discovery" and the associated reference manual "Manual for State Trial Courts Regarding E-Discovery Cost Allocation". The Subcommittee will continue to consider whether it is necessary to manage ESI discovery by statute in the CPLR and examine new developments in the common law along with existing rules, ethical requirements and statutes bearing on this issue. The Committee also continues to examine proposals and issues pertaining to electronic discovery by the Commercial and Federal Litigation Section of the New York State Bar Association.

2. The Committee continues to review John Wiley & Sons, Inc. v. Kirtsaeng, (2009 WL 3003242 (S.D.N.Y.)), and to examine a proposal to eliminate the separate entity rule or to amend the statute on service of a restraining notice only. The Committee is analyzing the mechanisms for service on a bank in New York; the effect and application and enforcement of an attachment once accomplished; the question of the location of the *res* and the Committee awaits the development of further decisions in this area.

3. The Committee, in its entirety and through its Subcommittee on the Collateral Source Rule, will monitor the development of case law under Chapter 494 of the Laws of 2009 and weigh the necessity of recommending in the future amendments to CPLR 4545 to clarifying that there is no right to subrogation for collateral source payments made in the context of a lawsuit governed by CPLR 4545.

4. The Committee, in its entirety and through its Subcommittee on Technology, continues to work closely with the Technology Division of the Office of Court Administration, court personnel, leaders of the bench and bar, and the federal judiciary to improve and expand recent legislation and regulations permitting the Chief Administrative Judge to conduct a pilot program providing for the filing of court papers by fax or electronic means in selected locations throughout the state.

5. The Committee, through its Subcommittee on Costs and Disbursements, is considering a possible revision of Article 8l of the CPLR, governing costs.

6. The Committee, through its Subcommittee on Enforcement of Judgments and Orders, is reviewing the adequacy and operation of CPLR Article 52, relating to the enforcement of judgments.

7. The Committee, through its Subcommittee on Alternative Dispute Resolution, is continuing its analysis of CPLR Article 75, court-annexed alternative dispute resolution and the Revised Uniform Arbitration Act proposed by the National Conference of Commissioners on Uniform State Laws .

8. In cooperation with the Surrogate's Court Advisory Committee, the Committee continues to examine a proposal for clarifying the Supreme Court's authority to approve the distribution of proceeds in a wrongful death action.

VIII. Subcommittees

The following subcommittees of the Advisory Committee on Civil Practice are now operational:

- Subcommittee on Alternative Dispute Resolution
  Chair, Richard B. Long, Esq.

- Subcommittee on Appellate Jurisdiction
  Chair, Thomas F. Gleason

- Subcommittee on Civil Jury Trial Procedures
  Chair, Richard B. Long, Esq.

- Subcommittee on the Collateral Source Rule
  Chair, Richard Rifkin, Esq.

- Subcommittee on the Commercial Division
  Chair, Mark C. Zauderer, Esq.

- Subcommittee on Contribution and Apportionment of Damages
  Chair, (to be designated)

- Subcommittee on Costs and Disbursements
  Chair, Thomas F. Gleason, Esq.

- Subcommittee on the Court of Claims
  Chair, Richard Rifkin, Esq.

- Subcommittee on Courts of Limited Jurisdiction
  Chair, Leon Brickman, Esq.

- Subcommittee on Court Operational Services Manuals
  Chair, John F.Werner, Esq.

- Subcommittee on Criminal Contempt Law
  Chair, George F. Carpinello, Esq.

- Subcommittee on Disclosure
  Chair, Burton N. Lipshie, Esq.

- Subcommittee on Electronic Discovery
  Chair, Thomas F. Gleason, Esq.

. Subcommittee on the Enforcement of Judgments and Orders
Chair, Mark C. Zauderer, Esq.

. Subcommittee on Evidence
Chair (to be designated)

. Subcommittee on Expansion of Offers to Compromise Provisions
Chair, Jeffrey E. Glen, Esq.

. Subcommittee on General Obligations Law Section 15-108
Chair, Brian Shoot, Esq.

. Subcommittee on Impleader Procedures
Chair, Robert C. Meade, Esq.

. Subcommitee on Interest Rates on Judgments
Chair, Brian Shoot, Esq.

. Subcommittee on Legislation
Chair, George F. Carpinello, Esq.

. Subcommittee on Liability Insurance and Tort Law
Chair, George F. Carpinello, Esq.

. Subcommittee on Matrimonial Procedures
Chair, Myrna Felder, Esq.

. Subcommittee on Medical Malpractice
Chair, Richard Rifkin, Esq.

. Subcommittee on Mortgage Foreclosure Procedure
Chair, James N. Blair, Esq.

. Subcommittee on Motion Practice
Chair, Richard Rifkin, Esq.

. Subcommittee on Periodic Payment of Judgments and Itemized Verdicts
Chair, Brian Shoot, Esq.

. Subcommittee on Preliminary Conference Orders
Chair (to be designated)

. Subcommittee on Pretrial Procedure
Chair, Lucille A. Fontana, Esq.

. Subcommittee on Procedures for Specialized Types of Proceedings
Chair, Leon Brickman, Esq.

. Subcommittee on Provisional Remedies
Chair, James N. Blair, Esq.

. Subcommittee on Records Retention & CPLR 3404
Chair, John F. Werner, Esq.

. Subcommittee on Sanctions
Chair, Thomas F. Gleason, Esq.

. Subcommittee on Service of Process & Interlocutory Papers
Co-Chairs, Leon Brickman, Esq. & Thomas F. Gleason, Esq.

. Subcommittee on Statutes of Limitations
Acting Chair, Richard Rifkin

. Subcommittee on Technology
Chair, Thomas F. Gleason, Esq.

. Subcommittee on Tribal Court Judgments
Chair, Lucille A. Fontana, Esq.

. Subcommittee on the Uniform Rules
Chair, Harold A. Kurland, Esq.

. Subcommittee on the Use of the Regulatory Process to Achieve Procedural Reform
Chair, Richard Rifkin, Esq.

. Subcommittee on Venue
Chair, Thomas Newman, Esq.

. Ad Hoc Sub-Committee on Electronic Discovery
Chair (to be designated)

. Joint Subcommittee with the Advisory Committee on Surrogate's Court Practice on Structured Settlement Guidelines
Chair, Lucille A. Fontana, Esq.

Respectfully submitted,

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