Report of the Advisory Committee on Civil Practice

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

January 2013

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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 2013 Report, the Advisory Committee recommends a total of 30 measures for enactment by the 2013 Legislature. Of these, eighteen measures previously have been endorsed in substantially the same form, six are modified measures, and six 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 six new measures proposed for 2013. They are designed to: (1) require a certificate of merit in certain residential mortgage foreclosure actions (CPLR 3012-b(new)); (2) allow persons about whom discovery is sought to move for an order of protection during discovery (CPLR3103(a)); (3) require the pleading of an affirmative defense and a motion to dismiss for objections regarding certain notices of claim (CPLR 3018(b) & 3211)); (4) conform the statutes on the timing of a motion seeking leave to appeal, the automatic stay and the 5-day rule (CPLR 5519)); (5) require notice to the parties and a statement of conduct constituting neglect regarding dismissal for want of prosecution (CPLR 3216(a) and (b)) and (6)enact a waiver of Privileged Confidential Information for Exclusive Use in a Civil Action (CPLR 4504(a)).

Part III sets forth and summarizes the six modified measures proposed for 2013. These measures would (1) eliminate the distinction between a party and a non-party when seeking disclosure from a non-party (CPLR 3101(a) & (d) (1)(iii)); (2) set a time for expert witness disclosure (CPLR 3101(d)(1)); (3) allow the use of an affirmation in a civil action by any person (CPLR 2106); (4) allow the non-party witness to make objections at a deposition (CPLR 3113(c)); (5) permit appellate review of a non-final judgment or order in certain circumstances (CPLR 5501(e)(new)) and (6) extend discretion to the court to retain alternate jurors after final submission (CPLR 4106).

Part IV summarizes the previously endorsed measures not enacted through 2013, but once again recommended by the Committee in substantially the same form. These measures: (1) extend the 20-day rule on the notice of intention to arbitrate (CPLR 7503(c)); 2) address certain CPLR Article 16 issues in relation to apportionment of liability for non-economic loss in personal injury actions (CPLR 1601, 1603, 3018); (3) amend the General Obligations Law in relation to the limitation of non-statutory reimbursement and subrogation (Gen. Ob. L. § 5-335); (4) permit service of a levy upon any branch of a financial institution to be effective as to any account as to which the institution is a garnishee ((CPLR 5222(a), 5225(b), 5227, 5232(a), 6214(a)); (5) 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)); (6) 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)); (7) modify the manner of service of papers when service is by facsimile (CPLR 2103); (8) remove the requirement that papers served by mail be mailed within the state CPLR 2103(f)(1); (9) 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)); (10) extend the judgment lien on real property and repeal the notice of levy upon real property (CPLR 5014, 5203 & 5235 (repealer)); (11) modify the contents of a bill of particulars to expand the categories of information that may be required(CPLR 1603), 3018(b), 3043); (12) 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)); (13) 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)); (14) 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)); (15) expand expert disclosure in commercial cases (CPLR 3101(d)(1)); (16) amend the rate of interest (CPLR 5004); (17) provide for pre-judgment interest after offers to compromise in personal injury actions (CPLR 3221, 5001(a)(b)) and (18) allow a notary public to compare and certify copies of papers that will comprise a record on appeal (CPLR 2105).

Part V sets forth the Committee's regulatory proposals. The Committee seeks approval of seven regulatory measures in 2013: (1) requiring the redaction of certain personal identifying information in papers filed in court in a civil action (22 NYCRR 202.5(e)(new)); (2) providing greater flexibility for the court to address confidentiality in the submission of court papers in the Commercial Division of the Supreme Court (22 NYCRR 202.70(g) Rule 9 (new)(see Appendix for Recommended Form of Stipulation and Order)); (3) 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; (4) 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)); (5) a recommendation encouraging the court to grant requests to appear at conference via telephonic or other electronic means (22 NYCRR 202.10 (new)); (6) a proposal eliminating the notice of medical, dental and podiatric malpractice action and tailoring the special rules for medical, dental and podiatric malpractice action (22 NYCRR 202.56) and (7) 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 sets forth a set of statewide guidelines to assist the bench and bar practice for the State Courts regarding electronic discovery conducted pursuant to Article 31 of the CPLR.

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

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

Part X of the Report in an Appendix containing recommended forms.

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:

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Advisory Committee on Civil Practice
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II. New Measures

1. Requiring a Certificate of Merit in Certain Residential Mortgage Foreclosure Actions (CPLR 3012-b (new))

The Committee proposes a new CPLR 3012-b to create a procedure whereby the plaintiff lender's attorney must take certain steps to ascertain that his or her client has standing to maintain the action. Specifically, before commencing such an action, he or she must be assured that the plaintiff he or she represents holds the instrument of indebtedness in the action. To evidence that the plaintiff's attorney has received such assurance, the complaint he or she files in the action must be accompanied by a certificate, executed by the plaintiff's attorney, declaring that the attorney has reviewed the merits of the action and that, based upon consultation with authorized representatives of the plaintiff or the attorney's review of pertinent documents, the attorney has concluded on the basis of that consultation or review that there is reasonable basis for the commencement of the action. Also, the plaintiff's attorney must attach to the complaint copies of the relevant instruments of indebtedness and any instruments of assignment. This measure would also amend CPLR 3408 to required a plaintiff to file proof of service within 20 days of service. This amendment will supply the necessary ingredient to ensure participation by the parties in the mandatory foreclosure conference with the court.

The Committee believes that, in addition to helping the bar by clarifying in statute the plaintiff's attorney's obligation to the court in a residential foreclosure action, this measure is an appropriate public policy response to the crisis in foreclosure cases. The Committee believes that statutory reform is needed to ensure the integrity of the mortgage foreclosure process and eliminate the cases brought without standing or merit. This proposal seeks to prevent completely the problem of "shadow dockets" in the residential foreclosure cases which was unforeseen at the time the recent affirmations rule was promulgated by administrative order. The trial court would have reasonable assurance that all of the instruments of indebtedness underpinning these actions, including any UCC Article 9 document evidencing a security interest in the note, and all instruments of assignment, if any, are in place at the commencement of the action.

Proposal

AN ACT to amend the civil practice law and rules, in relation to residential foreclosure actions

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 3012-b to read as follows:

§ 3012-b. Certificate of merit in certain residential foreclosure actions. (a) In any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, the complaint shall be accompanied by a certificate, executed by the attorney for the plaintiff, certifying that the attorney has reviewed the facts of the case and that, based on consultation with authorized representatives of the plaintiff and the attorney's review of pertinent documents, including the mortgage, security agreement and note or bond underlying the mortgage executed by the residential defendant and all instruments of assignment, if any, or any other instrument of indebtedness there is reasonable basis for the commencement of such action and that plaintiff is currently the creditor entitled to enforce rights under such documents. Such certificate shall attach a copy of the mortgage, security agreement and note or bond underlying the mortgage executed by the residential defendant and all instruments of assignment.

(b) Where a certificate is required pursuant to this section, a single certificate shall be filed for each action, even if more than one defendant has been named in the complaint or is subsequently named.

(c) The provisions of rule 3015(d) shall not be applicable to a defendant resident of the property subject to foreclosure who is not represented by an attorney.

(d) If a plaintiff willfully fails to provide the copy of the papers as required by subdivision (a) of this section and the court finds, upon the motion of any party or on its own motion on notice to the parties, such mortgage and security agreement or note or bond or other instrument ought to have been provided, the court may (i) dismiss the complaint or (ii) make such final or conditional order with regard to such failure as is just, including but not limited to

denial of the accrual of any interest, costs, attorneys' fees and other fees, relating to the underlying mortgage debt. Any such dismissal shall not be on the merits.

§2. Subdivision (a) of rule 3408 of the civil practice law and rules, as amended by section 9 of chapter 507 of the laws of 2009, is amended to read as follows:

(a) In any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant resident is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to, determining whether the parties can reach a mutually agreeable solution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate.

§3. This act shall take effect immediately and shall apply to actions commenced on or after such effective date; provided, however that the amendments to subdivision (a) of rule 3408 of the civil practice law and rules made by section two of this act shall not affect the expiration of such subdivision and shall be deemed to expire therewith.

2. Allowing Persons About Whom Discovery is Sought to Move for an Order of Protection During Discovery
(CPLR 3103(a))

The Committee recommends an amendment to the language of CPLR §3103(a) to expand the delineated persons who may seek the remedy of a protective order in regard to the use of discovery devices such as a subpoena for records.

Presently the statute contemplates protective orders made by the court on its own motion or on motion of a party or a person from whom discovery is sought. Not addressed is a person about whom records are being subpoenaed from either a party or another non-party. By way of example, if an accountant is subpoenaed to produce the records of clients who are not parties to the litigation, it is unclear under the present statute whether the non-party clients would have standing to object to the production of their records.

It would be an unwarranted anomaly for such non-parties to have less of a right to protect their records than those persons presently delineated in the statute.

It should be noted that it is not the purpose of this amendment to change existing case law as to whether or not a third party has a protectable interest in certain records. See, Norkin v. Hoey, 181 A.D.2d 248, 252 (1st Dept., 1992) (bank records); People v. DiRaffaele, 55 N.Y.2d 234 (1982) (telephone records). This measure would solely provide a procedural mechanism by which a person, whose information is contained in the records sought, may object to the subpoena.

Proposal

AN ACT to amend the civil practice law and rules, in relation to prevention of abuse during discovery

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

Section 1. Subdivision (a) of section 3103 of the civil practice law and rules is amended to read as follows:

(a) Prevention of Abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

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

3. Requiring the Pleading of an Affirmative Defense and a Motion to Dismiss for Objections regarding Certain Notices of Claim (CPLR 3018(b) and 3211

The Committee recommends the amendment of CPLR 3018 and 3211 governing the practice requirements for responses to certain notices of claim as set forth below.

The Provisions, in a Nutshell

The proposed measure would (1) require objections relating to the timeliness or manner of service or filing of a notice of claim to be pleaded as an affirmative defense, and (2) provide that any such objection is waived unless the party asserting the objection moves for dismissal within 90 days of serving his or her answer or other responsive pleading.

In other words, the same "Use It or Lose It" rule that now applies to objections based upon alleged lack of personal jurisdiction and to alleged defects in service of process would be extended to procedural objections concerning the notice of claim, but with the difference that the movant will have 90 days rather than 60 days to make the motion. Just as is now true of motions that allege defects in personal jurisdiction or service of process, a court could extend the deadline "upon the ground of hardship."

The provisions would not address or alter the circumstances in which a notice of claim is required. Nor would the provisions alter the required content of such notices. The provisions would not alter proceedings in the Court of Claims and would therefore not affect the State of New York.

Completely apart from the amendments concerning notice of claim objections, the measure would fill an apparently unintended gap in CPLR 3211(e) so as to specify that dismissal motions premised upon CPLR 3211(a)(11) — that is, that the allegedly liable party is immune from liability under the Not-For-Profit Corporation Law — may be made at any time.

The Amendments Concerning Notice of Claim Objections

The amendments concerning notice of claim objections would (1) promote dispositions of actions on their merits, (2) curtail dismissals that are obtained by delayed objections to the alleged failure to serve a notice of claim, and, (3) reduce waste of precious judicial resources.

Currently, every or virtually every village, town, municipal corporation, and public authority enjoys the benefit of some notice of claim provision. Typically, as is the case with those municipal entities that enjoy the protection of General Municipal Law § 50-e, the would-be plaintiff is not permitted to bring suit with respect to a given claim unless the plaintiff (1) timely served a notice of claim detailing the basic facts of the claim, and (2) afforded the municipal entity an opportunity to question the plaintiff concerning the claim.

Generally, the notice of claim must be served within 90 days of the events on which the claim is premised. However, there are literally hundreds of such notice of claim statutes and they can vary regarding which individuals should be served, the information that must be provided, the time by which the notice must be served, and the time within which an application to permit late notice must be made.

Under current law, a municipal defendant that knows that service of the notice of claim was defective has no obligation to raise the objection in timely fashion and may literally wait years to do so. This problem is most dramatically illustrated in the ruling in Scantlebury v. NYCHHC, 4 N.Y.3d 606 (2005). In Scantlebury, plaintiff Janet Scantlebury claimed that the defendant's Kings County Hospital committed medical malpractice and had thus injured her. She served a notice of claim on November 3, 1999, which was while she was still in the hospital. Unfortunately, she served the Comptroller of the City of New York, who was not authorized to receive service of the notice of claim.

Far from raising any objection at that time, the Comptroller demanded a § 50-h hearing, which was held on July 19, 2000. Plaintiff next commenced her action in August of 2000. The parties began and eventually completed discovery. It was not until February of 2003, right after plaintiff filed a note of issue, that HHC moved for dismissal based upon the defective service of the notice of claim. In moving for dismissal, HHC did not advance any excuse for its delay. However, it argued that none of that mattered; and the Court of Appeals agreed with that position and dismissed plaintiff's action.

The purpose of the notice of claim provisions is to provide municipalities with the opportunity to timely investigate claims, not to provide them with the means to obtain dismissals. If there was a service error of some sort and the time to correct the error has not passed, there is no reason why the plaintiff should not be given the opportunity to correct the

error. Nor is there any reason why a municipality cannot be fairly expected to "use or lose" its notice of claim objections. Nor is there any reason why a municipality should be allowed to sit silently through years of litigation — including conferences attended by judges or their staff, motions read and resolved by judges and their staffs, appeals consuming court time and resources, and even trials — before raising a dispositive objection that could have been raised years earlier.

The Amendment Concerning CPLR 3211(a)(11) Motions

CPLR 3211(a) specifies the grounds on which a party may move to dismiss a claim. Currently, it contains eleven numbered paragraphs, each of which sets forth one or more bases on which a motion to dismiss may be made. This measure would add a twelfth paragraph, for motions premised upon notice of claim objections.

CPLR 3211(e) specifies the times in which each of the various 3211(a) motions may or must be made. The deadlines vary greatly. At one extreme, certain motions, such as alleged lack of personal jurisdiction, can be waived even prior to filing of the party's initial pleading. At the other extreme, certain objections, including alleged failure to state a cause of action, may be raised at any time.

The problem is that, for no discernable reason, CPLR 3211(e) expressly addresses only ten of the eleven paragraphs in CPLR 3211(a). It says nothing at all about paragraph eleven. That paragraph authorizes a motion to dismiss on the ground that "the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law."

In the absence of any specific directive, the Appellate Division has ruled (1) that the general language of the first sentence of CPLR 3211(e) dictates that a motion premised upon CPLR 3211(a)(11) must be made even before the would-be movant's filing of its initial pleading, but (2) the would-be movant can still move for summary judgment under CPLR 3212 if it misses the 3211(e) deadline. Woodford v. Benedict Community Center, 176 A.D.2d 1115 (3rd Dep't 1991). While the latter half of the ruling makes the first half more palatable, the easily waivable nature of the 3211(a)(11) option largely defeats the Legislature's purpose in enacting the provision in the first place.

This measure would amend CPLR 3211(e) so as to expressly address motions premised

upon CPLR 3211(a)(11). Such motions could now be made at any time, as with a motion premised upon alleged failure to state a cause of action.

Proposal

AN ACT to amend the civil practice law and rules, in relation to certain notices of claim, pleading an affirmative defense and making a motion to dismiss

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

Section 1. Subdivision (b) of section 3018 of the civil practice law and rules 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, 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, or failure to serve a notice of claim or failure to properly or timely serve a notice of claim.

§2. Rule 3211 of the civil practice law and rules is amended to read as follows:

Rule 3211. Motion to dismiss. (a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him or her on the ground that:

1. a defense is founded upon documentary evidence; or

2. the court has not jurisdiction of the subject matter of the cause of action; or

3. the party asserting the cause of action has not legal capacity to sue; or

4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires; or

5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

6. with respect to a counterclaim, it may not properly be interposed in the action; or

7. the pleading fails to state a cause of action; or

8. the court has not jurisdiction of the person of the defendant; or

9. the court has not jurisdiction in an action where service was made under[314] section three hundred fourteen or [315] section three hundred fifteen of this chapter; or

10. the court should not proceed in the absence of a person who should be a party[.] or

11. the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law. Presumptive evidence of the status of the corporation, association, organization or trust under section 501(c)(3) of the internal revenue code may consist of production of a letter from the United States internal revenue service reciting such determination on a preliminary or final basis or production of an official publication of the internal revenue service listing the corporation, association, organization or trust as an organization described in such section, and presumptive evidence of uncompensated status of the defendant may consist of an affidavit of the chief financial officer of the corporation, association, organization or trust. On a motion by a defendant based upon this paragraph the court shall determine whether such defendant is entitled to the benefit of section seven hundred twenty-a of the not-for-profit corporation law or subdivision six of section 20.09 of the arts and cultural affairs law and, if it so finds, whether there is a reasonable probability that the specific conduct of such defendant alleged constitutes gross negligence or was intended to cause the resulting harm. If the court finds that the defendant is entitled to the benefits of that section and does not find reasonable probability of gross negligence or intentional harm, it shall dismiss the cause of action as to such defendant; or

12. in an action in which service of a notice of claim is a condition precedent to the commencement of the action, the notice of claim was not served or was not properly or timely served.

(b) Motion to dismiss defense. A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition

of the controversy, order immediate trial of the issues raised on the motion.

(d) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his or her responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

(e) Number, time and waiver of objections; motion to plead over. 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 or eleven of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted; 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 or twelve 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. An objection based upon a ground specified in paragraph twelve of subdivision (a) is also waived if the objecting party fails to move for judgment on that ground within ninety days after serving the pleading, unless the court extends the time upon the ground of undue hardship.

(f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed

extends the time to serve the pleading until ten days after service of notice of entry of the order.

(g) Standards for motions to dismiss in certain cases involving public petition and participation. A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

(h) Standards for motions to dismiss in certain cases involving licensed architects, engineers, land surveyors or landscape architects. A motion to dismiss based on paragraph seven of subdivision (a) of this rule, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action in which a notice of claim must be served on a licensed architect, engineer, land surveyor or landscape architect pursuant to the provisions of subdivision one of section two hundred fourteen of this chapter, shall be granted unless the party responding to the motion demonstrates that a substantial basis in law exists to believe that the performance, conduct or omission complained of such licensed architect, engineer, land surveyor or landscape architect or such firm as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant a preference in the hearing of such motion.

§3. This act shall take on the first day of January next succeeding the date on which it shall have become law and shall apply to all actions commenced on or after that date.

4. Conforming the Statutes on the Timing of a Motion Seeking Leave to Appeal, the Automatic Stay and the 5-Day Rule
(CPLR 5519)

The Committee recommends that § 5519 (e) of the CPLR be amended to provide that, upon an appeal from an order affirming or modifying an order or judgment, any existing stay pending appeal continues if an appeal is taken, a motion is made for permission to appeal or an affidavit of intention to file a motion for permission to appeal is served within five (5) days of the order of appealed from.

Under current law, the automatic five (5)-day stay continues until final determination of the appeal if the appellant takes an appeal or makes a *motion for permission to appeal* within the five (5) days. In contrast, under § 5519(a), which deals with initial appeals, taking an appeal or serving *an affidavit of intention to move for permission to appeal* is sufficient to invoke the stay. It seems apparent to the Committee that the original legislative intent in allowing a stay to be invoked upon the filing of an affidavit of intention to move for permission to appeal was to give the appellant the benefit of an immediate stay of execution of the judgment without having to prepare the papers in support of a motion for permission to appeal. It appears to have been an oversight on the Legislature's part that, upon a subsequent appeal, the appellant must actually prepare the papers on the motion for permission to appeal within five (5) days in order to invoke the continuation of the stay.

Commentators are divided as to how the current § 5519 (e) is to be interpreted, and as to whether a party that files an affidavit of intention receives the benefit of the continuation of the stay. *Compare* A. Karger*, The Powers of the New York Court of Appeals*, (3d ed. 2005) at 648, n.3 (opining that where an appellant does not have sufficient time to prepare a motion for leave to appeal, the appellant may serve a notice of intention to move for permission to appeal and thereby secure a stay); and T. Newman, *New York Appellate Practice* (3d. 1997) at § 6.06 (suggesting that, so long as an undertaking is still in effect, the service of an affidavit of intention to move for leave to appeal results in the continuation of the stay) with 36 *Siegel's Prac. Rev.* 2 (1995) (opining that, under § 5519(e) the appellant must actually make a motion for leave to appeal and that an affidavit of intention to move for permission is not effective to continue the stay).

This amendment would resolve any existing ambiguity and would make it clear that the appellant, upon serving a notice of appeal or an affidavit of intention to seek permission to appeal, will receive the immediate benefit of the continuation of the stay already in existence on the appeal.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the continuation of the stay pending appeal

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

Section 1. Subdivision (e) of section 5519 of the civil practice law and rules is amended to read as follows:

(e) Continuation of stay. If the judgment or order appealed from is affirmed or modified, the stay shall continue for five days after service upon the appellant of the order of affirmance or modification with notice of its entry in the court to which the appeal was taken. If an appeal is taken or a motion [is made] for permission to appeal or an affidavit of an intention to move for permission to appeal[,] from such an order is served before the expiration of the five days, the stay shall continue until five days after service of notice of the entry of the order determining such appeal or motion. When a motion for permission to appeal is involved, the stay, or any other stay granted pending determination of the motion for permission to appeal, shall:

(i) if the motion is granted, continue until five days after the appeal is determined; or

(ii) if the motion is denied, continue until five days after the movant is served with the order of denial with notice of its entry.

§2. This act shall take effect immediately and shall apply to judgments or orders appealed from on or after that date.

5. Requiring Notice to the Parties and a Statement of Conduct Constituting Neglect Regarding Dismissal for Want of Prosecution
(CPLR 3216 (a) and (b))

In this measure the Committee responds to widespread complaints from the bar concerning CPLR 3216, which governs want of prosecution in a civil matter. Section 3216 has not been amended since 1978 and those amendments preceded the current IAS system, preliminary conferences, compliance conferences and certification orders. Simply put, the language of 3216 is out-of-sync with current, well-established facets of civil practice.

The Committee has undertaken an extensive analysis of the practice pursuant to 3216 and considered possible amendments. Since 2004 the Committee has recommended a measure which would amend both 3216 and 3404. As detailed in the Court of Appeals' recent decision in Cadichon v. Facelle, 18 N.Y.3d 230, 938 N.Y.S.2d 232 (2011), many courts automatically include a 90-day notice in a generic preliminary conference order the execution of which may result in an administrative dismissal of a civil action with no further notice to the parties. In addition, the practice under 3216 is further complicated by the confusion that erupts from the interplay between a 90-day demand, statutory disclosure requirements and the filing of a note of issue. The Committee believes, consistent with the decision in Cadichon, that the bench and bar would benefit from a statutory amendment which codifies a specific, simple roadmap and includes a red flag, formal notice to the parties of the threat of a dismissal. In many cases the parties are actively prosecuting or defending the matter and, given an opportunity to do so, would be prepared to establish that fact to the court, a result infinitely more beneficial to the litigants than an outright dismissal by the court clerk's office.

This measure would add to 3216(a) the requirement that a dismissal order from the court may only be "with notice to the parties." It would amend 3216(b)(2) to clarify the time line by requiring that no dismissal shall be directed unless [o]ne year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later." Finally, the measure would amend 3216(b) (3) to add that [w]here the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

Importantly, the Committee believes that the balance encompassed in the original statute should remain intact. Further, the it believes that the court's ability to *sua sponte* order dismissal should be preserved, with the addition of this amendment requiring that such order may only be made upon notice to the parties and not as an automatic dismissal because a pre-set deadline has passed.

Proposal

AN ACT to amend the civil practice law and rules, in relation to want of prosecution

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

Section one. Paragraphs (a) and (b) of rule 3216 of the civil practice law and rules, as amended by chapter 4 of the laws of 1978, are amended to read as follows:

(a) Where a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party's pleading on terms. Unless the order specifies otherwise, the dismissal is not on the merits.

(b) No dismissal shall be directed under any portion of subdivision (a) of this rule and no court initiative shall be taken or motion made thereunder unless the following conditions precedent have been complied with:

(1) Issue must have been joined in the action;

(2) One year must have elapsed since the joinder of issue or six months must have elapsed since the issuance of the preliminary court conference order where such an order has been issued, whichever is later;

(3) The court or party seeking such relief, as the case may be, shall have served a written demand by registered or certified mail requiring the party against whom such relief is sought to resume prosecution of the action and to serve and file a note of issue within ninety days after receipt of such demand, and further stating that the default by the party upon whom such notice is serve in complying with such demand within said day period will serve as a basis for a motion by the party serving said demand for dismissal as against him or her for unreasonably neglecting to proceed. Where the written demand is served by the court, the demand shall set forth the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.

§2. This act shall take effect on the first day of January next succeeding the date on

which it shall become law.

6. Enacting a Waiver of Privileged Confidential Information for Exclusive Use in a Civil Action (CPLR 4504(a))

CPLR 4504 creates an evidentiary privilege governing communications between a patient and his or her physician, as well as other named persons attending a patient in a professional capacity, regarding information necessary to enable that physician or other named person to act in that professional capacity. In recent years, court decisions have made clear that, under this statute, the results of any tests administered following a motor vehicle accident which reveal the alcohol or drug contents in the body of the operator of a motor vehicle are not to be discoverable nor admitted into evidence in a civil action unless the test is administered at the direction of a public officer or by court order. (See, Dillenbeck v. Hess, 73 N.Y.2d 278 (1989); Neferis v. DeStefano, 265 A.D.2d (2d Dept. 1999); Fox v. Marshall, 2012 NY Slip Op. 00328 (2d Dept., Jan. 2012); NYS Vehicle and Traffic Law §1194).

We believe that the Legislature must address the evidentiary problem unforeseen at the time the privilege was enacted. This measure would do this. It would enact a waiver of the privilege by an operator of a motor vehicle in this state who has been in a motor vehicle accident upon whom medical tests were administered following the accident, *solely* as to the results of the tests administered where the tests reveal the contents of alcohol or drugs in the driver's body and for the *exclusive* purpose of use in a civil action.

In this regard, we agree with the views expressed by the dissent in Dillenbeck that such an amendment would further the strong public policy of this State to prevent the driving of a motor vehicle while impaired by alcohol or drugs.

This measure is intentionally narrow and does not infringe upon the confidentiality between a patient and his or her health care provider. The waiver does not include notes or observations made or recorded in a patient's chart nor a patient's statements made in the emergency room or elsewhere nor any other test results nor any written or verbal communication between the patient and his or her healthcare professional. This permits the trial court to allow the discovery of and admission into evidence the results of a test taken after a motor vehicle accident revealing the alcohol or drug contents in the motor vehicle operator's body.

Proposal

AN ACT to amend the civil practice law and rules, in relation to waiver of privileged confidential information

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

Section 1. Subdivision (a) of section 4504 of the civil practice law and rules, as amended by chapter 555 of the laws of 1993, is amended to read as follows:

(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he or she acquired in attending a patient in a professional capacity, and which was necessary to enable him or her to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.

An operator of a motor vehicle in this state shall be deemed to have waived this privilege in regard to the results of any tests administered following a motor vehicle accident which reveal the alcohol or drug contents in such operator's body. A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this subdivision. For the purposes of this subdivision:

1. "person" shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and

2. "Insurance benefits" shall include payments under a self-insured plan.

§2. This act shall take effect on the first day of January next succeeding the date on

which it shall have become law and it shall apply to any action commenced on or after that date.

III. Modified Measures

1. Eliminating the Distinction Between a Party and a Non-Party When Seeking Disclosure from a Non-Party (CPLR 3101(a); 3101(d)(1)(iii))

The purpose of this measure is to clarify the scope of disclosure available with respect to non-parties to an action, and to resolve a split among the various Departments of the Appellate Division. The measure has been modified in this 2013 Report to clarify that the language of CPLR 3101(d)(1)(iii) is specifically meant to preserve existing law under 3101(a)(3)(deleted by this measure) to allow disclosure of the person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to that party demanding disclosure or who has been retained by that party as an expert witness.

Prior to 1984, CPLR 3101 provided that non-party disclosure would be available only upon a motion showing "special circumstances" warranting disclosure by a non-party. In 1984, CPLR 3101(a) was amended. First, the amendment permitted the party seeking a deposition to serve a subpoena upon the non-party, without the need to first obtain permission of the court. Second, the amendment rejected the "special circumstances" test. Instead, the current statute simply requires that the subpoena, and the notice served on all other parties, state "the circumstances or reasons such disclosure is sought or required" (CPLR 3101(a)(4)).

Despite the 1984 amendment, the Appellate Division, Second Department, continued to apply the "special circumstances" test whenever a non-party sought to challenge a disclosure subpoena [see, Dioguardi v. St. John's Riverside Hospital, 144 AD2d 333 (2d Dept. 1988); Matter of Cavallo, 66 AD3d 675 (2d Dept. 2009)]. The First and Fourth Departments, however, disagreed, holding that the purpose of the amendment was to eliminate that test, and treat non-parties equally with parties with respect to disclosure [see, Matter of New York County DES Litigation, 171 AD2d 119 (1st Dept. 1991)(the test is "usefulness and reason," and the barrier is "truly a nominal one"); Cavaretta v. George, 270 AD2d 862 (4th Dept. 2000)].

Recently, the Second Department has revisited the issue, and, while conceding that the "special circumstances" test no longer appears in the statute, held that "a motion to quash is, thus, properly granted where the party issuing the subpoena has failed to show that the disclosure sought cannot be obtained from sources other than the nonparty" [Kooper v. Kooper, 74 AD3d 6

(2d Dept. 2010)]. The Third Department has agreed with that conclusion, noting that, by contrast, "the Appellate Division, Fourth Department has evidently adopted" the "material and necessary" standard for non-party disclosure [Matter of Troy Sand & Gravel Company, Inc. v. Town of Nassau, 80 AD3d 199 (3d Dept. 2010)].

The First Department has recently reiterated its view that the statute mandates "full disclosure of all matter material and necessary in the prosecution of defense of an action," and that "the person seeking to quash a subpoena bears "'the burden of establishing that the requested documents and records are utterly irrelevant'" [Ledonne v. Orsid Realty Corp., 83 AD3d 598 (1st Dept. 2011)].

In this Committee's view, the First and Fourth Departments are correct, and the statute should be amended in order to make clear that no statutory barrier prevents disclosure of all matter "material and necessary" to an action, whether possessed by a party or a non-party. The Committee believes that the fact that information held by a non-party may also be within the knowledge of a party should not, in and of itself, be a basis for precluding discovery of that non-party. A party's right to discovery of all the material and necessary facts, and its right to seek confirmation, or to test the veracity of, a party's version of the facts should be liberally construed.

Of course, in any individual instance, the court retains the discretionary authority to "make a protective order denying, limiting, conditioning or regulating the use of any discosure device" to "prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice to any person or the courts" [CPLR 3103(a)]. Moreover, the non-party will not have to bear the expense of any production. CPLR 3122(d) provides, in relevant part, that "the reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery."

Proposal

AN ACT to amend the civil practice law and rules, in relation to the scope of disclosure by a non-party

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

Section 1. Subdivision (a) of section 3101 of the civil practice law and rules, as amended by chapter 98 of the laws of 1993, is amended to read as follows:

(a) Generally. There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by [:

(1) a party, or the officer, director, member, agent or employee of a party;

(2) a person who possessed a cause of action or defense asserted in the action;

(3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness; and

(4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required] any person. A subpoena served upon a non-party shall state the nature of the action.

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

(iii) 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 restrictions as to scope and provision 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,] has provided medical, dental or podiatric care or

diagnosis to the party demanding disclosure or who has been retained by that party as an expert witness 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.

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

2. Setting a Time 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, which could be modified by the court to give earlier or later expert disclosure depending on the needs of the case.

Current Law

Current CPLR § 3101(d)(1) requires that each party must, "[u]pon request, identify each person whom the party expects to call as an expert witness." The disclosing party must also provide certain other information, including "the substance of the facts and opinions on which each expert is expected to testify." (The names of the experts may be withheld in medical, dental and podiatric malpractice actions.)

The problem with the current statute is that it does not say (a) *when* such disclosure must be made, or (b) whether the affidavit of a previously undisclosed expert may be used *to support or oppose a motion for summary judgment*. As a result, courts have rendered inconsistent decisions as to when expert disclosure is due, and parties have found it difficult to gauge what they must do to assure that they can rely upon their experts at trial or within the context of summary judgment motions.

The most recent appellate ruling of note, Rivers v. Birnbaum, 953 N.Y.S.2d 232, 2012 WL 4901445 (2d Dep't October 27, 2012), nicely underscores the uncertainties inherent in the current statute. The Court there noted that the current statute "does not specify when a party must disclose its expected trial experts upon receiving a demand." The Court concluded that, by failing to provide any deadline for disclosure, "the statute itself specifically vests a trial court with the discretion to allow the testimony of an expert who was disclosed near the commencement of trial," and that courts also have the "discretion" to "consider an affidavit or affirmation from that expert submitted in the context of a motion for summary judgment."

In other words, virtually every question connected to the timeliness of the disclosure is now a function of the court's "discretion." Yet, if virtually all determinations regarding expert disclosure are discretionary, that means that two judges can render very different rulings on much the same facts. It also means that a party will not know in advance what will occur if he or she delays hiring and disclosing an expert, perhaps in the hope that the case may settle without

incurring the costs of retaining an expert.

The Proposal

The proposal sets forth specific deadlines for disclosure of experts. The party with the burden of proof on a claim, cause of action, damage or defense must disclose his or her experts "at least sixty days before the date on which the trial is scheduled to commence." The opposing party then has thirty days to disclose his or her responsive experts. These deadlines can be modified by a court order in the case or by a rule of the Chief Administrator of the Courts.

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

The amendment would also make clear that expert disclosure, while a prerequisite for trial, is not required for purposes of summary judgment motions.

The Committee recognizes that trial dates are fluid and such dates are often adjourned. When the trial is adjourned, the deadline to serve expert information will also shift. Yet until the trial date is adjourned, counsel should assume that the trial date is fixed and act accordingly in making expert disclosure.

Moreover, this amendment would not affect the trial court's ability to set a specific date for expert disclosure, apart from the deadlines set forth in the proposal, so long as such dates are set forth in the scheduling order and the parties are apprised of the specific date. The Committee believes that such active case management and the setting of deadlines will promote efficient case management.

What The Proposal Would Not Change

The amendment would not alter what must be provided, and would not alter the current law regarding deposition of experts. It would merely set forth when the disclosure must occur.

The amendment also would not apply to any "treating physician or other treating health care provider for whose records a patient authorization is given to the opposing party." This would codify the current, judge-made rule that 3101(d)(1) disclosure need not be made of a treating physician for whose records a patient authorization is given to the opposing party. See Jiang v. Dollar Rent A Car, Inc., 91 A.D.3d 603 (2d Dep't 2012); Casey v. Tan, 255 A.D.2d 900, 900 (4th Dep't 1998); Rosati v. Brigham Park Co-Op. Apartments, 37 Misc.3d 1206(A), Slip Op

2012 WL 4748396.

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. If the trial is adjourned, the deadlines in this subparagraph shall shift accordingly. 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) This subparagraph shall not apply to a treating physician or other treating health care provider for whose records a patient authorization is given to the opposing party.

§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.

3. Allowing the Use of an Affirmation in a Civil Action by Any Person (CPLR 2106)

The Committee recommends the amendment of CPLR 2106 to permit the use of an affirmation in place of an affidavit for all purposes in a civil action, a procedure modeled upon the Federal declaration procedure (*see* 28 USCA 1746; unsworn declarations under penalty of perjury). This proposal has been amended to add the words "under the laws of New York" in the affirmation.

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)). However, specified professional persons (attorney, physician, osteopath or dentist) may substitute an affirmation for an affidavit in judicial proceedings in which they are not a party. This measure would broaden the statute to permit the use of an affirmation in place of an affidavit for all purposes in a civil action with no restriction to non-parties.

The current law has created two significant problems in New York practice. First, the requirement for notarization places a major burden on unrepresented litigants who have difficulty locating a notary. Second, the requirement has made it extremely burdensome to obtain equivalent notarization in foreign countries, which is a common occurrence in major commercial litigation.

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, there should be no impediment caused by lack of a notary. In addition, the Committee is advised that some persons have religious objections to swearing, but no such objections to affirming. This change would offer an alternative to swearing to the truth of a paper submission that is presently available to live witnesses giving testimony. [See, CPLR 2309 (a), (b)].

It is even more burdensome to execute an affidavit abroad. Questions often arise as to

who would be the appropriate official that would be equivalent to a New York notary and whether the affidavit obtained in a foreign country may be unusable in New York litigation. See Green v. Fairway Operating Corp., 72 A.D. 3d 613, 898 N.Y.S. 2d 848 (1st Dept. 2010); Matter of Eggers, 122 Misc.2d 793, 471 N.Y.S.2d 570 (Surr. Ct., Nassau Co. 1984). Commercial litigants with international cases in the Commercial Division of State Supreme Court increasingly must go to extraordinary lengths to obtain affidavits notarized overseas. This in turn detracts from the desirability of New York as a forum for international commercial disputes, which desirability is important for maintaining New York as an international commercial center. These concerns have led to the proposed adoption of the Uniform Unsworn Foreign Declarations Act as promulgated by the Uniform Law Commission which would allow declarations to be executed abroad without the need for a notary's attestation. The Committee believes, however, that a statute allowing affirmations in all litigation circumstances by all persons is more appropriate for inclusion in the CPLR.

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." CPLR 2309(b); see People v. Coles, 141 Misc.2d 965, 535 N.Y.S.2d 897 (N.Y. Sup. Ct., Kings Co. 1988) (waiver of immunity held to be under "oath" if defendant testified to grand jury that signature on it was his); People v. Lennox, 94 Misc.2d 730, 405 N.Y.S.2d 581 (N.Y. Sup. Ct., Westchester Co. 1978) (signature above words to the effect that document signed under penalties for perjury would satisfy requirement for sworn traffic information). Because the affirmation authorized by the amendment would be used by a much larger group than the limited classes of professionals now permitted, and such may not be familiar with the particulars of the law of perjury, the amendment requires that the signer affirm the facts stated in this form:

> I affirm this ____day of ____, ____, under the penalties of perjury under the laws of New York, 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)

The proposed amendment will result in greatly expanded use of the CPLR 2106 affirmation, and it is likely to supplant the use of making affidavits in almost all circumstances.

Accordingly, the Committee considered whether there is any difference in the charges or punishment between perjury by affidavit or affirmation. The Committee concluded that, whether made in an affidavit or in the form of an affirmation as proposed in amended CPLR 2106, a false statement made with the intention of misleading the court will constitute perjury in the second degree, a Class E felony punishable by up to four years imprisonment. Penal Law §§ 70.00(2)(b), 210.00 (1) and (5), 210.10.

The Committee considered the widespread concern about misleading or inaccurate affidavits and affirmations by attorneys submitted in foreclosure proceedings, as reflected in Rule 202.12-A(f) of the Uniform Rules of the New York State Trial Courts permitting the Chief Administrative Judge to require counsel to file "affidavits or affirmations confirming the scope of inquiry and the accuracy of papers filed in residential mortgage foreclosure actions." However, the Committee concluded that, because this proposed amendment makes no change to the use of affirmations by attorneys, it will have no impact on the filing of affidavits and affirmations by attorneys in foreclosure actions.

Proposal

AN ACT to amend the civil practice law and rules, in relation to n affirmation by any person in a civil action

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

Section 1. Rule 2106 of the civil practice law and rules, as amended by judicial conference proposal number 3 for the year 1973, is amended to read as follows:

Rule 2106. Affirmation of truth of statement [by attorney, physician, osteopath or dentist]. The statement of [an attorney admitted to practice in the courts of the state, or of a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to an action] any person, when subscribed and affirmed by [him] that person to be true under the penalties of perjury, may be [served or filed] used in [the] an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

> I affirm this day of , , under the penalties of perjury under the laws of New York, 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)

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

4. Allowing the Non-party Witness to Make Objections at a Deposition (CPLR 3113(c))

The purpose of this measure is to legislatively overrule the decision of the Appellate Division, Fourth Department, in Thompson v. Mather, 70 AD3d 1436 (4th Dept 2010). The measure has been amended in 2013 to provide an appropriate limit on the participation of the non-party's counsel.

In Thompson, a medical malpractice action, arrangements were made for the videotaped depositions - for use at trial (22 NYCRR 202.15) - of plaintiff's treating physicians. During the course of those depositions, the attorney for a witness objected to the form and relevance of certain questions. The Appellate Division ultimately ruled that "counsel for a nonparty witness does not have a right to object during or otherwise to participate in a pretrial deposition." The Court principally relied upon the language of CPLR 3113(c), which provides that the examination of witnesses at a deposition "shall proceed as permitted in the trial of actions in open court." And, reasoned the Court, since a non-party's attorney has no right to interpose objections to questions asked of the witness at trial, no such right exists at deposition.

While the Thompson Court may have correctly interpreted the literal language of the statute, it has, in the Committee's view, reached the wrong result. In reducing counsel for a deposition witness to a "potted plant" [Sciara v. Surgical Associates of Western New York, P.C., 32 Misc.3d 904, 927 N Y S 2d 770 (Sup. Ct. Erie Co.2011)], the Thompson decision leaves a non-party witness essentially unprotected during a deposition. A lay witness may not, for example, know when to decline to answer a question because it invades a privilege, or is plainly improper and would, if answered, cause significant prejudice to any person. Moreover, a likely result of application of the Thompson ruling is that a party will be encouraged to depose a potential adverse party before joining that person as a party to the action, in order to be able to avoid the objections that a party's lawyer would be able to make at a post-joinder deposition. The Committee believes that this strategy ought not be promoted.

In the Sciara decision cited above, Supreme Court interpreted Thompson's restrictions as being limited to objections to form or relevance. That interpretation, if upheld, would ameliorate the deleterious effects of Thompson. But this Committee believes that a witness's attorney should be able to protect all of the witness's interests, and have the same right to object at a

deposition as does an attorney for a party.

Accordingly, we have recommended an amendment to CPLR 3113(c) to specifically provide that a non-party's counsel "may participate in the deposition and make objections *on behalf of his or her client* in the same manner as counsel for a party."

Proposal

AN ACT to amend the civil practice law and rules, in relation to conduct of the examination before trial

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

§1. Subdivision (c) of section 3113 of the civil practice law and rules, is amended to read as follows:

(c) Examination and cross-examination. Examination and cross-examination of deponents shall proceed as permitted in the trial of actions in open court, except that a non-party deponent's counsel may participate in the deposition and make objections on behalf of his or her client in the same manner as counsel for a party. When the deposition of a party is taken at the instance of an adverse party, the deponent may be cross examined by his or her own attorney. Cross-examination need not be limited to the subject matter of the examination in chief.

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

5. Permitting Review of a Non-Final Judgment or Order In Certain Circumstances (CPLR 5501(e) (new))

This proposal would add a new subdivision (e) to CPLR § 5501 in relation to the scope of review of non-final judgment and orders. It would also permit appellate review of a non-final judgment or order that does not "necessarily affect" a final judgment.

This proposal is designed to address two problems that arise under the current law. First, there is substantial confusion in the case law as to what non-final judgments "necessarily affect" a final judgment. This matter was most recently illustrated by the Court of Appeals decision in Siegmund Strauss, Inc. v. East 149th Realty Corp., 20 N.Y.3 37, 2012 WL. 5199393 *reversing* Siegmund Strauss, Inc. v. East 149th Realty Corp., 181 A.D.3d 260 (1st Dep't 2010). This uncertainty in the case law is amply illustrated by two recent articles in the New York Law Journal [see, Thomas R. Newman and Steven J. Ahmuty, Jr., The 'Necessarily Affects' Requirement of CPLR 5501 (NYLJ, Nov. 8, 2012); Thomas F. Gleason, Dangerous Interactions: Interlocutory Appeals and Judgments (NYLJ, Nov. 19, 2012)].

Under the current law, a careful litigant will take an interlocutory appeal of any decision where there is a question as to whether that decision necessarily affects the final judgment. This is true even in cases where it might be more prudent to await the final judgment before taking the appeal, either because the matter will ultimately become moot or because the issue will be more fully developed and would be better understood by the appellate court when the appeal is taken into context of a final decision. Nonetheless, the uncertainty underlying what necessarily affects the final judgment prevents the careful litigant from waiting with regard to any such appeal. With this change, parties would preserve the right to appeal all interlocutory orders until appeal from the final judgment.

Eliminating the requirement that an appeal necessarily affect the final judgment would not increase the work load of the appellate court. Indeed, it may well reduce the number of interlocutory appeals since litigants will not be compelled to file an interlocutory appeal on matters that do not or may not affect the final judgment. Once the final judgment is entered, that appeal could become moot or of little consequence and therefore would no longer require the involvement of the appellate court.

The second problem is the *result* of the Court of Appeals decision in Matter of Aho, 39

N.Y.2d 241 (1976), in which the court held that an appeal from an interlocutory order immediately terminates with the entry of a final judgment. In certain circumstances, this can eliminate a party's right to appellate review where the non-final order does not "necessarily affect" the final judgment. For example, an order imposing sanctions on an attorney or litigant would not necessarily affect the final judgment, so it would not be subject to review in the context of an appeal from the final judgment. Likewise, an order dismissing a cross-claim or third-party claim for indemnification may not necessarily affect the final judgment and such an appeal would terminate upon final judgment in favor of the plaintiff. Thus, even if an appeal from such an order had been fully briefed and argued, but not decided, at the time of the entry of judgment, appellate review would be foreclosed. Even in the case where the order appealed from necessarily affects the final judgment, the party's appeal would terminate upon entry of judgment, resulting in a tremendous waste of the party's and the court's resources.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the scope of review of non-final judgments and orders

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

Section 1. Section 5501 of the civil practice law and rules is amended to read as follows:

§ 5501. Scope of Review. (a) Generally, from final judgment. An appeal from a final judgment brings up for review:

1. any non-final judgment or order [which necessarily affects the final judgment], including any which was adverse to the respondent on the appeal from the final judgment and which, if reversed, would entitle the respondent to prevail in whole or in part on that appeal, provided that such non-final judgment or order has not previously been reviewed by the court to which the appeal is taken;

2. any order denying a new trial or hearing which has not previously been reviewed by the court to which the appeal is taken;

3. any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant, to which he objected;

4. any remark made by the judge to which the appellant objected; and

5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

(b) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty-six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the

non-final determination of the appellate division shall be reviewed.

(c) Appellate division. The appellate division shall review questions of law and questions of fact on an appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. The notice of appeal from an order directing summary judgment, or directing judgment on a motion addressed to the pleadings, shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal, without however affecting the taxation of costs upon the appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

(d) Appellate term. The appellate term shall review questions of law and questions of fact.

(e) Non-final judgments and orders. The entry of a final judgment shall not affect the appealability of a party's pending appeal of any non-final judgment or order.

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

6. Extending Discretion to the Court to Retain Alternate Jurors After Final Submission (CPLR 4106)

The Committee recommends the revision of CPLR section 4106 to permit the court in its discretion to retain one or more alternate jurors after final submission of the case to ensure availability if needed during deliberation. The proposed amendment of 4106 also addresses the manner in which the retained alternate jurors may be utilized.

Current 4106 provides that after final submission of the case, "the court shall discharge the alternate jurors". As a consequence, in the event that a juror becomes disabled during deliberations, the court must declare a mistrial unless all parties consent to proceed with a five person jury, which consent is rarely obtained. In cases of several weeks duration, classically commercial, medical malpractice or products liability cases, a mistrial results in a tremendous waste of time and money for the litigants, the attorneys, and the court, and frustration for the remaining jurors who have served throughout a prolonged trial in an effort to render a verdict. There is a continuing disparity among many courts statewide as to the practice regarding alternate jurors.

The Committee also recommends amendment of 4106 to address the manner in which the retained alternate jurors may be utilized by providing that once deliberations have begun, the court may allow an alternate juror to participate in such deliberations only if a regular juror becomes unable to perform the duties of a juror.

The proposed amendment also makes gender-neutral changes. The Committee appreciates the recommendations of Honorable Philip G. Minardo, former Administrative Judge, Richmond County, regarding the amendment of 4106. Judge Minardo made his recommendations on behalf of and with the support of the New York State Association of Supreme Court Justices and the New York City Association of Supreme Court Justices.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the discretionary retention of alternate jurors after final submission of the case

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

Section 1. Section 4106 of the civil practice law and rules, as amended by chapter 336 of the laws of 1972, is amended to read as follows:

4106. Alternate jurors. [Unless the court, in its discretion, orders otherwise, one] One or [two] more additional jurors, to be known as "alternate jurors", may be drawn upon request of a party and consent of the court. Such alternate jurors shall be drawn at the same time, from the same source, in the same manner, and have the same qualifications as [the] regular jurors, and be subject to the same examinations and challenges. They shall be seated with, take the oath with, and be treated in the same manner as the regular jurors [, except that after]. After final submission of the case, the court [shall discharge the] may, in its discretion, retain such alternate jurors [. If] to ensure availability if needed. At any time before or after the final submission of the case, if a regular juror dies, or becomes ill, or [for any other reason] unable to perform [his duty] the duties of a juror, the court may order [him to be] that juror discharged and draw the name of an alternate, or retained alternate, if any, who shall replace the discharged juror [in the jury box] and be treated as if [he] that juror had been selected as one of the regular jurors. Once deliberations have begun, the court may allow an alternate juror to participate in such deliberations only if a regular juror becomes unable to perform the duties of a juror.

§2. This act shall take effect on the first day of January next succeeding the date on which it shall become law and shall apply to all actions commenced on or after such date and to all pending actions on such date in which a jury has not yet been selected.

IV. Previously Endorsed Measures

1. Extending to 30 Days the Rule on Notice of Intention to Arbitrate CPLR 7503(c))

The Committee recommends an amendment to subdivision (c) of CPLR 7503, which presently provides for the service of a demand for arbitration or notice of intention to arbitrate, and the time in which to object to arbitrability. The notice requirement includes specificity regarding the agreement to arbitrate and a statement that unless the party served with a demand applies to stay the arbitration within twenty days after service, they shall thereafter be precluded from challenging the agreement to arbitrate or from asserting in court the bar of the statute of limitations.

The service of a demand for arbitration may be done in the manner of a summons, but also by registered or certified mail, return receipt requested. The requirement under 7503(c) that the application must be made "within twenty days after service" has been interpreted to mean receipt by the respondent in the arbitration. (Knickerbocker Insurance Co. v. Gilbert, 28 NY2d 57, 66 [1971]; Prudential Securities Inc. v. Warsh, 214 AD2d [2d Dept 1995]). Nevertheless, particularly in cases where there may be a genuine dispute regarding the existence or scope of the agreement to arbitrate, or where documentary evidence of same must be obtained, the twenty day time period can be unreasonably short, and raise difficulties for a party with a legitimate objection to arbitration.

The public policy in favor of arbitration is strong, and the twenty day period advances the objective of a swift and sure resolution of the arbitrability question. However, the Committee believes that on balance, extending the period of time from twenty to thirty days will ameliorate some legitimate difficulties of a party with a valid objection to arbitration, and at the same time not unreasonably affect the policy in favor of swift resolution of arbitration disputes.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the notice of intention to arbitrate

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

§1. Subdivision (c) of section 7503 of the civil practice law and rules, is amended to read as follows:

(c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within [twenty] thirty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within [twenty] thirty days after service upon him of the notice or demand, or [he] the party shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. Service of the application by mail shall be timely if such application is posted within the prescribed period. Any provision in an arbitration agreement or arbitration rules which waives the right to apply for a stay of arbitration is hereby declared null and void.

§2. 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 actions pending on such effective date or commenced on or after such effective date.

2. Addressing CPLR Article 16 Issues in Relation to Apportionment of Liability for Non-economic Loss in Personal Injury Actions (CPLR 1601, 1603, 3018)

The Committee recommends amendments of CPLR §§ 1601, 1603 and 3018(b) that would (1) correct an anomaly that arises from the current wording of CPLR § 1601, and (2) resolve a continuing disagreement between the Departments of the Appellate Division concerning whether a plaintiff is entitled to discover what claims, if any, the defendant intends to make at trial concerning the culpability of non-parties.

CPLR Article 16

Both of the proposed changes concern the workings of CPLR Article 16. Article 16, which was enacted in 1986 and applies solely to personal injury actions, provides that, except in those instances detailed in CPLR § 1602, a defendant who is assigned "fifty percent or less of the total liability" can limit his or her liability to that percentage share of the plaintiff's non-economic loss. Thus, a defendant assigned 30% of the fault is responsible for only 30% of plaintiff's pain and suffering damages, but is still jointly and severally responsible for the plaintiff's economic loss.

Prior to the article's enactment, a joint tortfeasor was responsible to the plaintiff for the entire judgment, regardless of its share of the fault. Rangolan v. County of Nassau, 96 N.Y.2d 42, 46, 725 N.Y.S.2d 611, 614-615 (2001). Although the tortfeasor might then seek contribution or indemnification from any others who contributed to causing the plaintiff's injury, such right could well be academic in the event that the others were bankrupt, judgment-proof, or were otherwise not subject to liability.

The statute was intended to modify the common law so as to assure that a defendant assigned a minor share of the fault would bear that same share of the liability for the plaintiff's non-economic loss. Rangolan, *supra*.

Correction Of The Anomaly Concerning The Plaintiff's Own Culpability

The proposed amendment of CPLR § 1601 would correct an anomaly that may occur when the plaintiff is found partially at fault for the subject injuries. As Justice Mark C. Dillon

recently noted in the Albany Law Review (73 Alb.L.Rev. 79 [2009]), there is an instance in which a defendant assigned 50% or less of the total culpability can nonetheless derive no benefit under CPLR § 1601.

As presently worded, the benefits of CPLR § 1601 go to a defendant who is assigned "fifty percent or less of the total liability assigned to all persons liable." While that may seem a long-winded way of saying "fifty percent or less of the total culpability," it is not. The difference arises when one of the culpable persons is the plaintiff.

Since the plaintiff is not "liable" for his or her own injury and is therefore not a "person liable," the plaintiff's culpability will not "count" for purposes of the statutory computation. This leads to the bizarre result that the defendant's rights could be *reduced* by virtue of the plaintiff's negligence.

If, for example, plaintiff is assigned 60% of the fault while defendants Smith and Jones are respectively assigned 30% and 10% of the fault, Smith's share of the "total culpability" is 30% but his or her share of the "total liability assigned to all persons liable" is 75%. Smith is thus wholly denied any benefits of Article 16 simply because the 60% share of the fault was assigned to the plaintiff rather than to another defendant or a non-party.

The problem noted by Justice Dillon is not merely theoretical. Those decisions that have addressed the issue have held that the "fifty percent or less" tortfeasor obtains no benefit under the statute in the circumstance in which it is the plaintiff's culpability that keeps the defendant below the 51% mark. Risko v. Alliance Builders Corp., 40 A.D.3d 345, 835 N.Y.S.2d 551 (1st Dep't 2007); Robinson v. June, 167 Misc.2d 483, 637 N.Y.S.2d 1018 (Sup. Ct. Tompkins Co. 1996).

The Committee believes that the Legislature could not have intended the consequences noted above, and, in any event, that apportionment in terms of "culpability" rather than "liability" would better effectuate the policies that the Legislature sought to promote. The Committee recommends that the statute be amended accordingly.

Amendment Of CPLR § 1603 To Resolve
The *Marsala*/*Ryan* Discovery Issue

The proposed amendments of CPLR §§ 1603 and 3018(b) would not alter the defendant's

current rights to limit liability under CPLR Article 16, but would resolve whether the plaintiff is entitled to notice and discovery concerning the claims that the defendant intends to advance at trial. The issue has been the subject of conflicting rulings by the Second and Fourth Departments of the Appellate Division.

In Ryan v. Beavers, 170 A.D.2d 1045, 566 N.Y.S.2d 112 (1991), the Appellate Division for the Fourth Department noted that, under the terms of CPLR § 1603, a defendant seeking to limit its liability under Article 16 bears the burden of proving that some other or others were also at fault in causing the subject injuries. For that reason, the Court ruled that the plaintiff was entitled to demand a bill of particulars specifying which persons were alleged to have negligently caused plaintiff's injury, and in what respects they were alleged to have acted negligently.

In Marsala v. Weinraub, 208 A.D.2d 689, 617 N.Y.S.2d 809 (1994), the majority of a divided Second Department panel reached the opposite conclusion. Noting that CPLR Article 16 did not characterize the claim to limit liability as an "affirmative defense," the majority ruled that it logically followed that the plaintiff was not entitled to demand any particulars regarding the claims that the defendant intended to assert at trial regarding Article 16 limitation of liability.

Since the ruling in Marsala more than a decade ago, the lower courts in the Second Department have, not surprisingly, continued to adhere to the binding ruling in Marsala. The contrary ruling in Ryan remains good law in the Fourth Department. Neither the First Department nor the Third Department has addressed the issue. Nor is it likely that the Court of Appeals will ever pass on the matter inasmuch as discovery disputes rarely reach that Court. Meanwhile, courts in the First and Third Departments must struggle with conflicting precedents. Maria E. v. 599 West Associates, 188 Misc.2d 119, 726 N.Y.S.2d 237 (Sup. Ct. Bronx Co. 2001).

As a result of the ruling in Marsala, a plaintiff in the Second Department may not discover until the trial itself which non-parties are claimed to be responsible for the subject injuries or in what respect they are claimed to have negligently caused the injuries. When that information becomes evident during the trial itself, it may not be possible to depose witnesses or otherwise seek to conduct discovery regarding the merits of the allegations. Further, while it is possible that the issue concerning the non-party's alleged negligence was directly or indirectly

referenced in a deposition, document, or expert disclosure notice, such will not necessarily have occurred and it is even possible that the non-party's very existence and role in causing the injury was known only to the defendant.

The Committee believes that the rule espoused in Marsala can result in the kind of "trial by ambush" that has long been deemed unacceptable in modern jurisprudence. Aside from the obvious problem with fairness, such practice can lead to situations in which a defense that would have failed if the operative facts were known instead succeeds.

The amendment would alter CPLR 3018(b) so as to list the Article 16 defense along with other affirmative defenses. This would have the practical effect of statutorily endorsing Ryan and rejecting Marsala.

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.

Proposal

AN ACT to amend the civil practice law and rules, in relation to apportionment of liability for non-economic loss in personal injury actions

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

Section 1. Subdivision 1 of section 1601 of the civil practice law and rules, as amended by chapter 635 of the laws of 1996, is amended to read as follows:

1. Notwithstanding any other provision of law, when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an action involving two or more tortfeasors jointly liable or in a claim against the state and the liability of a defendant is found to be fifty percent or less of the total [liability assigned to all persons liable] culpability of all persons deemed culpable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total [liability] culpability for non-economic loss; provided, however that the culpable conduct of any person not a party to the action shall not be considered in determining any equitable share herein if the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person in said action (or in a claim against the state, in a court of this state); and further provided that the culpable conduct of any person shall not be considered in determining any equitable share herein to the extent that action against such person is barred because the claimant has not sustained a "grave injury" as defined in section eleven of the workers' compensation law.

§2. 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 or section sixteen hundred two applies. A party seeking 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] culpability is fifty

percent or less of the total culpability.

§3. 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.

§4. This act shall take effect on the first day of January next succeeding the date on which it shall become law and shall apply to all actions commenced on or after such effective date and to all pending actions on such effective date in which trial has not yet commenced.

3. Amending the General Obligations Law in Relation to the Limitation of Non-statutory Reimbursement and Subrogation
(Gen. Ob. L. § 5-335)

This measure would amend General Obligations Law §5-335, which was enacted in 2009 (L. 2009, c. 494, pt. F, § 8, eff. Nov. 12, 2009) to further facilitate resolution of personal injury lawsuits.

Section 5-335 was enacted in response to the Court of Appeals' decision in Fasso v. Doerr, 12 NY3d 80 (2009). The Fasso Court held that the parties to a personal injury lawsuit could not enter into a settlement without the consent of a health insurer that had intervened in the action, thereby upholding the right of the health benefit provider to pursue a subrogation claim. Consistent with CPLR §4545, which bars plaintiffs in personal injury actions from recovering expenses that have been paid for by collateral sources, the recently enacted GOL §5-335 creates a conclusive presumption that a personal injury settlement does not include compensation for health care costs and other expenses paid by a benefit provider. It further states that unless there is a statutory right of reimbursement, no party entering into a settlement shall be subject to a subrogation or reimbursement claim by a benefit provider with respect to the losses or expenses paid by the provider.

However, the recent decision in Rink v. State of New York, 27 Misc.3d 1159 (Ct. Claims 2009), demonstrates that further clarification is necessary so that the goals underlying GOL §5-335 can be accomplished. The Rink court granted a health insurer's motion to intervene in a pending medical malpractice action, holding that GOL §5-335 addresses only situations in which the insured and tortfeasor have settled an action and not those in which litigation is still pending. The Committee believes that such intervention is impliedly precluded by current law except where intervention is sought to enforce a statutory right of reimbursement or subrogation. The measure would make that explicit. It would also provide that unless there is a statutory right of reimbursement, a benefit provider may not intervene in a personal injury or wrongful death action, in order to assert a subrogation claim or claim for reimbursement with respect to those losses or expenses.

The proposed amendment adopts the predominant view in the Appellate Divisions, under which intervention by health insurers is precluded (see Fasso, 12 NY3d at 89). Moreover, the

proposal is fully consistent with the purposes underlying the collateral source provisions of CPLR §4545 as well as other 1980s legislation enacted in response to the liability crisis in that it would provide savings to parties to personal injury litigation and liability insurers, simplify and reduce the cost of litigation, and facilitate settlement.

Proposal

AN ACT to amend the general obligations law, in relation to the limitation of non-statutory reimbursement and subrogation

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

Section 1. Section 5-335 of the general obligations law, as added by chapter 494 of the laws of 2009, is amended to read as follows:

§5-335. Limitation of non-statutory reimbursement and subrogation claims in personal injury and wrongful death actions. (a) When a plaintiff settles with, or obtains judgment against, one or more defendants in an action for personal injuries, medical, dental, or podiatric malpractice, or wrongful death, it shall be conclusively presumed that the settlement or judgment does not include any compensation for the cost of health care services, loss of earnings or other economic loss to the extent those losses or expenses have been or are obligated to be paid or reimbursed by a benefit provider, except for those payments as to which there is a statutory right of reimbursement. By entering into any such settlement or by seeking or obtaining such judgment, a plaintiff shall not be deemed to have taken an action in derogation of any non-statutory right of any benefit provider that paid or is obligated to pay those losses or expenses; nor shall a plaintiff's entry into such settlement or recovery of such judgment constitute a violation of any contract between the plaintiff and such benefit provider.

Except where there is a statutory right of reimbursement, no party entering into such a settlement or obtaining such a judgment shall be subject to a subrogation claim or claim for reimbursement by a benefit provider and a benefit provider shall have no lien or right of subrogation or reimbursement against any such [settling] party, with respect to those losses or expenses that have been or are obligated to be paid or reimbursed by said benefit provider. Except where there is a statutory right of reimbursement, a benefit provider shall not be permitted to intervene in an action for personal injury, medical, dental, or podiatric malpractice, or wrongful death, for the purpose of asserting a subrogation claim or claim for reimbursement with respect to such losses or expenses.

(b) This section shall not apply to a subrogation claim for recovery of additional first-party benefits provided pursuant to article fifty-one of the insurance law. The term "additional

first-party benefits", as used in this subdivision, shall have the same meaning given it in section 65-1.3 of title 11 of the codes, rules and regulations of the state of New York as of the effective date of this statute.

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

4. Permitting Service of a Levy upon any Branch of a Financial Institution to be Effective as to any Account as to Which the Institution is a Garnishee (CPLR §§ 5222(a), 5225(b), 5227, 5232(a) and 6214(a)

The Committee recommends that the "separate entity rule," which limits the effect of levies, restraining notices and orders of attachment served upon financial institutions as garnishees to accounts maintained at the branch served, be legislatively repealed so that service of such levies and orders upon any office of the institution will be effective as to any account held by the institution as garnishee, regardless of any nominal identification of the account with a particular office. While the separate entity rule made sense when considerable time might be required for one branch office to alert others and the main office of service of a levy, when in the current era all offices of every financial institution are in instant communication with each other by computer networks this rule has outlived any usefulness and should be eliminated. The separate entity rule of long standing is that "[I]n order to reach a particular bank account the judgment creditor must serve the office of the bank where the account is maintained…." Therm-X-Chemical & Oil Corp. v. EXTEBANK, 84 A.D. 2d 787, 444 N.Y.S. 2d 26 (2d Dept. 1981) (Restraining notice served on main office of bank ineffective as to branch which did not receive actual notice); McCloskey v. Chase Manhattan Bank, 11 N.Y. 2d 936 (1962) (Warrant of attachment and sheriff's levy in New York ineffective to reach balance of accounts in New York bank's branch in Germany). The original purpose of the rule was to avoid undue interference with ordinary banking transactions and the possibility of a bank suffering multiple liabilities because of the inability for one branch served with a restraining notice or other order to instantaneously notify all other branches.

In recent decades, some decisions have relaxed the rule. In 1980, in an action to enforce a foreign judgment, the Southern District found that service of a restraining notice on the main office of Manufacturer's Hanover Bank was effective to restrain funds in accounts of a branch office, at least in the case of a bank like Manufacturer's Hanover which was largely computerized and had centralized many functions, including imposition of a hold on a depositor's account. DIGITREX, INC., v. Johnson, 491 F. Supp. 66, 69 (U.S.D.C., S.D.N.Y. 1980). In Therm-X-Chemical & Oil Corp., *supra,* the Second Department implicitly endorsed this relaxing of the separate entity rule, but only in the circumstances found by the DIGITREX

court.

It remains the case that the DIGITREX exception is applicable only if (1) the restraining notice is served on the bank's main office, (2) the main office and branch with funds on deposit are in the same jurisdiction and (3) the branches are connected to the main office by high speed computers and are under the centralized control of the main office, all of which elements must be established by the party seeking to exploit the exception. Limonium Maritime, S.A. v. Mizshima Marinera, S.A., 961 F. Supp. 600, 607 (U.S.D.C., S.D.N.Y. 1997) (Denying order of attachment under Federal Supplemental Rule B; citing Therm X. Chemical & Oil Corp., *supra*); National Union Fire Insurance Co. v. Advanced Employment Concepts, Inc., 269 A.D.2d 101, 703 N.Y.S. 2d 3 (1st Dept. 2000). (Holdings of DIGITREX and Limonium Maritime endorsed in decision rejecting attachment of bank account in Florida because beyond the New York court's jurisdiction).

A recent example of the continuing vitality of the separate entity rule occurred in John Wiley & Sons v. Kirtsaeng, 2009 WL 3003242 (SDNY 9/15/2009). In that case plaintiff was seeking an order holding Bank of America ("BOA") in contempt for failing to obey a temporary order of attachment on funds of defendant in an account at a BOA branch in California. The order was served on a branch of BOA in Manhattan and the funds were subsequently paid to the defendant by the California Branch. The Southern District denied the plaintiff's motion because service on BOA did not comply with New York's separate entity rule and the funds as to which attachment was sought were not located in the district of the court issuing the process. The separate entity rule has been applied with equal vigor to enforcement of judgments (Therm-X-Chemical & Oil Corp, *supra*) and attachments (John Wiley, *supra*).

The Committee believes that the now ubiquitous use of computer networks that give all branch offices of a financial institution instantaneous access to central data banks makes the limitation of the separate entity rule obsolete, and its continued existence unnecessarily complicates and limits enforcement of judgments and attachments without any mitigating benefit to concepts of fairness or the functioning of the civil justice system. Accordingly it recommends that the operative language in the CPLR concerning restraining notices (CPLR 5222(a)), turnover orders for property of the debtor (CPLR 5225(b)) or debts owed to the debtor (CPLR 5227), levy upon personal property (CPLR 5232) and orders of attachment (CPLR 6214) be

amended by providing that service upon a financial institution may be made by "serving the institution's main office or any branch office of the financial institution."

The proposed amendments do not directly address another issue raised by service on an office of a garnishee other than that in which the account is nominally maintained, whether or not such service would be effective with respect to property held outside of the state. Two recent opinions of the Court of Appeals have considered the levy and attachment of out-of-state assets.

In Koehler v. Bank of Bermuda, 12 N.Y. 3d 533, 883 N.Y.S. 2d 763 (June 4, 2009), the issue was whether a judgment creditor could compel a bank to turn over stock certificates held in Bermuda by a bank not a party to the action by means of a proceeding commenced pursuant to CPLR 5225(b) in New York where the court had personal jurisdiction over the Bermuda bank. The District Court denied the petition upon the ground that a New York court cannot order turnover of property not within the state. The Second Circuit certified the issue to the New York Court of Appeals, which found that the turn over order should have been granted, because the court had personal jurisdiction over the garnishee, the Bermuda bank.

In Hotel 71 Metz Lender LLC v. Falor, 14 N.Y.3d 30, 926 N.E.2d 303 (2010), the Court of Appeals addressed the same question with respect to attachments. The Court held that because the court below had personal jurisdiction (through his physical presence in New York) over the non-resident garnishee of the property being attached, interests in 23 out-of-state business entities controlled by the garnishee, the attachment was valid notwithstanding the location of the property being attached outside the state.

These decisions address levy and attachment of out of state assets after service has been made and jurisdiction obtained. The amendment proposed by the Committee addresses only how service is made upon a financial institution. The constitutional limits on the execution or garnishment of assets should be determined by case development.

Proposal

AN ACT to amend the civil practice law and rules, in relation to making service upon a financial institution of orders of attachment and notices and orders in aid of enforcement of judgments effective upon any account as to which the institution is a garnishee

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

Section 1. Subdivision (a) of section 5222 of the civil practice law and rules, as amended by chapter 409 of the laws of 2000, is amended to read as follows:

(a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section. It shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it. Service of a restraining notice upon a department or agency of the state or upon an institution under its direction shall be made by serving a copy upon the head of the department, or the person designated by him or her and upon the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested, or if issued by

the support collection unit, by regular mail. Service of a restraining notice upon a financial institution shall be made by serving the institution's main office, the branch office at which defendant's account was maintained, or any branch office of the financial institution.

§2. Subdivision (b) of section 5225 of the civil practice law and rules, as amended by chapter 388 of the laws of 1964, is amended to read as follows:

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceeding shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his rights in accordance with section 5239. Service of an order to show cause and petition or notice of petition and petition commencing a special proceeding pursuant to this subdivision upon a financial institution shall be made by serving the institution's main office, the branch office at which defendant's account was maintained, or any branch office of the financial institution.

§3. Section 5227 of the civil practice law and rules, as amended by chapter 532 of the laws of 1963, is amended to read as follows:

§ 5227. Payment of debts owed to judgment debtor. Upon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment, and to

execute and deliver any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor. Costs of the proceeding shall not be awarded against a person who did not dispute the indebtedness. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his or her rights in accordance with section 5239. Service of an order to show cause and petition or notice of petition and petition commencing a special proceeding pursuant to this section upon a financial institution shall be made by serving the institution's main office, the branch office at which defendant's account was maintained, or any branch office of the financial institution.

§4. Subdivision (a) of section 5232 of the civil practice law and rules is amended to read as follows:

(a) Levy by service of execution. The sheriff or support collection unit designated by the appropriate social services district shall levy upon any interest of the judgment debtor or obligor in personal property not capable of delivery, or upon any debt owed to the judgment debtor or obligor, by serving a copy of the execution upon the garnishee, in the same manner as a summons, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318. Service upon a financial institution shall be made by serving the institution's main office, the branch office at which defendant's account was maintained, or any branch office of the financial institution. In the event the garnishee is the state of New York, such levy shall be made in the same manner as an income execution pursuant to section 5231 of this article. A levy by service of the execution is effective only if, at the time of service, the person served owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property not capable of delivery in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in a notice which shall be served with the execution that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property not capable of delivery in the possession or custody of the person served. All

property not capable of delivery in which the judgment debtor or obligor is known or believed to have an interest then in or thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due or thereafter coming due to the judgment debtor or obligor, shall be subject to the levy. The person served with the execution shall forthwith transfer all such property, and pay all such debts upon maturity, to the sheriff or to the support collection unit and execute any document necessary to effect the transfer or payment. After such transfer or payment, property coming into the possession or custody of the garnishee, or debt incurred by him, or her shall not be subject to the levy. Until such transfer or payment is made, or until the expiration of ninety days after the service of the execution upon him or her, or of such further time as is provided by any order of the court served upon him or her, whichever event first occurs, the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or the support collection unit or pursuant to an order of the court. At the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion of the judgment creditor or support collection unit has provided, the levy shall be void except as to property or debts which have been transferred or paid to the sheriff or to the support collection unit or as to which a proceeding under sections 5225 or 5227 has been brought. A judgment creditor who, or support collection unit which, has specified personal property or debt to be levied upon in a notice served with an execution shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the levy.

§ 5. Subdivision (a) of section 6214 of the civil practice law and rules is amended to read as follows:

(a) Method of levy. The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant, by serving a copy of the order of attachment upon the garnishee, or upon the defendant if property to be levied upon is in the defendant's possession or custody, in the same manner as a summons except that such service shall not be made by delivery of a copy to a person authorized to receive service of summons solely by a

designation filed pursuant to a provision of law other than rule 318. Service upon a financial institution shall be made by serving the institution's main office, the branch office at which defendant's account was maintained, or any branch office of the financial institution.

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

5. 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 ground specified in paragraph seven of subdivision (a) may be asserted in a later pleading, or by motion if 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.

6. 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.

7. Modifying the Manner of Service of Papers When Service is by Facsimile (CPLR 2103(5))

The Committee recommends a modification of CPLR 2103(b)(5) to allow an "opt in" for fax service whereby a party must affirmatively stipulate to accept service by fax. Currently, merely designating the fax number on an attorney's letterhead is sufficient under the CPLR to signify the attorney's consent to receive service by fax. The Committee believes that this measure will improve upon the existing practice, whereby the statutory language authorizes and has resulted in myriad abuses where a party unfairly seeks tactical advantage over another unsuspecting party in civil proceedings.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the service of papers when service is by facsimile

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

Section 1. Paragraph 5 of subdivision (b) of rule 2103 of the civil practice law and rules, as amended by chapter 244 of the laws of 1990 is amended as to read as follows:

5. by transmitting the paper to the attorney by facsimile transmission, provided that a facsimile telephone number is designated by the attorney for that purpose by a stipulation in the action in which the facsimile service is to occur. Service by facsimile transmission shall be complete upon the receipt by the sender of a signal from the equipment of the attorney served indicating that the transmission was received, and the mailing of a copy of the paper to that attorney. [The designation of a facsimile telephone number in the address block subscribed on a paper served or filed in the course of an action or proceeding shall constitute consent to service by facsimile transmission in accordance with this subdivision.] An attorney may change [or rescind] a facsimile telephone number by serving a notice on the other parties; or

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

8. 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:

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];

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

9. 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 to read 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 day of January next succeeding the date on which it shall have become law.

10. 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 1. 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, is amended to read 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] twenty 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. Section 5235 of the civil practice law and rules is REPEALED.

§4. This act shall take effect on the first day of January next succeeding the date on which it shall have become law; except that section three of this act shall take effect ten years

after such date provided that any execution issued pursuant to section 5235 before such date shall remain in effect.

11. Modifying the Contents of a Bill of Particulars to Expand the Categories of Information That May be Required
(CPLR 1603, 3018(b), 3043)

In the interests of balance and fairness in civil practice, our Committee recommends in this measure that the categories of information required in a bill of particulars be expanded. The measure amends 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 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. 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.

§2. 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.

12. 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 UMA 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 day 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.

13. 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 day 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.

14. 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 made 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 day of January next succeeding the date on which it shall have become a law.

15. 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.

16. 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 since then. 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 proposal 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 day 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.

17. 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 day 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.

18. 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, section 135 of the Executive Law 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 day 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. Redaction of Personal Identifying Information in the Filing of Papers in Civil Proceedings (except matrimonial or Surrogate's Court Proceeding) (22 N.Y.C.R.R. 202.5 (e) (new)

The Committee recommends that Rule 202.5, the rule governing papers filed in the Supreme Court and the County Court (22 NYCRR 200 et. seq.) be amended to require that certain personal identifying information be redacted prior to filing. The Committee believes that frequently there are cases with filed papers involving myriad sensitive personal information including, but not limited to, social security numbers and other numerical identifiers which, if revealed, increase the risk of identity theft, fraudulent use or disclosure in violation of state or federal law. The Committee urges the adoption of this proposal to further the protection of that information. As the court system enters the electronic age, courthouse papers are increasingly accessed by internet services and personal information is of increasing interest to identity thieves. Further, the Committee believes that by necessity practitioners are aware of the risks associated with revealing sensitive personal information and have access to all state and federal laws concerning identity theft issues.

Generally, personal information is increasingly subject to protection by law (See Public Officers Law § 96-a (g) (eff. Jan. 1, 2010; added L. 2008, c. 279) and General Business Law § 399-dd (6) (eff. Jan. 3, 2009; added L. 2008, c. 279)). However, in New York, court papers are presumptively public once filed with the county clerk or the clerk of court. Court records are presumptively open. *See, e.g.*, Nixon v. Warner Communications, 435 U. S. 539 (1978); Danco Laboratories, Ltd. v. Chemical Workers of Dedeon Richter, Ltd., 274 A.D.2d 1, 711 N.Y.S. 2d 419 (1st Dept. 2000). The Federal Courts have implemented Rule 5.2 of the Federal Rules of Civil Procedure (28 USCA 5.2) to address protection of privacy in federal cases.

Currently, however, there are no court rules addressing specifically the protection of confidentiality of sensitive personal information in civil court papers. There are certain specific statutes which do address particular information and certain information may be presumptively sealed by statute. (*Compare, e.g.*, Mental Health Information - N. Y. Mental Hygiene Law § 33.14 (Sealing of records pertaining to treatment for mental illness) with HIV Information - N. Y. Public Health Law § 2785 (Court authorization for disclosure of confidential HIV related information)).

This proposal defines "confidential personal information" by using a closed list, clearly provides that the rule applies "[e]xcept as otherwise provided by law or order" and expressly excepts matrimonial actions and proceedings in Surrogate's court from the purview of the rule. This proposal places the responsibility of compliance squarely on the parties by requiring that "the parties shall omit or redact" confidential personal information. The measure omits "address" information from the rule under the rationale that address information is required in many papers and judgments in civil actions. The proposal does not allow for the inclusion of "limited or partial" confidential information and the Committee rejects this approach as too subjective, unnecessarily opening the door to ancillary litigation and possible disclosure of such information.

The proposal makes clear that the court has, *sua sponte* or in response to a motion, discretion to order redaction or sealing under the Rule 216.1 (22 NYCRR § 216.1) standard. Also, the proposal adopts a "good cause shown" standard by which the court might, upon a finding of good cause vary the provisions of the rule. In addition, the proposal expressly provides that the court has discretion to order redaction and replacement of information in papers filed previous to enactment and if the court deems it necessary, under the standard of Rule 216.1, to order the offending paper sealed. Further, the proposal allows the court to "look back" in the case and order redaction of papers already filed in a pending action upon motion or *sua sponte.*

The measure allows the plaintiff to include the last four digits of the defendant's account number, if any, in an action arising out of a consumer credit transaction. If the defendant appears and denies responsibility for that account, the court may review plaintiff's amended paper in-camera or, if filed under the standard of Rule 216.1, under seal.

The proposed rule change is not intended to disturb the current strong presumption in the law favoring open access for the public to court records that are not confidential. The Committee unanimously recognizes the importance of transparency in the third branch of government and the necessity of maintaining the public right to open court records. The Committee supports the preservation of the established standard in Rule 216.1 requiring a finding of good cause before court records are ordered sealed. Further, the proposal allows for the waiver of the protection of this rule as to that party's own personal identifying information by filing it without redaction and not under seal.

The Committee believes that F. R. Civ. P. Rule 5.2 has provided guidance as a privacy measure for federal cases, but is quite limited in scope, protecting only four specified items of information, and fails to provide the bench with sufficient discretion to order redaction. The Committee recommends that New York lead the way in state practice by enacting a broader rule designed to correct the current practice whereby far too revealing personal information is included or attached to papers for filing in the state courts.

The Committee recognizes the important report by and comments of the New York City Bar Association and the comments of the Civil Practice Law and Rules Committee of the New York State Bar Association.

Proposal

§ 202.5 (e) Papers Filed in Court

(e) Redaction of Personal Identifying Information. (1) Except in a matrimonial action or a proceeding in surrogate's court or as otherwise provided by law or court order and whether or not a sealing order is or has been sought, and where not waived under subdivision 4 of this section, the parties shall omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information means: (i) a social security number; (ii) a date of birth, except a person's year of birth; (iii) a mother's maiden name; (iv) a driver's license number or a non-driver photo identification card number; (v) an employee identification number; (vi) a credit card number; (vii) an insurance or financial account number; (viii) a computer password or computer access information or (ix) electronic signature data or unique biometric data.

(2) The court sua sponte or on motion by any person may order a party to remove confidential personal information from papers or to resubmit a paper with such information redacted; order the clerk to seal the papers or a portion thereof containing confidential personal information in accordance with rules promulgated by the chief administrator of the courts; for good cause permit the inclusion of confidential personal information in papers; or determine that particular information in a particular action is not confidential.

(3) The redaction requirement does not apply to the last four digits of the relevant account number(s), if any, in an action arising out of a consumer credit transaction, as defined in subdivision (f) of section one hundred five of the civil practice law and rules and in such an action in the event the defendant appears and denies responsibility for the identified account, the plaintiff may without leave of court amend his or her pleading to add full account or confidential personal information by (i) submitting such amended paper to the court on written notice to defendant for in camera review or (ii) filing such full account or other confidential personal information under seal in accordance with rules promulgated by the chief administrator of the courts.

(4) A party waives the protection of this rule as to the party's own personal identifying information by filing it without redaction and not under seal.

2. Providing Greater Flexibility for the Court to Address Confidentiality in the Submission of Court Papers in the Commercial Division of the Supreme Court (22 NYCRR 202.70(g) Rule 9 (new)

The Committee recommends that the Uniform Rules for the Commercial Division of the Supreme Court be amended to give courts greater flexibility regarding submission or filing of confidential documents exchanged in discovery. The proposed rule change is not intended to disturb the current strong presumption in the law favoring open access for the public to court records that are not confidential. The Committee unanimously recognizes the importance of transparency in the third branch of government and the necessity of maintaining the public right to open court records. The Committee supports the preservation of the established standard in Rule 216.1 requiring a finding of good cause before court records are ordered sealed.

The Committee believes that an appropriate balance can be struck by a new rule that would allow confidential documents, so designated pursuant to a protective order, to be filed under seal in the commercial trial court. This measure would establish a procedure under a new section 202.70(g) Rule 9 whereby, at a preliminary conference a standard stipulation, approved by the court under the existing good cause standard, would allow the parties to file under seal pleadings containing documents exchanged in discovery and designated by the parties as confidential, such as those containing trade secrets or other information which if disclosed would cause substantial economic injury to a commercial enterprise. The court would be required to approve the stipulation. Whenever papers are filed under seal, this rule would require the parties to file a redacted copy in the public record. Both the papers filed under seal and the redacted copy must prominently display on the front page a reference to the order allowing the filing under seal and the date of that order.

The Committee also urges the adoption of the Stipulation and Order for the Production and Exchange of Confidential Information and Order for the Partial Sealing of a File or the Sealing of an Entire File (see Appendix A), as model recommended forms, rather than mandatory, for use in the Commercial Division under Rule 9.

The Committee acknowledges the analysis and reports on this issue by the New York State Bar Association Commercial and Federal Litigation Section ("Sealing Documents in Business Litigation: A Comparison of Various Rules and Methods Applied in Federal, New

York State and Delaware Courts" (December 8, 2009)) and the New York City Bar Association Committee on State Courts of Superior Jurisdiction (Model Confidentiality Agreement, "Stipulation and Order for the Production and Exchange of Confidential Information" available at http://www.nycbar.org/Publications/reports)

Proposal

§ 202.70(g). Rules of Practice for the Commercial Division

Rule 9. Confidentiality Orders.

1. (a) Nothing in Rule 216.1 shall prevent the parties from entering into an appropriate stipulation approved by court order, whereby documents exchanged in discovery, such as those that contain trade secrets or information that if disclosed are likely to cause substantial economic injury to a commercial enterprise, may be designated by the parties as confidential. The stipulation and order shall provide for a procedure, determined by the court, for the handling of such designated documents in the public file. Nothing herein shall prevent any person or party from moving to unseal any documents filed under seal. This rule shall not be construed as altering in any way any of the provisions of Rule 216.1.

(b) A redacted copy of papers filed under seal shall be filed in the public record.

(c) The papers filed under seal and the redacted copy shall prominently display on the front page that the papers are being filed pursuant to an order allowing the filing under seal and the date of such order.

3. Giving the Court Discretion to Accept an Untimely Submission for Good Cause Shown or in the Interest 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(b)) 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.

4. 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.

5. 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.

6. Eliminating the Notice of Medical, Dental and Podiatric Malpractice Action and Tailoring the 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 [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:] request for judicial intervention, pursuant to section 202.6 of this Part, which shall cause the assignment of the action to a judge.

[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.]

7. 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

B. Temporarily Tabled Regulatory Proposals

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. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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).

20. 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.

21. 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 standing Sub-Committee on Electronic Discovery, continues to examine proposals and issues pertaining to electronic discovery. In particular, the Committee is considering the Report to the Chief Judge and the Chief Administrative Judge on Electronic Discovery in the New York State Courts; a 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"; proposals by the Commercial and Federal Litigation Section of the New York State Bar Association and a proposal by the National Conference of Commissioners on Uniform State Laws. 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.

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 program providing for the filing of court papers by fax or electronic means.

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 the e-situs of property with regard to traditional concepts of *in rem* jurisdiction and concomitant constitutional issues.

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, Esq.

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

- Subcommittee on Class Actions
  Chair, Richard Rifkin, 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.

. Subcommittee 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 Paper Terrorism
Chair, Jeffrey E. Glen, 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.

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

. Ad Hoc Subcommittee on Confidentiality of Settlements
Chair, David Paul Horowitz, Esq.

Respectfully submitted,

George F. Carpinello, Esq., Chair
Prof. Vincent C. Alexander, Esq.

James N. Blair, Esq.
Helene E. Blank, Esq.
Robert M. Blum, Esq,
Leon Brickman, Esq.
Lance D. Clarke, Esq.
Leonard Cohen, Esq.
Robert L. Conason, Esq.
Prof. Patrick M. Connors, Esq.
Edward C. Cosgrove, Esq.
Hon. Betty Weinberg Ellerin (ret.)
Myrna Felder, Esq.
Lucille A. Fontana, Esq.
Thomas F. Gleason, Esq.
Jeffrey E. Glen, Esq.
Barbara DeCrow Goldberg, Esq.
Philip M. Halpern, Esq.
David J. Hernandez, Esq.
John R. Higgitt, Esq.
David Paul Horowitz, Esq.
Lawrence S. Kahn, Esq.
Lenore Kramer, Esq.
Harold A. Kurland, Esq.
Burton N. Lipshie, Esq.
Richard B. Long, Esq.
Catherine Nagel, Esq.
Thomas R. Newman, Esq.
Richard Rifkin, Esq.
Jay G. Safer, Esq.
Brian Shoot, Esq.
Prof. David D. Siegel, Esq.
John F. Werner, Esq.
Mark C. Zauderer, Esq.
Oren L. Zeve, Esq.

Holly Nelson Lütz, Esq., Counsel

IX. APPENDIX of Recommended Forms

Appendix A.:

Order for the Partial Sealing of a File or Sealing of an Entire File

Appendix B.:

Stipulation and Order for the Production and Exchange of Confidential Information

Appendix A. Order for the Partial Sealing of a file or Sealing of an Entire File

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

_____,

Plaintiff,

- against -

Defendant.

Index No._____

ORDER for the
PARTIAL SEALING of a
FILE
or the
SEALING of an

ENTIRE FILE

This matter having come before the Court by application of _____, for the entry of an order pursuant to CPLR NYCRR 216.1, and as explained in the accompanying memorandum opinion, the court, pursuant to and in accordance with 22 NYCRR 216.1, having determined that good cause exists for the sealing of papers contained in the file in this action and the grounds therefor having been specified, it is now,

[ ] ORDERED that the County Clerk is directed to seal the file in this action in its entirety upon service on him of a copy of this order; or, in the alternative, it is

[ ] ORDERED that the County Clerk is directed to seal in part the file in this action as to certain documents specified in the accompanying memorandum opinion and to separate these papers and to keep them separate from the balance of the file in this action; and it is further

ORDERED that thereafter, or until further order of the court, the County Clerk shall deny access to the said sealed file in its entirety or in part as specified above to anyone (other than the staff of the county clerk or the court) except for counsel of record for any party to this case, a party, and any representative of counsel of record for a party upon presentation to the County Clerk of written authorization from said counsel.

Dated: _____ ENTER: _____

J.S.C.

Appendix B. Stipulation and Order for the Production and Exchange of Confidential Information

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____

_____,

Plaintiff,

- against -

Defendant.

_____

Index No._____

STIPULATION and ORDER for the PRODUCTION and EXCHANGE of CONFIDENTIAL

INFORMATION

This matter having come before the Court by stipulation of plaintiff, _____, and defendant, _____, for the entry of a protective order pursuant to CPLR 3103(a), limiting the review, copying, dissemination and filing of confidential or proprietary documents and information to be produced by either party and their respective counsel or by any non-party in the course of discovery in this matter to the extent set forth below; and the parties, by, between and among their respective counsel, having stipulated and agreed to the terms set forth herein, and good cause having been shown;

IT IS hereby ORDERED that:

1. This Stipulation is being entered into to facilitate the production, exchange and discovery of documents and information that the parties agree merit confidential treatment (hereinafter the "**Documents**" or "**Testimony**").
2. Either party may designate Documents produced, or Testimony given, in connection with this action as "confidential," either by notation on the document, statement on the record of the deposition, written advice to the respective undersigned counsel for the parties hereto, or by other appropriate means.
3. As used herein:
   (a) "Confidential Information" shall mean all Documents and Testimony, and all information contained therein, and other information designated by the parties as

confidential, such as those that contain trade secrets or information that, if disclosed, are likely to cause a substantial economic injury to a commercial enterprise.

(b) "Producing party" shall mean the parties to this action and any third-parties producing "Confidential Information" in connection with depositions, document production or otherwise, or the party asserting the confidentiality privilege, as the case may be.

(c) "Receiving party" shall mean the party to this action or any non-party receiving "Confidential Information" in connection with depositions, document production or otherwise.

4. The Receiving party may, at any time, notify the Producing party that the Receiving party does not concur in the designation of a document or other material as Confidential Information. If the Producing party does not agree to declassify such document or material, the Receiving party may move before the Court for an order declassifying those documents or materials. If no such motion is filed, such documents or materials shall continue to be treated as Confidential Information. If such motion if filed, the documents or other materials shall be deemed Confidential Information unless and until the Court rules otherwise.

5. Except with the prior written consent of the Producing party or by Order of the Court, Confidential Information shall not be furnished, shown or disclosed to any person or entity except to:

a. personnel of plaintiff or defendant actually engaged in assisting in the preparation of this action for trial or other proceeding herein and who have been advised of their obligations hereunder;

b. counsel for the parties to this action and their associated attorneys, paralegals and other professional personnel (including support staff) who are directly assisting such counsel in the preparation of this action for trial or other proceeding herein, are under the supervision or control of such counsel, and who have been advised by such counsel of their obligations hereunder;

c. expert witnesses or consultants retained by the parties or their counsel to furnish

technical or expert services in connection with this action or to give testimony with respect to the subject matter of this action at the trial of this action or other proceeding herein; provided, however, that such Confidential Information is furnished, shown or disclosed in accordance with paragraph 7 hereof;

d. the Court and court personnel, if filed in accordance with paragraph 12 hereof;

e. an officer before whom a deposition is taken, including stenographic reporters and any necessary secretarial, clerical or other personnel of such officer, if furnished, shown or disclosed in accordance with paragraph 10 hereof;

f. trial and deposition witnesses, if furnished, shown or disclosed in accordance with paragraphs 9 and 10, respectively, hereof; and

g. any other person agreed to by the parties.

6. Confidential Information shall be utilized by the Receiving party and its counsel only for purposes of this litigation and for no other purpose.

7. Before any disclosure of Confidential Information is made to an expert witness or consultant pursuant to paragraph 5(c) hereof, counsel for the Receiving party shall provide the expert's written agreement, in the form of Exhibit A attached hereto, to comply with and be bound by its terms. Counsel for the party obtaining the certificate shall supply a copy to counsel for the other party at the time of the disclosure of the information required to be disclosed by CPLR 3101(d), except that any certificate signed by an expert or consultant who is not expected to be called as a witness at trial is not required to be supplied.

8. All depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days after a transcript of said deposition is received by counsel for each of the parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately.

9. Should the need arise for any of the parties to disclose Confidential Information during any hearing or trial before the Court, including through argument or the presentation of evidence, such party may do so only after taking such steps as the Court, upon motion of the disclosing party, shall deem necessary to preserve the confidentiality of such Confidential Information.

10. This Stipulation shall not preclude counsel for the parties from using during any deposition in this action any documents or information which have been designated as Confidential Information under the terms hereof. Any court reporter or deposition witness who is given access to Confidential Information shall, prior thereto, be provided with a copy of this Stipulation and shall execute the certificate annexed hereto. Counsel for the party obtaining the certificate shall supply a copy to counsel for the other party.

11. A party may designate as Confidential Information subject to this Stipulation any document, information or deposition testimony produced or given by any non-party to this case, or any portion thereof. In the case of Documents, designation shall be made by notifying all counsel in writing of those documents which are to be stamped and treated as such at any time up to fifteen (15) days after actual receipt of copies of those documents by counsel for the party asserting the confidentiality privilege. In the case of deposition Testimony, designation shall be made by notifying all counsel in writing of those portions which are to be stamped or otherwise treated as such at any time up to fifteen (15) days after the transcript is received by counsel for the party asserting the confidentiality privilege. Prior to the expiration of such fifteen (15) day period (or until a designation is made by counsel, if such designation is made in a shorter period of time), all such documents shall be treated as Confidential Information.

12. A party who seeks to file with the court any deposition transcripts, exhibits, answers to interrogatories, or other documents which have previously been designated as comprising or containing Confidential Information and any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information shall follow the procedure herein determined by the court and set forth below for the handling of documents so designated in the public file. Accordingly, the party(ies) shall EITHER:

(a) appear at a conference on _____(date) to obtain advance approval by court order for the filing of papers under seal in accordance with 22 NYCRR Part 216.1; OR

(b) file the papers under seal as part of a motion or application to the court whereby the court shall determine, concurrent with the decision on the motion or application to the court whether the papers shall remain under seal in accordance with 22 NYCRR 216.1.

(c) A redacted copy of papers filed under seal shall be filed in the public record.

(d) All papers filed under seal and the redacted copy shall prominently state on the front page that the papers are being filed pursuant to an Order allowing the filing under seal and the date of such Order.

13. Any person receiving Confidential Information shall not reveal or discuss such information to or with any person not entitled to receive such information under the terms hereof.

14. Any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its "confidential" nature as provided in paragraphs 2 or 11 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving party identifying the document or information as "confidential" within a reasonable time following the discovery that the document or information has been produced without such designation.

15. Extracts and summaries of Confidential Information shall also be treated as confidential in accordance with the provisions of this Stipulation.

16. The production or disclosure of Confidential Information shall in no way constitute a waiver of each party's right to object to the production or disclosure of other information in this action or in any other action.

17. This Stipulation is entered into without prejudice to the right of either party to seek relief from, or modification of, this Stipulation or nay provisions thereof by properly noticed motion to the Court or to challenge any designation of confidentiality as inappropriate under the CPLR or other applicable law.

18. This Stipulation shall continue to be binding after the conclusion of this litigation except (a) that there shall be no restriction on documents that are used as exhibits in Court (unless such exhibits were filed under seal); and (b) that a party may seek the written permission of the Producing party or further order of the Court with respect to dissolution or modification of any provisions of the Stipulation. The provisions of this Stipulation shall, absent prior written consent of both parties, continue to be binding after the conclusion of this action.

19. Nothing herein shall be deemed to waive any privilege recognized by law, or shall be deemed an admission as to the admissibility in evidence of any facts or documents revealed in the course of disclosure.

20. Within sixty (60) days after the final termination of this litigation by settlement or exhaustion of all appeals, all Confidential Information produced or designated and all reproductions thereof shall be returned to the Producing party or shall be destroyed, at the option of the Producing party. In the event that any party chooses to destroy physical objects and documents, such party shall certify in writing within sixty (60) days of the final termination of this litigation that it has undertaken its best efforts to destroy such physical objects and documents, and that such physical objects and documents have been destroyed to the best of its knowledge. Notwithstanding anything to the contrary, counsel of record for the parties may retain one copy of documents constituting work product, a copy of pleadings, motion papers, discovery responses, deposition transcripts and deposition and trial exhibits.

21, This Stipulation shall not be interpreted in a manner that would violate any applicable cannons of ethics or codes of professional responsibility. Nothing in this Stipulation shall prohibit or interfere with the ability of counsel for any party, or of experts specially retained for this case, to represent any individual, corporation or other entity adverse to any party or its affiliate(s) in connection with any other matters.

22. This Stipulation may be changed by further order of this Court, and is without prejudice to the rights of a party to move for relief from any of its provisions, or to seek or agree to different or additional protection for any particular material or information.

By:_____ By:_____

_____ _____

Tel.: Tel.:

Attorney for Plaintiff Attorney for Defendant

Dated: _____ Dated:_____

Dated: _____ **SO ORDERED_____**

J.S.C.