Report of the Advisory Committee on Civil Practice

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

January 2015

Dedicated to

Professor David D. Siegel

Committee member, mentor, teacher, friend.

October 18, 1931 - October 9, 2014

Our profession, our Committee, indeed our entire state, has lost a great educator, humorist, and human being. We are all the wiser, and perhaps wittier, for having known him and called him a friend and colleague, and we are deeply saddened by his passing.

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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 2015 Report, the Advisory Committee recommends a total of 23 measures for enactment by the 2013 Legislature. Of these, 12 measures previously have been endorsed in substantially the same form, five are modified measures, and five are new measures. In Parts II, III and IV, individual summaries of the proposals are followed by drafts of legislation.

In 2014 five measures recommended by the Committee were enacted into law: (1) creating a statewide rule on furnishing motion papers to the court (CPLR 2214) (L. 2014, c. 109); (2) addressing certification of business records produced by non-parties (L. 2014, c.314); (3) requiring notice to the parties and a statement of conduct constituting neglect regarding dismissal for want of prosecution (CPLR 3216(a) and (b))(L.2014, c.371); (4) allowing the non-party witness to make objections at a deposition (CPLR 3113(c))(L. 2014, c.379) and (5) allowing the use of foreign affirmations in a civil action by any person (CPLR 2106) (L. 2014, c. 380). In addition, the NYS Court of Appeals decision in *Kapon v. Koch*, 23 NY3d 32 (2014), resolved favorably the issues considered by the Committee in its proposal to eliminate the distinction between a party and a non-party when seeking disclosure from a non-party (CPLR 3101(a) & (d)(1)(iii)).

Part II sets forth and summarizes the five new measures proposed for 2015. They are designed to: (1) authorize the Chief Administrative Judge to effect e-filing in all civil cases (CPLR 304, 2103, Article 21-A (new); Ct.CAct 11-A(new); Jud. L. 212(2)(s)(1)(i)(new); NYCCiv.Ct. Act 2103-a (new); NYUDCt.Act 2103-a (new)); (2) address timeliness in access to records in medical malpractice cases for use at trial (CPLR 2306); (3)harmonize the law of evidence regarding inadvertent waiver of the attorney-client privilege (CPLR 4550); (4) address the law of evidence regarding the exclusion of hearsay statements of an agent or employee (CPLR 4551) and (5) establish uniformity in practice regarding the use of expert affidavits is summary judgment (CPLR 3212(b)).

Part III sets forth and summarizes the five modified measures proposed for 2015. These measures would: (1) reinforce the viability of consent as a basis of general personal jurisdiction over foreign corporations authorized to do business in New York State (CPLR 301(a); BCL 1301(e)(new); Gen. Assoc. Law 18(5)(new); Ltd. Liability Co. Law 802(c)(new); Not-for-Profit Corp. Law 1301(e)(new); Partnership law 121-902(e)(new) and Partnership law 121-1502(r0(new)); (2) set a time frame for expert witness disclosure (CPLR 3101(d)(1)); (3) amend an exception to the rule against hearsay to address business records relied upon by experts in civil trials (CPLR 4549(new)); (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)) and (5) remove the requirement that papers served by mail be mailed within the State (CPLR 2103(f)(1)).

Part IV summarizes the 12 previously endorsed measures not enacted through 2014, but once again recommended by the Committee in substantially the same form. These measures: (1) enact a waiver of privileged confidential information for exclusive use in a civil action (CPLR 4504(a)); (2) amend the General Obligations Law in relation to the limitation of non-statutory reimbursement and subrogation (Gen. Ob. L. § 5-335); (3) clarify the manner in which the acknowledgment of a written agreement made before or during marriage may be proven in an action or proceeding (D. R. L. §236(B)(3); (4) clarify the meaning of property of a judgment

debtor (CPLR 5225(a) & (b)); (5) permit appellate review of a non-final judgment or order in certain circumstances (CPLR 5501(e)(new)); (6) require the pleading of an affirmative defense and a motion to dismiss for objections regarding certain notices of claim (CPLR 3018(b) & 3211)); (7) conform the statutes on the timing of a motion seeking leave to appeal, the automatic stay and the 5-day rule (CPLR 5519)); (3); (4); (8) address certain CPLR Article 16 issues in relation to apportionment of liability for non-economic loss in personal injury actions (CPLR 1601, 1603, 3018); (9) 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)); (10) 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)); (11) eliminate 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)) and (12) expand expert disclosure in commercial cases (CPLR 3101(d)(1)).

Part V sets forth the Committee's regulatory proposals. In 2014 two of the Committee's rule proposals were promulgated in modified form: (1) requiring redaction of certain personal identifying information in papers filed in court in a civil action (22 NYCRR 202.5(e) and (2) addressing practice in consumer credit matters (22 NYCRR 208.14-a; 210.14-a and 212.14-a).

The Committee seeks approval of four regulatory measures in 2014: (1) clarifying the remedies available to the court for failure of counsel to comply with the rule on pretrial conference appearance (22 NYCRR 202.26); (2) providing a procedure under the principles of comity for the recognition of judgments rendered by tribunals or courts of federally-recognized tribes (22 NYCRR 202.71 (new)); (3) 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)) and (4) amending 22 NYCRR 202.48(b) to give the court discretion to accept an untimely submission for good cause shown or in the interest of justice.

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

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

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

Part IX of the Report is an Appendix containing the Committee's 2015 Report on E-Filing to the Chief Administrative Judge.

On the basis of long experience in drafting and reviewing legislation, the Committee would like to emphasize three general principles to the Legislature with respect to the enactment of civil procedural bills:

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

(2) The Committee recommends that, aside from corrective or remedial bills, which become effective immediately, the effective date of bills should be deferred a sufficient time after enactment to publicize them. For example, this Committee sets the effective date of most of its legislative proposals as "the first day of January next succeeding the date on which it shall have become a law." Further, because mere designation of an effective date is often insufficient to resolve ambiguities as to when actions or claims come within its ambit (see e.g.,

Majewski v. Broadalbin-Perth Central School District, 91 NY2d 577 [1998], affg 231 AD2d 102 [3d Dept 1997]; Morales v. Gross, 230 AD2d 7 [2d Dept 1997] [interpreting Omnibus Workers' Compensation Reform Act of 1996]), bills that alter substantive rights or shorten statutes of limitations should specify by stating, for example, that they apply to injuries occurring, actions commenced or trials commenced after a certain date.

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

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

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

II. New Measures

1. Authorizing the Chief Administrative Judge to Effect e-Filing in all Civil Cases (CPLR §§304, 2103, Article 21-A (new); Ct.CAct §11-A(new); Jud. L. § 212(2)(s)(1)(i)(new); NYCCiv.Ct. Act §2103-a (new); NYUDCt.Act §2103-a (new))(See Appendix for Report)

E-filing was first authorized in New York by legislation in 1999 as a pilot program for civil cases in specified counties on a voluntary basis. The Committee supported that pilot and has continued to review it and to support the expansion of the e-filing program since its inception. In 2015 the New York Legislature must re-authorize the e-filing program.

The Committee recommends that the e-filing statutes be re-consolidated from the Unconsolidated Laws to the practice chapters, including enactment of civil e-filing authorization in the Civil Practice Law and Rules. The Committee believes that there is no persuasive argument to keep the e-filing statutes located in the Unconsolidated Laws.

The Committee recommends that the e-filing statutes should confer plenary authority to the Chief Administrative Judge with expansion issues addressed solely by the Chief Administrative Judge by rule. The Committee believes that there has been extensive e-filing experience by practitioners, county clerks and court clerks through the pilot and the continued expansion of the e-filing program in the various counties. The implementation of e-filing to date fully supports broader authority in the Chief Administrative Judge.

Further, the Committee believes that based upon such experience there is no need to allow the county clerk of any particular count to reject e-filing. It has been reported to the Committee by practitioners in particular counties that there is great disappointment over the lack of an e-filing program in those counties and the Committee encourages further efforts to implement e-filing in those counties. The Committee further recognizes that the Chief Administrative Judge will be attentive to concerns raised by the county clerks, but ultimate authority to implement e-filing should rest with the Chief Administrative Judge. The cost-

savings and court efficiencies attendant with e-filing have been amply demonstrated, and it should be the policy of the State to move forward with e-filing statewide.

The Committee takes no position with regard to making permanent the e-filing in family and criminal courts, as such recommendation may be beyond its jurisdictional purview and those courts may face specific issues with regard to implementation of an e-filing system. However, the Committee does recommend expansion of e-filing into all four categories of previously excepted classes of cases, *i.e.*, proceedings in the Election Law, Domestic Relations Law for matrimonial proceedings, Article 78 proceedings and Mental Health Law proceedings. In each of these classes of cases, the Chief Administrative Judge should have the authority and flexibility to address an practical concerns by rule. Further, the Committee recommends that, with the exceptions noted above, e-filing be made permanent in all cases and all types of actions, that the Chief Administrative Judge be given plenary authority, generally, and that the e-filing statutes be located in the practice acts.

The Committee also recommends that e-filing should be fully adopted by the appellate divisions. The Committee notes that, while the Chief Administrative Judge promulgates rules for the trial courts, the Chief Administrative Judge's role with regard to the appellate division rules on e-filing may be advisory. The Committee believes that for the benefit of the bench and bar, the implementation of the appellate division e-filing program should be through a single (NYCEF) platform and through a single set of court rules applicable to all appellate divisions.

The Committee recommends that the e-filing authorization for civil cases be re-codified into the Civil Practice Law and Rules. In addition, it is the recommendation of the Committee that there be continuing provision for an annual report on e-filing to the legislature. The Committee believes that this reporting requirement should not appear in the CPLR, but rather, in the Judiciary Law. Further, the statute as proposed and enacted should confer plenary authority to the Chief Administrative Judge with expansion issues addressed solely by the Chief Administrative Judge by rule.

In conclusion, the Committee submits for consideration its legislative proposal on e-filing in civil matters in the CPLR, which would effect a simple, general delegation of authority

to the Chief Administrative Judge to enact mandatory e-filing in civil matters statewide, with the authority to promulgate rules to implement the statute.

Proposal

AN ACT to amend the civil practice law and rules, the court of claims act, the judiciary law, the New York city civil court act and the New York uniform district court act, in relation to use of electronic means for the commencement and filing of papers in certain actions and proceedings

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

Section 1. Subdivision (b) of section 304 of the civil practice law and rules, as amended by chapter 125 of the laws of 2007, is amended to read as follows:

(b) Notwithstanding any other provision of law, [such] filing [may] shall be accomplished by [facsimile transmission or] electronic means [, as defined in subdivision (f) of rule twenty-one hundred three] where applicable as provided in article 21-A of this chapter[,] and where and in the manner authorized by the chief administrator of the courts by rule and filing may be accomplished by facsimile transmission where and in the manner authorized by the chief administrator of the courts by rule.

§ 2. Paragraph (7) of subdivision (b) of rule 2103 of the civil practice law and rules, as amended by chapter 416 of the laws of 2009, is amended to read as follows:

7. By transmitting the paper to the attorney by electronic means where and in the manner [authorized] provided by the chief administrator of the courts by rule [and, unless such rule shall otherwise provide, such transmission shall be upon the party's written consent] as provided by article 21-A of this act. The subject matter heading for each paper must indicate that the matter being transmitted electronically is related to a court proceeding.

§3. The civil practice law and rules is amended by adding a new article 21-A to read as follows:

ARTICLE 21-A —FILING OF PAPERS IN THE COURTS BY ELECTRONIC MEANS

Section

§2110. Definitions.

§2111. Filing of papers in the trial courts by electronic means.

§2112. Filing of papers in the appellate division by electronic means.

§2110. Definitions. For purposes of this section, "facsimile transmission" and "electronic means" shall be as defined in subdivision (f) of rule 2103 of this chapter.

§2111. Filing of papers in the trial courts by facsimile transmission and by electronic means.

(a) Notwithstanding any other provision of law, the chief administrator of the courts, with the approval of the administrative board of the courts, may promulgate rules in all classes of cases authorizing a program in the use of filing by electronic means in the supreme court, the court of claims, the civil court of the city of New York, the district courts, the surrogate's courts and the court of claims for: (i) the commencement of civil actions and proceedings, and (ii) the filing and service of papers in pending actions and proceedings.

(b) The chief administrator may promulgate rules providing counsel or an unrepresented party an exemption from electronic filing rules.

(c) Notwithstanding the foregoing, a court may exempt upon application for good cause shown counsel or an unrepresented party from electronic filing rules.

§2112. Filing of papers in the appellate division by electronic means. Notwithstanding any other provision of law, the appellate division in each judicial department may promulgate rules authorizing a program in the use of electronic means for: (i) taking an appeal to such court from the judgment or order of a court of original instance or from that of another appellate court, (ii) making a motion for permission to appeal to such court, (iii) commencement of any other proceeding that may be brought in such court, and (iv) the filing and service of papers in pending actions and proceedings.

§ 4. The court of claims act is amended by adding a new section 11-a to read as follows:

§11-a. Use of facsimile transmission and electronic filing authorized.

1. Notwithstanding any other provision of law, the chief administrator of the courts, with the approval of the administrative board of the courts, may authorize a program in the use of facsimile transmission and electronic means in the court as provided in article 21-A of the civil practice law and rules.

2. For purposes of this section, "facsimile transmission" and "electronic means" shall be as defined in subdivision (f) of rule 2103 of the civil practice law and rules.

§ 5. Subdivision 2 of section 212 of the judiciary law is amended by adding a new paragraph (t) to read as follows:

(t) Not later than April first in each calendar year, the chief administrator of the courts shall submit to the legislature, the governor and the chief judge of the state a report evaluating the state's experience with programs in the use of electronic means for the commencement of actions and proceedings and the service of papers therein as authorized by law and containing such recommendations for further legislation as he or she shall deem appropriate.

§ 6. The New York city civil court act is amended by adding a new section 2103-a to read as follows:

§2103-a. Use of electronic filing authorized.

1. Notwithstanding any other provision of law, the chief administrator of the courts may authorize a program in the use of electronic means in the civil court of the city of New York as provided in article 21-A of the civil practice law and rules.

2. For purposes of this section, "electronic means" shall be as defined in subdivision (f) of rule 2103 of the civil practice law and rules.

§ 7. The uniform district court act is amended by adding a new section 2103-a to read as follows:

§2103-a. Use of electronic filing authorized.

1. Notwithstanding any other provision of law, the chief administrator of the courts may authorize a program in the use of electronic means in the civil court of the city of New York as provided in article 21-A of the civil practice law and rules.

2. For purposes of this section, "electronic means" shall be as defined in subdivision (f) of rule 2103 of the civil practice law and rules.

§ 8. This act shall take effect September 1, 2015.

2. Amending Procedures for Access to Subpoenaed Records for Use at Trial (CPLR §§ 2305(d)(new))

The Committee has studied the procedures by which a records intended for use at trial are produced pursuant to a subpoena duces tecum. The Committee believes that counsel should have the option of having trial material delivered to counsel's office, rather than to the clerk of the court. This is especially true where the materials are in digital format and can be delivered on a disk or through other electronic means.

In this proposal, section 2305 would be amended to create a new subdivision (d) providing that where a trial subpoena directs service of the subpoenaed documents to the attorney's office, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records to all opposing counsel forthwith in the same format.

The amendment, which has no fiscal impact upon the state, would be effective immediately and apply to all actions pending on or after such effective date.

Proposal

AN ACT to amend the civil practice law and rules, in relation to a subpoena of records for trial

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

Section 1. Section 2305 of the civil practice law and rules, as amended by chapter 575 of the laws of 2002, is amended by adding a new subdivision (d) to read as follows:

(d) Subpoena duces tecum for a trial; service of subpoena and delivery of records. Where a trial subpoena directs service of the subpoenaed documents to the attorney's office, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel forthwith.

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

3. Harmonizing the Law of Evidence Regarding Inadvertent Waiver of the Attorney-Client Privilege

(CPLR 4550 (new))

The Committee has reviewed and supports, with modification, the proposal of the Advisory Group to the New York State Federal Judicial Council to more closely align New York law with the waiver provisions of F.R.E. 502(a) *via* the enactment of a new section into CPLR Article 45, CPLR §4550.

The addition of the new §4550 to the C.P.L.R. would accomplish two goals: first, to more closely harmonize New York State's evidentiary law concerning the inadvertent waiver of the attorney-client privilege and/or work product protection in both civil and criminal litigation with corresponding evidentiary law in the federal courts; and, second, to codify existing decisional law in New York regarding the standard for establishing inadvertent waiver and, where inadvertent waiver has been established, codify existing decisional law in New York governing the return or retention of such inadvertently exchanged matter.

This measure incorporates into the proposed statute the requirement that a party inadvertently exchanging matter that is privileged or work product demonstrate that the recipient of the inadvertently exchanged matter will not be prejudiced by its return. *See, e.g., Manufacturers & Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 522 N.Y.S.2d 999 (4th Dep't 1987). The Committee considered and rejected the idea of adopting Fed. R. Civ. P. 26(b)(5)(B), which sets forth the action required by the recipient of inadvertently exchanged matter upon realizing, or being notified, that the matter exchanged was exchanged inadvertently. The Committee believes that action by the recipient of what is, or comes to be known as, inadvertently exchanged matter is an ethical matter, appropriately and adequately addressed by New York's Rules of Professional Conduct. *See,* Rule 4.4(b).

The Committee extends its gratitude to the Advisory Group to the New York State Federal Judicial Council for proposing this legislation.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the waiver of privileges

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 4550 to read as follows:

§4550. Scope of waiver of privileges. (a) When disclosure is made in a proceeding or to a government office or agency that waives any privilege provided in this article, or any privilege under subdivision (c) and paragraph (2) of subdivision (d) of section 3101 of this chapter, the waiver extends to an undisclosed communication or information only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) the disclosed and undisclosed communication ought in fairness to be considered together.

(b) When made in a proceeding or to a government office or agency, a disclosure does not waive any privilege provided in this article, or any privilege under subdivision (c) and paragraph (2) of subdivision (d) of section 3101 of this chapter, if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; (3) the holder of the privilege or protection took reasonable steps to rectify the error; and (4) the party in possession of the disclosure will not be unduly prejudiced.

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

4. Addressing the Law of Evidence Regarding the Exclusion of Hearsay Statements of an Agent or Employee
(CPLR 4551 (new))

The Committee recommends a relaxation of the common law exclusion of hearsay statements of a party's agent or employee, provided that the statement was on a matter within the scope of that employment or agency relationship, and made during the existence of the relationship. The proposal would add a new CPLR 4551, and cause New York's hearsay exception to follow the approach of Federal Rule of Evidence 801(d)(2)(D).

The proposal is intended to change the extent of authority that a proponent must show in order to make the hearsay statement of an opposing party's agent or employee admissible. While under current law it appears clear that a hearsay statement will be admissible if there was actual authority to speak on behalf of the party, such authority often may be shown only by implication in light of the circumstances of the employment or agency relationship. In practice, this tends to limit "speaking authority" to only the high levels of management.

Professor Michael J. Hutter has analyzed several Appellate Division cases that take a very strict view of the predicate proof for speaking authority, and these cases indicate that an employee or agent who is not in charge of the business will have no implied authority to speak on behalf of the employer -- even if the statement made relates to an activity the person was charged to undertake. Instead, the proponent of the hearsay statement may need to make the difficult showing of express authority to speak on behalf of the employer. See *Boyce v Gumley-Haft, Inc.*, 82 AD3d 491 [1st Dept 2011]; *Scherer v Golub Corp.*, 101 AD3d 1286 [3d Dept 2012]; Hutter, "Speaking Agent Hearsay Exception: Time to Clarify, if Not Abandon," New York Law Journal, June 6, 2013, Pg. 3, col. 1, Vol. 249, No. 108.

The Committee believes a strict requirement to demonstrate such authority to speak may exclude reliable proof of an event, even though the employer as a party might not be treated unfairly by admissibility, either because the statement is true and made by a person with relevant knowledge, or because the employer is able to introduce other proof in opposition to the

implications of the hearsay statement. As noted above, the current strict requirement to show speaking authority is contrary to Federal Rule of Evidence. See Barker and Alexander, Evidence in New York State and Federal Courts (2d ed.) 8:26, p. 148.

The Committee further believes that the rule is unlikely to change without legislative action. (See, *Loschiavo v Port Auth. of New York & New Jersey*, 58 NY2d 1040, 1041 [1983]["We decline plaintiff's invitation to change this well-settled, albeit widely criticized rule of evidence but note, in this connection, that a proposal for modification of the hearsay rule in this State is now before the Legislature"]).

An example of statements excluded under the current rule include an employee-driver's admissions of negligence, unless the driver was authorized by the employer to speak about the subject accident. In *Schner v Simpson*, (286 AD 716, 718 [1st Dept 1955]), an employee's statement "I am sorry that I knocked you down, but I think you will be able to get up" was held inadmissible on the ground that "[g]enerally speaking, employment does not carry authority to make either declarations or admissions."(See, also, *Jankowski v Borden's Condensed Milk Co.*, 176 AD 453 [2d Dept 1917][driver's statement that it was his fault held not admissible]; and *Raczes v Horne*, 68 AD3d 1521, 1522-1523 [3d Dept 2009][maintenance worker's statement: "this is the third time that I fixed this railing and I'm getting sick of it," not competent to establish notice on the part of employer]).

However, such employee statements generally are admissible in federal court and would be admissible under the proposed rule. (See *Corley v Burger King Corp.*, 56 F3d 709, 710 [5th Cir 1995]; *Martin v Savage Truck Line*, 121 F Supp 417, 419 [DDC 1954]). On the other hand, an employee's statement would not be admissible against the employer where it concerned a matter that was not within the employee's scope of employment. (*See, e.g., Wilkinson v Carnival Cruise Lines, Inc.*, 920 F2d 1560 [11th Cir 1991]; *Hill v Spiegel, Inc.*, 708 F2d 233, 237 [6th Cir 1983]).

The Committee believes that the federal approach is an improvement over the current state of New York decisional law, and that trial judges will exercise appropriate discretion to exclude such hearsay evidence when there is inadequate foundation or indicia of reliability.

Proposal

AN ACT to amend the civil practice law and rules, in relation to admissibility of an opposing party's statement

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 4551 to read as follows:

§ 4551. Admissibility of an opposing party's statement. A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by a person whom the opposing party authorized to make a statement on the subject or by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship.

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

5. Establishing Uniformity in Practice Regarding the Use of Expert Affidavits in Summary Judgment

(CPLR 3212(b))

The Committee recommends an amendment to CPLR 3212(b) to effect a very narrow, but much needed, change in the procedural law concerning the admissibility of expert affidavits in civil summary judgment motions. It would, in effect, legislatively overrule a line of decisions, starting with *Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dep't 2008), and continuing, *inter* alia, with *Garcia v. New York*, 98 A.D.3d 857, 951 N.Y.S.2d 2 (1st Dep't 2012), *Rivers v. Birnbaum*, 102 A.D.3d 26, 953 N.Y.S.2d 232 (2d Dep't 2012), and, most recently, *DeSimone v. New York*, 2014 NY Slip Op 06667 (1st Dep't 2014). These First and Second Department cases have permitted trial judges, as an exercise of discretion, to decline to consider expert affidavits submitted in support of, or in opposition to, summary judgment motions where the proponent of the affidavit did not serve a CPLR 3101(d)(1)(i) exchange prior to the filing of the note of issue. This measure would amend 3212(b) to expressly allow such an expert affidavit whether or not an expert disclosure was made prior to the submission of the affidavit.

Current Law

One statute in New York addresses the issue of expert timing, CPLR 3101(d)(1)(i), which provides:

> (d) Trial preparation.
>
> 1. Experts.
>
> (i) Upon 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. However, where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof, the party shall not thereupon be precluded from introducing the expert's testimony at the trial solely on grounds of noncompliance with this paragraph. In that instance, upon motion of any party, made before or at trial, or on its own initiative,

> the court may make whatever order may be just. In an action for medical, dental or podiatric malpractice, a party, in responding to a request, may omit the names of medical, dental or podiatric experts but shall be required to disclose all other information concerning such experts otherwise required by this paragraph. (3101(d)(1)(i)).

CPLR 3101(d)(1)(i) makes no mention of the filing of the note of issue, and does not link or limit the exchange of experts to a period of time at or prior to the filing of the note of issue, or at or prior to the completion of fact discovery, or anything else. The only reference point stated for the exchange of experts refers to "an insufficient period of time before the commencement of trial . . .." *Id.*

In *Construction by Singletree, Inc. v. Lowe*, 55 A.D.3d 861, 866 N.Y.S.2d 702 (2d Dep't 2008), the Second Department affirmed as proper exercise of discretion a trial court's decision in declining to consider affidavits proffered by defendant's purported experts, since defendant failed to identify experts in pretrial disclosure and served affidavits after the filing note of issue and certificate of readiness attesting to completion of discovery. Thereafter, in *Rivers v. Birnbaum*, 102 A.D.3d 26, 953 N.Y.S.2d 232 (2d Dep't 2012) the Second Department appeared to back away from its prior holding in *Singletree*, holding in *Rivers* that while post-note of issue expert exchange is but one fact for the court to consider, it nonetheless remains a factor.

In the First Department, in *Garcia v. New York*, 98 A.D.3d 857, 951 N.Y.S.2d 2 (1st Dep't 2012), without citing *Singletree* or its progeny (*Garcia* was decided before *Rivers*), held that "[t]he expert's affidavit should not have been considered in light of plaintiff's failure to identify the expert during pretrial discovery as required by defendants' demand (citations omitted)."

Garcia was cited as the sole authority in a recent 2014 First Department decision, *DeSimone v. New York*, 2014 NY Slip Op 06667 (1st Dep't 2014), where that court held:

> The court providently exercised its discretion in denying plaintiff's cross motion to submit a disclosure of his expert professional engineer, since it was first submitted in opposition to defendants' motions for summary judgment dismissing the complaint, and subsequent to the filing of the note of issue and certificate of readiness (citation omitted).

Both Departments have issued decisions with contrary holdings. *See, e.g.: Ramsen A. v. New York City Hous. Auth.*, 112 A.D.3d 439, 976 N.Y.S.2d 73 (1st Dep't 2013):

CPLR 3101(d)(1)(i) does not require a party to retain an expert at any particular time (citation omitted). "[E]ven where one party requests trial expert disclosure during discovery pursuant to CPLR 3101(d)(1)(i), a recipient party who does not respond to the request until after the filing of the note of issue and certificate of readiness will not automatically be subject to preclusion of its expert's trial testimony" (citation omitted).

Buchanan v. Mack Trucks, Inc. 2014 NY Slip Op 318 (2d Dep't 2014) (citing *Rivers*):

"[A] party's failure to disclose its experts pursuant to CPLR 3101(d)(1)(i) prior to the filing of a note of issue and certificate of readiness does not divest a court of the discretion to consider an affirmation or affidavit submitted by that party's experts in the context of a timely motion for summary judgment" (citations omitted).

Rowan v. Cross Country Ski & Skate, 42 A.D.3d 563, 840 N.Y.S.2d 414 (2d Dep't 2007):

Contrary to the plaintiff's contention, the court properly permitted the defendants' expert to testify. "CPLR 3101 (d) (1) (i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proferring expert testimony merely because of noncompliance with the statute unless there is evidence of intentional or willful failure to disclose and a showing of prejudice by the opposing party" (citations omitted). Here, the record does not support a conclusion that the defendants' delay in retaining their expert or in serving their expert information was intentional or willful. Furthermore, disclosure of the expert information was not made on the eve of trial since the plaintiff had two weeks within which to review the material prior to the date when the trial was scheduled to begin. Moreover, any potential prejudice to the plaintiffs could have been eliminated by an adjournment of the trial (citation omitted).

The Advisory Committee's View

The Committee believes that the *Singletree/Rivers* holdings (a) impose a temporal requirement for noticing expert witnesses that contravenes the provisions of CPLR 3101(d)(1)(i) and, in effect, precludes otherwise admissible expert testimony, and (b) contravenes the longstanding application of CPLR 3101(d)(1)(i) to the noticing of experts for trial in relation to the date set for trial of an action or proceeding.

Compounding the difficulties practitioners face in navigating the conflicting holdings cited *above* are the multitude of different Judicial District, County, and individual judges' rules addressing the timing of expert disclosure, many of which may be at odds with CPLR 3101(d)(1)(i) or which do not require disclosures of expert information before the filing of a

notice. Another factor complicating the timing of expert disclosure is the continuing practice in certain counties to permit routine post-note of issue disclosure.

This Measure

This measure would not alter the circumstances in which expert testimony may be offered. Nor would it alter the rules concerning the admissibility of the reports or data on which the testimony may be premised.

This measure would simply provide that a party's right to submit an expert affidavit in support of, or in opposition to a summary judgment motion would not be affected by whether or not the party made disclosure of the expert before submitting the affidavit is designed to aid in establishing uniformity in practice state-wide, reducing confusion among members of the bench and bar as to the timing of expert disclosure, and making certain that where expert testimony is required or desired in support or opposition to a summary motion, the functional equivalent of a trial, that parties have the same latitude to utilize expert testimony as they do at trial.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the use of expert affidavits in summary judgment motions

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

Section 1. Paragraph (b) of rule 3212 of the civil practice law and rules in amended to read as follows:

(b)Supporting proof; grounds; relief to either party. A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to section 3101(d)(1)(i) was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

§ 2. This act shall take effect immediately and apply to all pending cases for which a summary judgment motion is made on or after the date on which it shall have become law and all cases filed on or after such effective date.

III. Modified Measures

1. Reinforcing the Viability of Consent as a Basis of General Personal Jurisdiction Over Foreign Corporations Authorized to do Business in New York State
(CPLR § 301(a); BCL § 1302(e)(new); Gen. Assoc. Law § 18(5)(new); Ltd. Liability Co. Law § 802(c)(new); Not-for-Profit Corp. Law § 1301(e)(new); Partnership Law § 121-902(e)(new) and Partnership Law § 212-1502(r)(new).

This measure would amend § 1301 of the Business Corporation Law (BCL) to reinforce the continuing viability of consent as a basis of general (all-purpose) personal jurisdiction over foreign corporations authorized to do business in New York. In so doing, the measure serves a substantial public interest. Being able to sue New York-licensed corporations in New York on claims that arose elsewhere will save New York residents and others the expense and inconvenience of traveling to distant forums to seek the enforcement of corporate obligations. The measure likewise amends the General Associations Law, the Limited Liability Company Law, the Not-for-Profit Corporation Law, and the Partnership Law to encompass other similarly situated foreign business organizations that must register to do business in New York.

Until recently, a foreign corporation doing business in New York could be sued here on claims arising anywhere in the world. The doing of business in New York, such as soliciting and facilitating orders for New York sales from an office in New York staffed by corporate employees, was treated as corporate "presence," which traditionally allowed for the assertion of general personal jurisdiction. When general jurisdiction exists, the claim being sued upon need not arise out of activity of the corporate defendant in New York. These principles were articulated in the 1917 case of *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, and carried forward by CPLR 301.

In the recent decision of *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), however, the U.S. Supreme Court held that due process requires more than the doing of business in a state before the courts of that state may assert general jurisdiction. By analogy to the assertion of general

jurisdiction over individuals domiciled in the state, the corporation must be "at home" in the state. This means that the only type of local activity by a corporation that will ordinarily qualify for general jurisdiction is incorporation in the state or maintenance of its principal place of business in the state. *Id.* at 760-62. Doing business in the state, by itself, will not suffice, even if such business is conducted on a regular and systematic basis from a local office or other facility. *Tauza*-type general jurisdiction, therefore, is no longer available in New York for those seeking to enforce corporate obligations incurred outside the state. On the other hand, *Daimler*'s at-home requirement has no application to cases in which a corporation is subject to "specific" jurisdiction pursuant to a long-arm statute, such as CPLR 302, which confers jurisdiction for claims arising from a defendant's local acts.

Because *Daimler*'s limitation on general jurisdiction was decided on the basis of constitutional due process, amending the CPLR to explicitly confer general jurisdiction over foreign corporations simply because they are doing business in the state would be futile. The *Daimler* Court, however, did not address consent-based general jurisdiction that occurs through corporate licensing and registration with the Secretary of State. (*See* 134 S.Ct. at 755-56, citing "textbook case" of *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), for guidance as to circumstances that permit exercise of general jurisdiction "over a foreign corporation that has not consented to suit in the forum.")

A foreign corporation, as a condition to doing business in New York, must apply for authorization to do so from the New York Secretary of State. BCL § 1301(a). As a part of such licensing and registration, BCL § 304(b) specifies that the corporation must designate the Secretary of State as its agent upon whom process may be served in a New York action. *See also* BCL § 1304(a)(6). Furthermore, BCL § 304(c) provides that foreign corporations already authorized to do business in New York as of the 1963 effective date of the BCL were "deemed" to have made such designation. (During the statutory regime that preceded adoption of the BCL, foreign corporations seeking authorization to do business in New York could appoint either a private individual or a public officer as agent upon whom process could be served. *See Karius v. All States Freight, Inc.*, 176 Misc. 155, 159 (Sup.Ct. Albany Co. 1941)).

From 1916 to the present, New York courts — State and Federal — have held that a foreign corporation's registration to do business in New York constitutes consent by the corporation to general personal jurisdiction in the New York courts. Judge Benjamin N. Cardozo wrote in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916), that such consent flows from the foreign corporation's statutorily required designation of a New York agent for service of process:

> The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person "upon whom process may be served." The actions in which he is to represent the corporation are not limited. The meaning must, therefore, be that the appointment is for any action which under the laws of this state may be brought against a foreign corporation. . . . The contract deals with jurisdiction of the person. . . . It means that whenever jurisdiction of the subject matter is present, service on the agent shall give jurisdiction of the person.

Id. at 436-37. Judge Cardozo rejected the notion that the consent at issue in *Bagdon* was limited to claims that arose from the foreign corporation's New York activity. The consent extended to all claims, regardless of where they arose. *Id.* at 438.

Although the applicable New York statutes, both in 1916 and now, do not explicitly state that registration to do business or designation of a local agent to accept service of process constitutes consent to general jurisdiction, judicial interpretation of the statutes is what matters. The Supreme Court has twice recognized that a corporation's statutorily required designation of a local agent to accept process rationally may be interpreted as consent to general jurisdiction: "[W]hen a power is actually conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act." *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 96 (1917); *see also Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 174-75 (1939).

From the time of *Bagdon*, almost all New York courts have held that consent to general personal jurisdiction is the inherent by-product of registration to do business in New York. Some have reasoned, as in *Bagdon*, that the act of consent is the designation of the Secretary of State or some other person as agent in New York (*see, e.g., Karius v. All States Freight, Inc.*, *supra*, 176

Misc. at 159; *Robfogel Mill-Andrews Corp. v. Cupples Co.*, 67 Misc.2d 623, 624 (Sup.Ct. Monroe Co. 1971); *see also* Restatement of the Law (Second) of Conflict of Laws § 44 (1971)), while others have held that a foreign corporation consents to general jurisdiction as a result of both registration "and concomitant designation of the Secretary of State as its agent for service of process" (*Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175 (3d Dep't 1983); *see also The Rockefeller University v. Ligand Pharmaceuticals Inc.*, 581 F.Supp.2d 461, 466-67 (S.D.N.Y. 2008)). Still others have simply held that becoming licensed to do business in New York constitutes consent to general jurisdiction. *Le Vine v. Isoserve, Inc.*, 70 Misc.2d 747, 749 (Sup.Ct. Albany Co. 1972); *STX Panocean (U.K.) Co., Ltd. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131 (2d Cir. 2009); *China National Chartering Corp. v. Pactrans Air & Sea, Inc.*, 882 F.Supp.2d 579, 596 (S.D.N.Y. 2012); *Steuben Foods, Inc. v. Oystar Group*, 2013 WL 2105894 (W.D.N.Y. 2013) (observing in n.1 that a contrary decision in *Bellepointe, Inc. v. Kohl's Dep't Stores, Inc.*, 975 F.Supp. 562, 564 (S.D.N.Y. 1997), has been rejected by the Second Circuit).

Because authorization to do business is not possible today without designation of the Secretary of State as an agent upon whom process may be served (BCL 304(b)-(c)), the acts of designating the Secretary of State and becoming registered are co-equal in effect. The critical fact is that the corporation has agreed to subject itself to the regulation of the state of New York and thereby has consented to general personal jurisdiction. This is "part of the bargain by which [the foreign corporation] enjoys the business freedom of the State of New York." *Neirbo Co. v. Bethlehem Shipbuilding Corp. supra*, 308 U.S. at 175. For at least 98 years, foreign corporations have been on notice that becoming licensed to do business in New York is a consent to general personal jurisdiction.

The addition of the proposed new subdivision (e) to BCL § 1301 would codify the case law and provide a forceful legislative declaration of the effect of a foreign corporation's registration to do business in New York. Consent to general jurisdiction is a fair requirement to impose on corporations that benefit from conducting business in New York. Such consent provides the certainty of a forum with open doors for the enforcement of obligations of New

York-licensed corporations without the expense and burden of proving jurisdiction on a case-by-case basis. In *Daimler*, the Supreme Court recognized the value of having an "easily ascertainable" and "clear and certain forum in which a corporate defendant may be sued on any and all claims." 134 S.Ct. at 760. It should be noted, however, that even when corporate defendants are registered in New York, courts retain the discretionary power to decline the exercise of jurisdiction over them in the interests of justice and convenience pursuant to the doctrine of forum non conveniens. CPLR 327; *see, e.g., Bewers v. American Home Products Corp.*, 99 A.D.2d 949 (1st Dep't), *aff'd*, 64 N.Y.2d 630 (1984).

Post-*Daimler* caselaw supports, both directly and indirectly, the validity and value of the proposed measure. The Supreme Court, New York County, held in *Bailen v. Air & Liquid Systems Corp.*, 2014 WL 3885949 (Aug. 5, 2014), that *Daimler* "does not change the law with respect to jurisdiction based on consent." A corporation consents to New York jurisdiction "by registering as a foreign corporation and designating a local agent." Similarly, two federal courts in New York have said that consent to general jurisdiction based on corporate registration presents an inquiry that is independent of *Daimler*. *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 136 n.15 (2d Cir. 2014) (although jurisdiction could not be based on the mere doing of business in New York, district court could "consider whether [a corporation] has consented to personal jurisdiction in New York by applying for authorization to conduct business in New York and designating the New York Secretary of State as its agent for service of process"); *Beach v. Citigroup Alternative Investments LLC*, 2014 WL 904650 (S.D.N.Y. 2014).

Of particular interest is the decision of the federal district court in *AstraZeneca AB v. Mylan Pharmaceuticals, Inc.*, 2014 WL 5778016 (D.Del. 2014), which held that Delaware's corporate consent regime was inconsistent with the premise of *Daimler*. However, the Delaware registration legislation, like the current BCL in New York, does not explicitly state that registration constitutes consent to jurisdiction. The proposition, rather, is established by caselaw. The Delaware district court, therefore, confined its holding "to Delaware's statutes specifically," noting that a more difficult question is raised when a state statute "expressly indicate[s] that foreign corporations consent to general jurisdiction by complying with the statutes." *Id.* at n. 6.

Adoption of the proposed amendments to the BCL and related statutes would clarify and confirm the well-established New York policy on corporate consent, as to which foreign corporations have been on notice for nearly a century.

BCL § 1312(a) will continue to provide an indirect enforcement mechanism to encourage foreign corporations doing business in New York to become authorized and thereby confer consent to general jurisdiction. BCL § 1312(a) states that a foreign corporation doing business in New York without authority may not maintain an action in the state's courts until it obtains the necessary authorization and pays relevant fees, taxes, penalties and interest charges. This statute "regulate[s] foreign corporations which are conducting business in New York so that they will not be on a more advantageous footing than domestic corporations." *Reese v. Harper Surface Finishing Systems*, 129 A.D.2d 159, 162 (2d Dep't 1987).

BCL § 1312(a) applies to corporations engaged in "regular, systematic and continuous" business in New York. *See, e.g., Highfill, Inc. v. Bruce and Iris, Inc.*, 50 A.D.3d 742, 743 (2d Dep't 2008). This standard encompasses corporations that maintain offices or other facilities in New York for the purpose of engaging in a mix of local and interstate business and provides sufficient flexibility for the inclusion of corporations that do business in New York without a fixed location, as was the case in *Highfill*. It has been noted that the "regular, systematic and continuous business" standard helps to ensure compliance with constitutional limits on state regulation of purely interstate business. *See Airtran New York, LLC v. Air Group, Inc.*, 46 A.D.3d 208, 214 (1st Dep't 2007).

Consistent with the history, policy and caselaw relating to foreign business corporations, this measure also codifies the principle that other types of foreign business organizations consent to general jurisdiction when they do business in New York and, pursuant to statute, expressly appoint the Secretary of State as their agent upon whom process may be served. This measure thus includes foreign joint stock associations and business trusts (*see* Gen. Assoc. Law §§ 18; 2(4) (these are the only "associations" that must designate the Secretary of State as agent)); foreign limited liability companies (*see* Ltd.

Liability Co. Law §§ 301(a); 802(a)); foreign not-for-profit corporations (*see* Not-for-Profit Corp. Law §§ 304, 1301, 1304(a)(6)); foreign limited partnerships (*see* Partnership Law §§ 121-104; 121-902); and foreign limited liability partnerships (*see* Partnership Law § 121-1502).

Authorized foreign corporations not wishing to continue their consent to jurisdiction may, of course, surrender their authority to do business in New York at any time in accordance with BCL § 1310. Other types of business organizations may likewise withdraw their authorization or certificate of designation to do business in the State. Currently, however, there is no statutory language specifically delineating the date upon which the consent to jurisdiction is deemed withdrawn. Accordingly, this measure would also enact a new CPLR 301-a to provide that where a business organization which is registered, authorized or designated to do business in this state surrenders, withdraws or otherwise revokes its registration, authorization or certificate of designation, its consent to jurisdiction terminates on the date of such surrender, withdrawal or revocation.

With respect to not-for-profit corporations, the amendment of the Not-for-Profit Corporation Law (§ 1301(e)) recognizes that some not-for-profits, such as religious corporations, are exempt from the requirement that they designate the Secretary of State as an agent upon whom process may be served. *See* Relig. Corp. Law § 2-b. *See also* Not-for-Profit Corp. Law § 113(b); Private Housing Finance Law § 13-a (limited-profit housing companies). In such cases, consent-based jurisdiction is lacking. Furthermore, foreign banks and foreign insurance companies are excluded from this measure. Although these foreign entities must register to do business in New York, their concomitant designation of the Secretary of Banking and the Secretary of Insurance, respectively, as an agent upon whom process may be served is explicitly limited by statute to a narrow range of claims. *See* Banking Law § 200(3); Ins. Law § 1212(a).

This measure, which would have no fiscal impact on the State, would take effect on the first of January next succeeding the date on which it shall have become law.

Proposal

AN ACT to amend the civil practice law and rules, the business corporation law, the general associations law, the limited liability company law, the not-for-profit corporation law and the partnership law, in relation to consent to jurisdiction by foreign business organizations authorized to do business in New York

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 301-a to read as follows:

§301-a. Termination of consent to jurisdiction in certain cases. Where a business organization registered, authorized or designated to do business in this state surrenders, withdraws or otherwise revokes its registration, authorization or certificate of designation, its consent to jurisdiction terminates on the date of such surrender, withdrawal or revocation.

§ 2. Section 1301 of the business corporation law is amended by adding a new paragraph (e) to read as follows:

(e) A foreign corporation's application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation. A surrender of such application shall constitute a withdrawal of consent to jurisdiction.

§ 3. Section 18 of the general associations law is amended by adding a new subdivision 5 to read as follows:

5. An association's certificate of designation prescribed by this section, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such association. A revocation of such designation shall constitute a withdrawal of consent to jurisdiction.

§ 4. Section 802 of the limited liability company law is amended by adding a new subdivision (c) to read as follows:

(c) A foreign limited liability company's application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such limited liability company. A surrender of such application shall constitute a withdrawal of consent to jurisdiction.

§ 5. Section 1301 of the not-for-profit corporation law is amended by adding a new paragraph (e) to read as follows:

(e) A foreign corporation's application for authority to conduct activities in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such corporation unless such corporation is exempt from any law requiring it to designate the secretary of state as agent of the corporation upon whom process against it may be served and it has made no such designation. A surrender of such application shall constitute a withdrawal of consent to jurisdiction.

§ 6. Section 121-902 of the partnership law is amended by adding a new subdivision (e) to read as follows:

(e) A foreign limited partnership's application for authority to do business in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such foreign limited partnership. A surrender of such application shall constitute a withdrawal of consent to jurisdiction.

§ 7. Section 121-1502 of the partnership law is amended by adding a new subdivision (r) to read as follows:

(r) A foreign limited liability partnership's notice to carry on or conduct or transact business or activities as a New York registered foreign limited liability partnership in this state, whenever filed, constitutes consent to the jurisdiction of the courts of this state for all actions against such foreign limited liability partnership. A withdrawal of such notice shall constitute a withdrawal of consent to jurisdiction.

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

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

The Committee 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. Amending an Exception to the Rule against Hearsay to Address Business Records Relied upon by Experts in Civil Trials (CPLR § 4549 (new))

This measure would add a new section 4549 to the CPLR to effect a very narrow but much needed change in the evidentiary law concerning the admission of expert testimony in civil trials. It would, in effect, legislatively overrule the oft-cited decision in Wagman v. Bradshaw, 292 AD2d 84 [2d Dept 2002].

Current Law

This measure relates to the "professional reliability" exception to the rule against hearsay.[1]

One commonly recurring question is whether and when an expert witness can rely, in reaching his or her opinion, on reports or data that is not itself in evidence. The Court of Appeals long ago stated the rule as being that "opinion evidence must be based on facts in the record or personally known to the witness," but that one exception to the rule is that an expert "may rely on out-of-court material if it is of a kind accepted in the profession as reliable in forming a professional opinion [internal quotations omitted]." Hambsch v. New York City Transit Authority, 63 NY2d 723, 725 [1984].

Unfortunately, that rule was greatly limited, especially in the Second Department, by the ruling in Wagman. Wagman which dealt with the testimony of a chiropractor who, in reaching an opinion, relied upon a report interpreting the patient's magnetic resonance imaging (MRI) films. Even though doctors and chiropractors routinely rely on such reports in their day-to-day practice of diagnosing and treating their patients, the Second Department ruled that the witness could not rely on the report "without the production and receipt in evidence of the original films

[1] There is, we should note, a view to the effect "that the 'professional reliability' exception is not an exception to the hearsay rule but an exception to the traditional evidentiary foundation required for expert opinions." Hon. John M. Curran, *The "Professional Reliability" Basis For Expert Opinion Testimony*, 85-Aug N.Y.St. B.J. 22, 22 [2013].

thereof or properly authenticated counterparts" (292 AD3d at 87).[2]

The Second Department afterwards extended Wagman even further, holding that the opinion evidence cannot be based upon an MRI report or similar data from another medical provider unless the author of the report was himself or herself subject to cross-examination.[3]

Although the Third Department appears to have definitively rejected the Wagman view,[4] the rule is less than clear in the other two Judicial Departments, where there are decisions that appear to be consistent with Wagman[5] and decisions that appear to be inconsistent with Wagman.[6]

The Advisory Committee's View

Our Advisory Committee believes that the Wagman rule (a) unduly obstructs the receipt

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[2] The same court had earlier reached the opposite conclusion. Torregrossa v. Weinstein, 278 AD2d 487, 488 [2d Dept 2000] ("John Torregrossa's treating physician was properly allowed to testify with respect to the MRI report because he had personally examined him, and the MRI report is data which is of the kind ordinarily accepted by experts in the field").

[3] *D'Andraia v. Pesce*, 103 AD3d 770, 771-772 [2d Dept 2013]; Elshaarawy v. U-Haul Co. of Mississippi, 72 AD3d 878, 882 [2d Dept 2010]; Clevenger v. Mitnick, 38 AD3d 586, 587 [2d Dept 2007].

[4] *O'Brien v. Mbugua*, 49 AD3d 937, 938-939 [3d Dept 2008) ("where a treating physician orders an MRI—clearly a test routinely relied upon by neurologists in treating and diagnosing patients, like plaintiff, who are experiencing back pain—he or she should be permitted to testify how the results of that test bore on his or her diagnosis even where, as was apparently the case here, the results are contained in a report made by the nontestifying radiologist chosen by the treating physician to interpret and report based on the radiologist's assessment of the actual films").

[5] Kovacev v. Ferreira Bros. Contracting, 9 AD3d 253, 253 [1st Dept 2004] ("[a] treating physician's opinion at trial cannot be based on an out-of-court interpretation of MRI films prepared by another health care professional who is not subject to cross-examination where, as here, the MRI films are not in evidence and there is no proof that the interpretation is reliable"); Vetti v. Aubin Contracting & Renovation, 306 AD2d 874, 874 [4th Dept 2003] (which, however, is arguably distinguishable).

[6] Trombin v. City of New York, 33 AD3d 564, 564 [1st Dept 2006] ("[tI]he trial court properly permitted defendants' orthopedist to testify as to his interpretation of the MRI films of plaintiff's cervical and lumbar spine, since he had reviewed the actual films and plaintiffs had notified the court of their intention to introduce the films into evidence"); Fleiss v. South Buffalo Railway Company, 291 AD2d 848, 848 [4th Dept 2002] ("defendant's examining physician was properly permitted to testify regarding the reports and findings of nontestifying treating physicians").

of opinion testimony, and (b) is out of touch with the manner in which professional opinions are generally formed beyond the bounds of the courtroom.

Doctors, for example, routinely rely upon x-ray reports, laboratory tests, MRI reports, and similar data in making life and death decisions. They do so because, in the overwhelming majority of such cases, the author of the report has more expertise than the treating doctor in interpreting the data in issue. It is, we believe, illogical to posit that such reports are sufficiently reliable to make a life or death choice of treatment, but not sufficiently reliable to serve as a predicate for expert opinion.

This illogic is exacerbated by the circumstance that, with the increasingly compartmentalized manner in which medical and diagnostic services are provided, a doctor may rely on many such reports from many different corporate providers in even the simplest cases.

This Measure

This measure would not alter the circumstances in which expert testimony may be offered. Nor would it alter the rules concerning the admissibility of the reports or data on which the testimony may be premised.

However, where the report or data is of the kind routinely relied upon in the profession as a basis for forming an opinion, the opinion shall not be rendered inadmissible on the ground that the predicate data is not in evidence. Nor shall the opinion be rendered inadmissible simply because its author or source is not available to be questioned.

The measure does not apply to expert opinions that are premised in whole or part upon predicate reports or opinions that were themselves prepared for purposes of litigation. We believe that the underlying rationale of this measure — namely, that reports or data that are routinely used to form professional opinions out in the "real world" beyond the courtroom are inherently reliable — simply does not apply to predicate data and reports that were generated for purposes of litigation.

By contrast, because governmental investigative reports are generally not compiled for

any litigation purpose, an expert's reliance upon such reports would not render the expert's opinion inadmissible *if* the "report or data [were] of a kind routinely accepted in the profession" as reliable in forming a professional opinion. This measure relates only to reports or data prepared outside of litigation. It does not address and is not intended to limit the admissibility of evidence that is otherwise admissible by statute or common law [see, e.g., Matter of State of New York v. Floyd Y., 22 N.Y.3d (2013)].

This measure, which would have no fiscal impact on the public treasury, would take effect immediately and apply to all actions pending on or after such effective date.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the admissibility of certain expert testimony

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 4549 to read as follows:

§ 4549. Admissibility of certain expert testimony. Expert opinion that is otherwise admissible in evidence shall not be rendered inadmissible by virtue of the expert's reliance on a report or other data which is not itself in evidence if that report or data is of a kind routinely accepted in the profession as reliable in forming a professional opinion. The rule set forth in this section shall apply irrespective of whether the author or source of the predicate report or data is in court or available for cross-examination. The rule set forth in this section shall not apply to a predicate report or opinion prepared for purposes of litigation. This section does not render inadmissible any evidence that is otherwise admissible by statute or common law.

§ 2. This act shall take effect immediately and shall apply to all actions pending on or after 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 pre-judgment 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. 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. But in the current era when 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 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.

The only rationale offered for its application on the domestic front is that some bank branches may not have broad access to the data banks containing account information on other branches. If this be the case, it must be concluded that it is because the bank in question chose to organize itself in this manner; in which case it should be prepared to accept the consequences of possible double liability resulting from service of a restraining notice on a New York branch. Whatever decisions a bank may make about its computer networks, in the current era of instant email communications it cannot be seriously argued that any bank would be burdened by developing a protocol for providing immediate notice to all branches of a restraining notice served on any branch.

The Committee recognizes that the Court of Appeals recently reached a different conclusion as to the application of the separate entity rule in the international context in *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149 (October 23, 2014). In that decision, the Court held that the separate entity rule is a common law doctrine not based on jurisdictional or constitutional principles which precluded giving effect to a restraining order served on a branch of Standard Chartered Bank in New York to restrain the bank from releasing assets in its branch in United Arab Emirates, thus preventing plaintiff from collecting $30 million of the over $2 billion of which it was defrauded by defendants. In support of its conclusion, the Court noted the long-standing history of the rule in New York, the reliance of the international banking community on the rule in establishing branches in New York, the continuing difficulties in conducting a world-wide search for a debtor's assets despite technological advances and centralized banking, and promotion of international comity by avoiding conflicts among sovereign schemes of bank regulation. The Court specifically stated that its decision did not address the application of the separate entity rule to bank branches in New York and elsewhere in the United States. *Motorola*, *supra*, n. 2.

Respectfully, the Committee believes that the reasons offered by the Court of Appeals in Motorola for preserving the separate entity rule in the international banking arena are no longer sustainable, for reasons explored in some depth in the dissent in *Motorola* (Abdus-Salem, J, joined by Pigott, J.).[1] The supposed difficulty in communicating among branches spread across the world can present a difficulty only if the bank chooses to make it so, as mentioned above in connection with domestic banks and branches. Banks have had to accommodate vast changes in the nature and extent of their relationships with their customers in recent decades, and there is nothing unique about the separate entity rule that should exempt it from adjustment to contemporary expectations of reasonable behavior by banks. As the dissent puts it, "Any burden imposed on the banks is far outweighed by the rights of judgment creditors to enforce their judgments." The existence of the separate entity rule is not a prerequisite to New York's preeminence in international finance, as

[1] The Committee recognizes that the reach of New York process of any kind to foreign corporations has been altered by the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (January 14, 2014). That decision will have no impact on the application of this measure to domestic corporations. How it might apply to foreign corporations including banks, and whether *Daimler* applies at all to jurisdiction over garnishees, is an issue yet to be determined by the courts.

indicated by New York's continued importance despite much greater governmental burdens such as the USA Patriot Act and the Bank Secrecy Act. Significantly, the long-standing availability to creditors of an injunction from New York courts to freeze assets in foreign bank branches has had no effect on New York's status in the world of finance. *United States v. First Natl. City Bank,* 379 U.S. 378 (1965); *Abuhamda v. Abuhamda*, 236 A.D. 2d 290, 654 N.Y.S. 2d 11 (1st Dept. 1997).

Nor is the limitation of the separate entity rule necessary to achieve any recognition of comity that may arise in the course of enforcing judgments. In the rare instances in which a conflict with a foreign regulatory body may arise, the courts may, in accordance with CPLR 5240 ("Modification or protective order; supervision of enforcement"), fashion a unique remedy for the unique difficulty encountered.

Accordingly, the Committee 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 any office of the financial institution."

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 or any 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 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 subdivision upon a financial institution shall be made by serving the institution's main office or any 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 or any 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 or any 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 or any 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. Removing the Requirement that Papers Served by Mail be Mailed within the State

(CPLR 2103(f)(1))

The Committee recommends this measure which would repeal the language in CPLR 2103(f)(1) that requires that papers served by mail upon an attorney in a pending action be mailed within the State of New York. This measure also extends by one day, to six days, the prescribed period of time for response to such papers when they are served by mail from outside the State but within the geographic boundaries of the United States.

We take particular note of a recent decision by the Appellate Division, First Department, holding service by mail made *outside* the State insufficient (*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)). In response, our Advisory Committee points out that CPLR 2103(b)(6), the rule regarding service upon an attorney via dispatch by overnight delivery service, 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:
>
> 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's view is that 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. The act of removing this requirement recognizes the current realities of multi-state practice and the increased mobility of litigants and litigation. Finally, the measure has been amended to be limited in scope and application to the geographic boundaries of the United States.

This measure would have no fiscal impact on the State. It would take effect on the first day of January next succeeding the date on which it shall have become law.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the definition of mailing for 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, as amended by chapter 461 of the laws of 1989, 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 if the mailing is made within the state and six days if made from outside the state but within the geographic boundaries of the United States; or

§2. Paragraph 1 of subdivision (f) of rule 2103 of the civil practice law and rules, as amended by chapter 461 of the laws of 1989, is amended to read 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 United States;

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

IV. Previously Endorsed Measures

1. 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); 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 of 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. For the exclusive purpose of use in a civil action, 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.

2. 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 originally 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 insurer 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, GOL §5-335, as amended, creates a conclusive presumption that a personal injury settlement does not include compensation for health care costs, loss of earnings or other economic expenses to the extent they have been paid, or are obligated to be paid, by an insurer. It further states that no person 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. The section does not apply to certain benefits specified in sections (b) and (c) of the section.

The section was amended in 2013 (L. 2013, c. 516) to clarify that it is specifically directed toward entities engaged in providing insurance, thus falling under the "savings" clause contained in ERISA, which reserves for the states the right and the ability to regulate insurance.

The decision in Rink v. State of New York, 27 Misc.3d 1159 (Ct. Claims 2009), aff'd, 87 AD 3d 1372 (4th Dept. 2011) 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 tortfeasor has 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 certain benefits specified in subdivisions (b) and (c) of section 5-335. The measure, adopting the predominant view in the Appellate Divisions, under which intervention by health insurers is precluded (see Fasso, 12 NY3d at 89), would make that explicit.

The proposal would also clarify that the section applies to judgments as well as settlements. Thus, for example, with respect to the claims covered by the section, an insurer could not assert a subrogation claim or claim for reimbursement against any person irrespective of whether the claim is resolved by settlement, as under the current statute, or by a judgment. The Committee believes that the principles underlying the section apply equally to matters that are resolved by settlement and those that are litigated.

Furthermore, 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. It would simplify and reduce the cost of litigation and facilitate settlement of claims. Moreover, it would ensure that the burden of payment for health care services, disability payments, lost wage payments or other benefits will be borne by the insurer providing such collateral sources, whether a claim against an alleged tortfeasor is resolved by settlement or judgment.

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 amended by chapter 516 of the laws of 2013, is amended to read as follows:

§5-335. Limitation of reimbursement and subrogation claims in personal injury and wrongful death actions. (a) When a person settles a claim, whether in litigation or otherwise, or obtains a judgment against, one or more other persons 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 an insurer. By entering into any such settlement, or by seeking or obtaining such judgment, a person shall not be deemed to have taken an action in derogation of any right of any insurer that paid or is obligated to pay those losses or expenses; nor shall a person's entry into such settlement or recovery of such judgment constitute a violation of any contract between the person and such insurer.

No person entering into such a settlement or obtaining such a judgment

shall be subject to a subrogation claim or claim for reimbursement by an insurer and an insurer shall have no lien or right of subrogation or reimbursement against any such [settling] person or any other party to such a settlement, with respect to those losses or expenses that have been or are obligated to be paid or reimbursed by said insurer. An

insurer 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.

(c) This section shall not apply to a subrogation or reimbursement claim for recovery of benefits provided by Medicare or Medicaid, specifically authorized pursuant to article fifty-one of the insurance law, or pursuant to a policy of insurance or an insurance contract providing workers' compensation benefits.

§2. This act shall take effect immediately and apply to all settlements entered into or judgments entered on or after November 12, 2009.

3. Clarifying the Manner in Which the Acknowledgment of a Written Agreement Made Before or During Marriage May be Proven in an Action or Proceeding
(D.R.L § 236(B)(3))

The measure would amend subdivision 3 of Part B of section 236 of the Domestic Relations Law so that a notary's inadvertent mistake does not invalidate an otherwise valid written agreement that both parties undisputedly signed.

Subdivision (3) currently requires that, in order to be valid, a written agreement made before or during marriage must be "subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." The provision thus adopts the requirement, set forth in Real Property Law § 291, that each signature must be "duly acknowledged by the person executing the same" or "proved" by use of a subscribing witness.

Due to the impracticality of the latter alternative, parties almost invariably opt for the acknowledgment option. A notary public is called, verifies that the individual who is signing in the notary's presence is indeed the individual described in the document, and so attests in the usual catechism.

The acknowledgment requirement fulfills two functions. First, it "serves to prove the identity of the person whose name appears on an instrument and to authenticate the signature of such person." Matisoff v. Dobi, 90 NY2d 127, 133 (1997). Second, "it necessarily imposes on the signer a measure of deliberation in the act of executing the document." Galetta v. Galetta, 21 NY3d 186, 192 (2013).

However, there is a problem with the inflexible nature of the current requirement concerning certification of the acknowledgment. The problem was plainly demonstrated by the Court of Appeals' recent ruling in Galetta. In that case, it was undisputed that both parties had signed the subject agreement, and, more than that, that both parties had done so in the presence of a notary who was retained specifically for that purpose. Unfortunately, the notary retained to

notarize the husband's signature inadvertently omitted a portion of the "boilerplate" language stating that the notary had confirmed the identity of the signatory, with the consequence that the notary's certification of the acknowledgment was defective. For that reason, and also because the notary could (understandably) not remember an entirely unmemorable event that had occurred many years earlier, a prenuptial agreement that both parties had undisputedly signed was deemed legally invalid.

The proposed amendment would not dispense with the requirement that the agreement be "duly acknowledged" or "proved" by a subscribing witness. The Committee believes that the requirement is good policy, serving the two purposes noted above. So, as before, if either signatory fails to sign in the presence of a notary formally retained to certify the signature, the agreement will not be valid.

The amendment would, however, allow some flexibility in the manner in which the acknowledgment is proven. More specifically, if a notary is called to certify the written acknowledgment where the notary's acknowledgment is defective in form, when the signing of the document by the parties and the parties' acknowledgment are proven, the court may ignore defects as to the form of the acknowledgment. The party may, for example, present testimony from the notary to the effect that his or her customary practice was to ask and confirm that the person signing the document was the same person named in the document.

Such was proposed by the Appellate Division majority in Galetta. The Committee believes that the idea is a good one. By injecting a modicum of flexibility into the statute, we can continue to ensure that marital and pre-marital agreements are authentic and are preceded by some measure of deliberation, while also ensuring that a notary's inadvertent error does not irrevocably alter the parties' lives.

Proposal

AN ACT to amend the domestic relations law, in relation to the proof of acknowledgment of the agreement of the parties in an action or proceeding

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

Section 1. Paragraph 3 of part B of Section 236 of the domestic relations law is amended to read as follows:

3. Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. However, where there is a written certification of acknowledgment that is defective in form, and signing of the document by the parties and the parties' acknowledgment are proven, the court may ignore defects as to the form of the acknowledgment. Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter. Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this article. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision. However, where there is a written certification of acknowledgment that is defective in form, the acknowledgment may be proven by other means.

§ 2. This act shall take effect immediately and shall apply to an agreement made prior before on or after such effective date.

4. Clarifying the Procedure Available for Payment or Delivery of Property of Judgment Debtor (CPLR 5225 (a) & (b))

CPLR 5225(a) provides that a judgment creditor can seek satisfaction of a judgment by moving against the judgment debtor for an order requiring him or her to deliver to the sheriff any money or personal property in which he or she has an interest if he or she is "*in possession or custody*" of that property. Similarly, CPLR 5225(b) allows the judgment creditor to commence a special proceeding against another 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." CPLR 5225(b) (italics supplied).

This measure would amend CPLR 5225(a) and (b) to facilitate the ability of a judgment creditor to seek the delivery of property in the possession of a person outside the court's jurisdiction by exercising jurisdiction over the judgment debtor or another person within the court's jurisdiction who may "control" the person with possession. The issue can arise in a number of contexts, including a situation where a garnishee's agent, such as an attorney, holds the property. The property is under the garnishee-client's "control," but arguably not in that client's "possession or custody."

This amendment may also come into play in a parent / subsidiary situation, as it did in the recent decision of the Court of Appeals in Commonwealth of the N. Mariana Islands v. Canadian Imperial Bank of Commerce, 21 N.Y.3d 55 (2013) ("*Mariana*"). In *Mariana*, the Court addressed whether a judgment creditor can obtain an Article 52 turnover order against a bank to garnish assets held by the bank's foreign subsidiary. *Mariana*, 21 N.Y.3d at 57. The plaintiff Commonwealth of the Northern Mariana Islands had obtained two separate tax judgments against two individuals, the Millards, who resided in the Commonwealth. Id. at 58. The Commonwealth registered the tax judgments in the United States District Court for the Southern District of New York and commenced proceedings as a judgment creditor pursuant to Fed. R. Civ. P. 69(a) and CPLR 5225(b), seeking a turnover order against the Millards. Id. The

Commonwealth named a bank, CIBC, as a garnishee on the basis that the Millards maintained accounts in 92%-owned foreign subsidiaries of CIBC. Id.

In *Mariana*, the Court of Appeals observed that, ". . . legislative use of the phrase 'possession or custody' contemplates **actual** possession. Notably, sections of the CPLR pertaining to the disposition of property utilize the narrower 'possession or custody' standard." Id. at 63 (emphasis added). The Court contrasted this with the "possession, custody or control" standard which "has been construed to encompass constructive possession." Id. As a result, the Court held that, ". . . for a court to issue a postjudgment turnover order pursuant to CPLR 5225(b) against a banking entity, that entity itself must have actual, not merely constructive, possession or custody of the assets sought . . . [I]t is not enough that the banking entity's subsidiary might have possession or custody of a judgment debtor's assets." Id. at 57-58.

CPLR 5225(b), when enacted, represented a change from the predecessor provision in the Civil Practice Act. As discussed in *Mariana*, Civil Practice Act § 796 provided for turnover of property in the "possession" or "control" of another person. Id. at 61. CPLR 5225(b), on the other hand, employs the "possession or custody" language, and omits the word "control." Id. In interpreting the statute, the Court reasoned that the omission was intentional, because "[w]hen the legislature has sought to encompass the concept of 'control' it has done so explicitly . . . ." Id. at 62.

By way of contrast, in other sections of the CPLR, such as disclosure provisions, the concept of "control" is included. See CPLR 3111 (requiring production at deposition of books, papers, and other items in "the possession, custody or control" of the person to be examined); see also CPLR 3120(1)(i) (requiring discovery or inspection of documents "in the possession, custody or control" of the party served with a subpoena). Although the issue has not been resolved at the appellate level, "control" has been interpreted by one trial court to mean that discovery can be obtained from a wholly-owned subsidiary, wherever located, of a parent that is a party to the case, because the parent has control over the wholly-owned subsidiary. See Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner, 175 Misc. 2d 408 (Sup. Ct. N.Y. Co. Jan. 15, 1998). The Committee expresses no view as to whether, in the context of a parent/subsidiary or other

relationship, the requisite "control" should be found; that is a matter for judicial development and determination in particular cases nor is the Committee expressing any view as to whether the word "control" as used in the context of CPLR 5225 necessarily should be construed in the same manner as it may be construed in the context of CPLR Article 31.

The proposed amendment would add "control" to CPLR 5225(a) and (b), thus restoring the standard reflected in the prior Civil Practice Act and the Code of Civil Procedure before it (§ 2447). It would facilitate the efforts of judgment creditors to satisfy judgments by reaching assets held by persons or entities under the control of garnishees. The Committee considered whether to add the "control" language to other garnishment and attachment provisions but declined to do so. The Civil Practice Act appropriately limited the control standard to the context of judicially supervised adversarial hearings.

Proposal

AN ACT to amend the civil practice law and rules, in relation to payment or delivery of property of judgment debtor

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

Section 1. Subdivisions (a) and (b) of section 5225 of the civil practice law and rules, as amended by chapter 388 of the laws of 1964, are amended to read as follows:

(a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession [or], custody or control of money or other personal property in which he or she has an interest, the court shall order that the judgment debtor 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 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. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

(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 or control 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 proceedings 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 or her rights in accordance with section 5239.

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

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 judgments 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 Oakes v. Patel, 20 N.Y.3d 633 (2013), where the Court acknowledged that its rulings as to what "necessarily affects" the judgment "may not all be consistent" (Id. At 644) and, in particular, with regard to orders granting or denying the amendment of pleadings, the application of the rule has been "particularly vexing." Id. Adding to the problem, the Court in Oakes overruled cases setting a bright-line standard that orders relating to amendments of pleadings were never orders necessarily affecting a final judgment, leaving the issue to be decided on a case-by-case basis. Id.

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 order where there is a question as to whether that order 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 in the context of a final order. 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's 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, subdivision (c) as amended by chapter 474 of the laws of 1997, 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 or she 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. 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.

7. 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.

8. 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.

9. 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.

10. 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.

11. Eliminating 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.

12. 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.

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. Clarifying the Remedies Available to the Court for Failure of Counsel to Comply with Rule on Pretrial Conference Appearance (22 N.Y.C.R.R. 202.26(e))

The Committee recommends that paragraph (e) of Section 202.26 of the Uniform Rules for the Supreme Court and the County Court (22 N.Y.C.R.R. 200 et. seq.) be amended to clarify the remedies which may be available to the Court where parties are represented by counsel and such counsel fails to comply with paragraph (e) of the rule on appearance at a pretrial conference. The Committee believes that the rule is unclear to the bench and bar, as evidenced by the reports from the practice and recent case law, such as the opinion of the Appellate Division, Third Department in CBA Properties, LLC v. Global Airlines Services, Inc., 108 A.D.3d 967, 970 N.Y.S.2d 326, 2013 N.Y. Slip Op. 05364 (2013). The Committee recommends adding the remedies set forth in Section 202.27 for counsel's failure to comply with paragraph (e). The proposed amended rule would state that the court may deem failure to comply a default under CPLR 3404 or a failure to comply with section 202.27.

Proposal

§ 202.26. Pretrial Conference

(e) Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations, or accompanied by a person empowered to act on behalf of the party represented, will be permitted to appear at a pretrial conference. Where appropriate, the court may order parties, representatives of parties, representatives of insurance carriers or persons having an interest in any settlement, including those holding liens on any settlement or verdict, to also attend in person or telephonically at the settlement conference. Plaintiff shall submit marked copies of the pleadings. A verified bill of particulars and a doctor's report or hospital record, or both, as to the nature and extent of injuries claimed, if any, shall be submitted by the plaintiff and by any defendant who counterclaims. The judge may require

additional data, or may waive any requirement for submission of documents on suitable alternate proof of damages. Failure to comply with this paragraph may be deemed a default under CPLR 3404 or a failure to comply with section 202.27. Absence of an attorney's file shall not be an acceptable excuse for failing to comply with this paragraph.

2. Providing a Procedure Under the Standards of Comity for the Recognition of Judgments Rendered by Tribunals or Courts of Federally-Recognized Tribes (22 NYCRR 202.71 (new))

The Advisory Committee proposes a new Rule 202.71 to provide for a procedure for the recognition of judgments rendered by tribunals or courts of federally-recognized tribes.

There are several active tribunals operated by the various federally-recognized Indian tribes within the State of New York. Increasingly, the parties that appear before these tribunals seek to obtain recognition of these judgments in New York's courts. As a judgment of a sovereign nation, a tribal judgment may be entitled to comity as a matter of common law. *See* Bird v. Glacier Electric Cooperative, Inc., 255 F.3d 1156 (9th Cir. 2001); Wilson v. Marchington, 127 F.3d 805, 807-11 (9th Cir. 1997); *see generally*, Hilton v. Guyot, 159 U.S. 113, 16 S. Ct. 139 (1895); S.B. v. W.A., 2012 WL 4512894 (S.Ct. West. Co., Sept. 26, 2012). Moreover, tribal money judgments may receive recognition pursuant to Article 53 of the CPLR, which is derived from the Uniform Foreign Money-Judgments Recognition Act.

The Committee has been advised that at least some courts are uncertain as to how to, or whether to, recognize these judgments. The purpose of this rule is to establish an expeditious and uniform procedure for the recognition of appropriate tribal judgments under the substantive common law or Article 53 of the CPLR. This procedural rule is not designed to change in any way the substantive requirements for recognition or non-recognition of any tribal judgments, or any other foreign-nation judgments. Further, it does not amend the procedures required for enforcement of judgments. It is merely designed to provide a roadmap for the parties and the courts as to how to seek recognition of these judgments.

Finally, this provision does not purport to apply to proceedings coming within the scope of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 *et. seq.*, which requires all state courts to give full faith in credit to any judgment of an Indian tribe applicable to Indian child custody proceedings. Such proceedings would come within the scope of Article 54, which provides for enforcement of judgments entitled to full faith and credit.

Proposal

Section 202.71. Recognition of Tribal Court Judgments. Any person seeking recognition of a judgment rendered by a court duly established under tribal or federal law by any Indian tribe or nation recognized by the State of New York or by the United States may commence a special proceeding in Supreme Court pursuant to Article 4 of the CPLR by filing a notice of petition and a petition with a copy of the tribal court judgment appended thereto in the County Clerk's office in any county of the state. Alternatively, the person may commence an action pursuant to CPLR 3213. If the court finds that the judgment is entitled to recognition under the provisions of Article 53 of the CPLR or under principles of the common law of comity, it shall direct entry of the tribal judgment as a judgment of the Supreme Court of the State of New York.

3. 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.

(*See*, 2014 Report of the Advisory Committee on Civil Practice, 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)

4. 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.

(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.

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

A. **Temporarily Tabled Legislative Proposals**

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A. Legislative Proposals

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

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

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

2. 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.

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

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

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

comply.

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

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

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

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

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

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

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

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

expiration of the 20-year lien period to prevent the lien from expiring while the sale of the real property takes place. Thus, the Committee has included language in the effective date section of the legislation which will ensure that §5235 remains available in those instances to provide the appropriate notice on the public record.

5. Modifying the Contents of a Bill of Particulars to Expand the Categories of Information That may be Requuired (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.

6. 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.

7. 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.

8. 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.

9. Allowing a Notary Public to Compare and Certify Copies of Papers that WillComprise 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.

10. 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.

11. 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.

12. 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.

13. Stay of Enforcement on Appeal Available to Municipal Corporationsand 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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-stateservice 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.

19. 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 alawsuit 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 alsoprohibited 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.

20. 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 aplaintiff 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.

21. 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.

22. 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. 3)

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 testimonyfor 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.

23. 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.

24. 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. 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, andFourth 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.

25. 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.

26. 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.

27. 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).

28. Addressing Current Deficiencies in CPLR Article 65 Dealing with Notice 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.

31. Addressing the Deficiencies of the Structured Verdict Provisions of CPLR Art. 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. 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) (See Temporarily Tabled Legislation No. 4., above)

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.

2. 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.

3. 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. The Subcommittee will continue to consider new developments in the common law along with existing rules, ethical requirements and statutes bearing on this issue.

2. 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.

3. 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 electronic means.

4. The Committee, through its Subcommittee on Costs and Disbursements, is considering a possible revision of Article 81 of the CPLR, governing costs.

5. 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.

6. 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 .

7. In cooperation with the Surrogate's Court Advisory Committee, the Committee continues to examine: 1) guidelines for structured settlements; 2) the e-situs of property with regard to traditional concepts of *in rem* jurisdiction and concomitant constitutional issues and 3) confidentiality of documents filed in court.

9. The Committee continues to examine periodically the continued occurrence of local rules which require motion papers be sent to the court rather than be filed with the County Clerk.

10. The Committee is examining questions that arise from the failure of a non-party to appear at a settlement conference.

11. The Committee, in its entirety and through is Subcommittee on Evidence, is reviewing the law governing the use of material obtained during discovery and challenges to admissibility.

VIII. Subcommittees

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

Subcommittee on Alternative Dispute Resolution
Chair, Harold A. Kurland, Esq.

Subcommittee on Appellate Jurisdiction
Chair, Thomas R. Newman, 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 Confidentiality of Documents
Co-Chairs, Thomas F. Gleason, Esq. & Mark C. Zauderer, Esq.

Subcommittee on Contribution and Apportionment of Damages
Chair, Brian Shoot, Esq.

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

Burton N. Lipshie, Chair

Subcommittee on Expansion of Offers to Compromise Provisions

Chair, Jeffrey E. Glen, Esq.

Subcommittee on Interest Rates on Judgments

Chair, Brian Shoot, Esq.

Subcommittee on Jurisdiction

Chair, Burton N. Lipshie, Esq.

Subcommittee on Legislation

Chair, George F. Carpinello, Esq.

Subcommittee on Liability Insurance and Tort Law

Chair, George F. Carpinello, Esq.

Subcommittee on Matrimonial Procedures

Chair, Myrna Felder, Esq.

Subcommittee on Medical Malpractice

Chair, Richard Rifkin, Esq.

Subcommittee on Mortgage Foreclosure Procedure

Chair, James N. Blair, Esq.

Subcommittee on Motion Practice

Chair, Richard Rifkin, Esq.

Subcommittee on Periodic Payment of Judgments and Itemized Verdicts

Chair, Brian Shoot, Esq.

Subcommittee on Preliminary Conference Orders

Chair, John R. Higgett, Esq.

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

Chair, Prof. Vincent C. Alexander

Subcommittee on Technology & E-Filing

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 R. 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 Medicare Liens and Settlement

Chair, Lucille Fontana, Esq.

Ad Hoc Subcommittee on CPLR 2106 Affirmations

Chair, James N. Blair, Esq.

Ad Hoc Subcommittee on Uniform Unsworn Foreign Declarations Act

Chair, Richard. B. Long, Esq.

Ad Hoc Subcommittee on Plaintiff Funding Advances

Chair, Helene E. Blank, Esq.

Ad Hoc Subcommittee on G.O. L. 5-335

Chair, George F. Carpinello, 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.

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.

Richard M. Steigman, Esq.

John F. Werner, Esq.

Mark C. Zauderer, Esq.

Oren L. Zeve, Esq.

Holly Nelson Lütz, Esq., Counsel

APPENDIX

2015 REPORT ON

E-FILING in CIVIL CASES

REPORT ON E-FILING IN CIVIL CASES

by the

Advisory Committee on Civil Practice to the Chief Administrative Judge

January, 2015

INTRODUCTION

The Advisory Committee on Civil Practice offers the following report to the Chief Administrative Judge of the Courts on E-Filing in Civil Cases in New York courts. E-filing was first authorized in New York by legislation in 1999 as a pilot program for civil cases in specified counties on a voluntary basis. The Committee supported that pilot and has continued to review it and to support the expansion of the e-filing program since its inception. In 2015 the New York Legislature must re-authorize the e-filing program. The Committee welcomes the opportunity to provide its report at this unique time.

The Committee's review of the e-filing program was commenced under the following assumptions regarding the objectives of the proposed 2015 legislation:

- The legislation will re-consolidate the e-filing statutes from the Unconsolidated Laws to the practice chapters.

- The legislation will remove the current legislative requirement for authorization of mandatory e-filing in civil cases and authorize the Chief Administrative Judge to implement and expand e-filing with consultation with the county clerks.

- The legislation will make permanent the statutes governing e-filing in family and criminal courts.

- The legislation will eliminate some or all of the excluded case types from mandatory e-filing.

- The legislation will provide for expansion of e-filing in the Appellate Divisions of New York's Supreme Court.

The Committee studied each of the five objectives set forth above through its Subcommittee on E-filing and Technology. The Subcommittee analyzed the objectives and made inquiries to courts and practitioners statewide about experience with e-filing. It reported to the full Committee on the responses that the Subcommittee received from its inquiries (Exh. A). The Committee accepted the report of the Subcommittee in its entirety and makes its final recommendations in this report. The Committee also submits herein for your consideration as part of the 2015 legislation, a proposed bill that would effect a simple, general delegation of authority in the Civil Practice Law and Rules ("CPLR") to the Chief Administrative Judge to enact mandatory e-filing in civil matters statewide, and authority to promulgate rules to implement the statute (Exh. B).

I. Report of the Subcommittee on E-Filing and Technology

A. E-filing is deeply entrenched in the court system (approximately 800,000 cases have been e-filed); and has worked well. Practically speaking, e-filing is a necessary part of the future court system.

B. There are continuing issues with courtesy hard copies, but these can be addressed administratively by the courts.

C. E-filing provides the court, the county clerk, the bar and its clients with undisputed efficiencies and cost savings, including ease of access to electronic court files, minimal storage requirements and sufficient, documented service.

D. The implementation of e-filing requires a team effort among the county clerk, chief court clerk, the UCS Division of Technology and the UCS E-Filing Resource Center. This model has addressed the needs and concerns of all interested parties. It has been very effective, and this model should be continued.

E. The complex implementation of e-filing is currently done successfully on a county-by-county basis; thus, the Chief Administrative Judge should be given plenary authority in the CPLR to adopt e-filing statewide in civil cases in the supreme and county courts. Court rules are the appropriate place in which to provide necessary adjustments tailored to the respective needs of the court, and where applicable, the county clerk.

F. The Subcommittee favors expansion of e-filing into all four categories of previously excepted classes of cases, *i.e.*, proceedings under the Election Law; the Domestic Relations Law for matrimonial proceedings; and Article

78 and Mental Health Law proceedings. Implementation in each class would be by Rule as previously noted.

G. The Subcommittee favors the adoption of mandatory e-filing for all classes of cases in all counties, implemented by Rule as previously noted.

H. E-filing procedures presently allow flexibility for use by practitioners, including opt-out as necessary. The court rules can continue these procedures.

I. E-filing for self-represented parties occurs with assistance in many courts. This has been increasingly successful, with further improvement expected as assistance becomes available in additional counties coming into the NYCEF system.

J. E-filing in the Appellate Divisions is endorsed by the Subcommittee if implemented with a single platform (NYCEF) and a single set of statewide rules or parallel appellate division rules.

II. Recommendations of the Advisory Committee

A. Re-consolidation of the e-filing statutes from the Unconsolidated Laws to the practice chapters.

The Committee recommends that the e-filing statutes be re-consolidated from the Unconsolidated Laws to the practice chapters, including enactment of civil e-filing authorization in the Civil Practice Law and Rules. The Committee believes that there is no persuasive argument to keep the e-filing statutes located in the Unconsolidated Laws.

B. Remove the current legislative requirement for authorization of mandatory e-filing in civil cases and authorize the Chief Administrative Judge to implement and expand e-filing with consultation with the county clerks.

The Committee recommends that the e-filing statutes should confer plenary authority on the Chief Administrative Judge, with expansion issues addressed by the Chief Administrative Judge by rule. The Committee believes that there has been extensive e-filing experience by practitioners, county clerks and court clerks through the pilot program, and the continued expansion of the e-filing program in all counties is now feasible and appropriate. The implementation of e-filing to date fully supports broader authority in the Chief Administrative Judge.

Further, the Committee believes that, based upon such experience, there is no need to give the county clerk of any particular county authority to reject e-filing. It has been reported to the Committee by practitioners in certain counties that there is great disappointment over the lack of an e-filing program in those counties. The Committee encourages further efforts to implement e-filing in those counties. The Committee also recognizes that some county clerks may prefer not to fully implement e-filing. The Committee believes that the cost-savings and efficiencies identified by county clerks who have implemented e-filing address such concerns or, at a minimum, must be as presented as strongly persuasive on the need for implementation. The Committee also recommends

that any provisions regarding procedures for the county clerks should be provided by rule and not in the CPLR.

C. Making permanent the statutes governing e-filing in Family and Criminal Courts.

The Committee takes no specific position on this objective, as it may be beyond its jurisdictional purview. With that exception, the Committee adopts fully the Subcommittee Report which recommended that e-filing be made permanent in all cases and all types of actions and that the Chief Administrative Judge be given plenary authority to implement e-filing throughout the State.

D. The legislation will eliminate some or *all* of the excluded case types from mandatory e-filing.

The Committee recommends expansion of e-filing to all four categories of previously excepted classes of cases, *i.e.*, proceedings in the Election Law; under the Domestic Relations Law for matrimonial proceedings; Article 78 proceedings; and Mental Health Law proceedings. In all classes, implementation would be made by the Chief Administrative Judge as necessary by rule. The Committee adopts fully the Subcommittee Report which recommended that e-filing be made permanent in all cases and all types of actions, subject to rules under the plenary authority of the Chief Administrative Judge.

E. Expansion of e-filing to the Appellate Division, NY Supreme Court.

The Committee recommends that e-filing should be expanded to the appellate divisions. The Committee does not make a recommendation as to whether specific legislation authorizing expansion to the appellate divisions is necessary; however, it concludes that there is no jurisdictional impediment to doing so. The Committee notes that while the Chief Administrative Judge promulgates rules for the trial courts, with regard to the appellate division rules on e-filing, the Chief Administrative Judge's role

may be advisory. The Committee does recommend that, for the benefit of the bench and bar, implementation of the appellate division e-filing occur through a single (NYCEF) platform and a single set of court rules be applicable to all appellate divisions.

III. Conclusion

The Committee recommends that the e-filing authorization for civil cases be re-codified in the Civil Practice Law and Rules. However, it is the recommendation of the Committee that the provision for an annual report on e-filing to the legislature should continue, but this reporting requirement should not appear in the CPLR, but rather, in the Judiciary Law. Further, the statute as proposed and enacted should confer plenary authority on the Chief Administrative Judge, with expansion and other procedural determinations addressed solely by the Chief Administrative Judge by rule.

The Committee submits for consideration its legislative proposal on e-filing in civil matters in the CPLR. This proposal would effect a simple, general delegation of authority to the Chief Administrative Judge to enact mandatory e-filing in civil matters statewide, with the authority to promulgate rules to implement the statute.

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.
Prof. Patrick M. Connors. Esq.
Edward C. Cosgrove, Esq.
Hon. Betty Weinberg Ellerin (ret.)
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Jay G. Safer, Esq.
Brian Shoot, Esq.
Richard M. Steigman, Esq.
John F. Werner, Esq.
Mark C. Zauderer, Esq.
Oren L. Zeve, Esq.

Holly Nelson Lutz, Esq., Counsel

EXHIBIT A

Timothy C. Idoni
Westchester County Clerk

To: Jeff Carucci, *Statewide Coordinator for Electronic Filing*

From: Eileen Songer McCarthy, *Assistant to the County Clerk*

Re: Electronic Filing in Westchester County

Date: November 7, 2014

Thank you for inviting the Office of the Westchester County Clerk to comment on our positive experience with electronic filing through the New York State Courts Electronic Filing ("NYSCEF") System.

Background

Westchester launched electronic filing of tax certiorari petitions on a consensual basis in April of 2008, but because the municipal defendants in tax certiorari cases refused to consent to e-filing, utilization of NYSCEF was sluggish. In 2009, state legislation provided that the electronic filing of tort actions would become mandatory in Westchester County and we began actively working with the Ninth Judicial District and Office of Court Administration staff to insure a smooth transition to mandatory e-filing in Westchester County. In June of 2010, we began accepting electronically filed Commercial Division eligible cases on a consensual basis. On January 19, 2011, we began accepting all commercial and tort actions on a consensual basis. On February 1, 2011, electronic filing of Commercial Division eligible cases became mandatory. On March 1, 2011, electronic filing of tort actions became mandatory and Small Claims Assessment Review actions were added as a consensual case type. On June 1, 2011 the electronic filing of all commercial actions, including breach of contract and foreclosure actions became mandatory. On January 17, 2012, the electronic filing of all foreclosure and tax certiorari cases became mandatory. On April 3, 2013, Westchester County was designated to institute a pilot program to become the first county in New York State to accept matrimonial actions electronically on a consensual basis. At present, all civil actions expect Article 78, Election Law, Matrimonial and Mental Hygiene actions must be commenced electronically. The electronic filing of Matrimonial actions is permissible, but not required.

Teamwork

Our success is the result of being part of a dedicated team led by Westchester County Clerk Tim Idoni and 9th Judicial District Administrative Judge Alan Scheinkman and supported by you as the Statewide Coordinator for Electronic Filing. County Clerk Idoni and Judge Scheinkman set ambitious goals which were embraced and accomplished by members of our staff in the County Clerk's Office as well as court staff including Chief Clerk Nancy Barry and Chief Court Attorney Diane Clerkin. I highlight our teamwork because electronic filing only becomes seamless for all the parties if everyone is able to work together, balance priorities, and follow through on establishing clear procedures. I would also like to note that the dedicated and knowledgeable staff at the E-Filing Resource Center has done a tremendous job supporting our staff and our customers in Westchester County. Resource Center staffers have been willing to learn about the specific needs and requirements in Westchester and have approached our various modification requests with an open mind and positive attitude which has contributed to our success.

Volume

We are proud to have a significant volume of documents entering and leaving our office electronically each day.

Over eighty percent (80%) of our civil actions are commenced electronically. In 2013, 19,452 of our 23,792 civil actions, or eighty one percent (81%), were commenced electronically. In the first three quarters of 2014, 14,121 of 17,156, or eighty two percent (82%) of our civil actions were commenced electronically.

The number of electronically submitted documents, which range from Affidavits of Service to Judgments to Summons and Complaints, increases each year. In 2013, we received 230,283 documents electronically. In the first three quarters of 2014, we have received 203,615 documents electronically.

Training and Promotion

Westchester County is proud of the training effort we have instituted with the launch of mandatory e-filing. To date, over one thousand five hundred individuals have taken a NYSCEF Continuing Legal Education class conducted here in Westchester. In addition to holding NYSCEF training classes near our White Plains office, we have travelled to large law offices to conduct these training sessions. In addition, classes have been sponsored by the Westchester County Bar Association, the Westchester Women's Bar Association, the Mount Vernon Bar Association, the New Rochelle Bar Association, the Northern Westchester Bar Association, the White Plains Bar Association, the Yonkers Bar Association, the Yorktown Bar Association and the Columbian Lawyers.

Results

Our office has experienced almost three years with the vast majority of new civil cases being commenced electronically and are extremely pleased the results for the following reasons:

- **NYSCEF Provides Tremendous Convenience for Our Customers:** Customers have the option of filing a document with our office any hour of the day and any day of the week. Currently customers who visit our office to file must travel to downtown White Plains, in some cases paying to park, enter the courthouse, proceed through security and travel up to the third floor where our Legal Division is located. Alternatively customers mail documents to our office, experiencing both a mailing cost and a delay in filing while the documents are travelling to our office via overnight or regular mail. By using the NYSCEF System, the customer eliminates the time and costs associated with getting paper filings to our office. There is no doubt this is both efficient and cost-effective for our customers.

- **NYSCEF Saves Taxpayer Dollars:** Allowing our customers to use the NYSCEF system is cost effective. While an initial investment in NYSCEF is required for counties, significant annual cost savings can be quickly realized. Clerks no longer need to data enter case captions, action types and document types as customers are doing that in NYSCEF. Clerks no longer need to input payment information for customers who pay by credit card or use the "Debit at County Clerk" option. As filings enter the office as scanned images, the cost of scanning and reviewing scanned images for quality is eliminated. As filings are electronically routed into electronic dockets, the cost of having a clerk place the paper filing in the proper file jacket is eliminated and, paper file jackets do not need to be purchased for e-filed cases. While there is a cost to maintaining a database of images which require permanent retention, the more significant cost associated with storing physical files is eliminated. A more detailed breakdown of cost savings follows in the next section.

- **NYSCEF Is Easy to Learn and Use:** The updated NYSCEF System launched on January 19, 2011 is a user friendly application with clean graphics and clear instructions. Users now find page specific help screens which guide them step-by-step through the filing process. In addition, users can move back and forth among various filing screens with a tremendous amount of flexibility.

- **NYSCEF Is a Successful Green Initiative:** The Office of the Westchester County Clerk receives approximately four million pieces of paper each year and our goal has always been to try to go green one piece of paper at a time. While the NYSCEF process is not paperless, the amount of paper required by the process is greatly reduced. In addition, the need to travel to our White Plains office is

eliminated. Alternatively, if filings had been mailed, the paper and travel involved in transporting these filings to our office is eliminated.

Cost Savings Achieved

In the current atmosphere of a shrinking government workforce and tightened budgets, elected officials are under pressure to do more with less. In Westchester County, the Office of the Westchester County Clerk recognized that electronic filing could bring efficiencies and cost-savings at exactly the right time. Our office has been able to achieve the following specific cost-savings through the implementation of e-filing:

- **Legal Document Scanning:** The Westchester County Clerk spends approximately $400,000 annually for legal documents to be scanned by an outside vendor. As electronically filed documents have already been scanned by the submitter, every page filed through the NYSCEF System saves eighteen cents for Westchester County. Our 2014 scanning costs will be down approximately $150,000. We expect annual savings when mandatory electronic filing is fully implemented for active cases will be over $250,000 per year.

- **Legal Document Storage:** At the end of 2013, our office released half of our space at an off-site interim storage facility, saving approximately $20,000 per year. A major factor in the release of space was the reduced number of paper court filings. Court records that are more than ten years old are boxed and sent to the County Archives and are retained pursuant to the appropriate retention schedule at a cost of approximately $7.50 per box per year. Our office will no longer send any civil case files to the Archives, resulting in an annual savings of over $5,000 per commencement year.

- **Legal File Jackets:** As approximately eighty percent of new cases are electronically filed in Westchester County, fewer legal file jackets are necessary resulting in a continuing savings of over $5,000 each year.

- **Personnel Costs:** The personnel cost savings resulting from electronic filing are difficult to itemize. However, there are distinct points in the work flow where efficiencies are captured. A cashier no longer completes preliminary data entry of information such as party names, case type or method of payment. Data entry staff does not complete additional data entry of items such as multiple parties or prepare filings for scanning. Filing staff does not sort and file paper documents into the proper case jacket. Customers no longer call our office to ask if a filing sent by regular mail has been received and staffers no longer have to spend time away from their desk searching through piles of documents to determine whether a paper filing has reached our office. And when these records have aged, they are not boxed and manually moved offsite to either an interim storage facility or the County Archives.

The Future

The Office of the Westchester County Clerk would like to see e-filing expanded so that Article 78, Election Law and Mental Hygiene cases are eligible for both voluntary and eventually mandatory electronic filing. Further, we would like Matrimonial actions to be made eligible for mandatory electronic filing.

When electronic filing was originally launched, the system did not have features in place which appropriately secured images and limited viewing to authorized parties. Now that the structure in the NYSCEF System exists to handle these secure filings, I believe that electronically submitted filings offer higher security than a filing existing in paper and moving through the process in hardcopy. Further, it is possible to track and monitor who has accessed a particular image if required.

Currently prohibited case types should be eligible for electronic filing for the following reasons:

Mental Hygiene: There are three general types of actions filed in our office pursuant to the Mental Hygiene Law: guardianship actions (under article 81), civil confinement actions (under article 10) and retention and NY Safe Act proceedings (under article 9). We believe that the guardianship actions are appropriate for mandatory electronic filing for a number of reasons. First, there is a defined guardianship bar which can be trained and supported during a transition to electronic filing. Second, the NYSCEF system offers appropriate protection for documents which contain personal information. Third, in cases where a guardian is appointed, annual reports will be filed until the guardianship is terminated and the NYSCEF System offers functionality to serve and store these reports in an efficient manner. The civil confinement actions filed pursuant to Article 10 of the Mental Hygiene Law, are appropriate for electronic filing also, provided all statutory privacy requirements are met. As these actions are filed by the New York State Attorney General's office, one office would need to be supported during a transition to electronic filing. The applications filed in the County Clerk's Office pursuant to Article 9 of the Mental Hygiene Law may not be appropriate at this time due to varied local practices.

- **Election Law:** As these matters are time-sensitive, electronic filing offers the benefit of delivering the filings in an extremely efficient manner. Local protocols already offer a structure for the submission of items such as ex parte orders. These protocols could be adapted, as necessary, for election law cases. In addition, should papers in election law matter be taken to a judge outside of regular business hours, protocols could simply require the uploading of the documents into the NYSCEF System within a specified period of time.

- **Article 78:** This case type is the most suitable of the three for electronic filing. The structure is already in place to move this type of filing efficiently through the court system. If authorized, outreach to prisons and correctional facilities to provide the proper forms for dissemination from their libraries should be conducted.

We believe strongly that NYSCEF has a bright future and we want nothing more than to be the county where e-filing is comprehensive and embraced by our customers and partners in the courts. Should the legislature decide to expand the electronic filing program to include the currently prohibited case types, we look forward to working with your office to bring these case types to Westchester's electronic filing program.

Holly Lütz

From: Jeffrey Carucci
Sent: Thursday, November 13, 2014 9:19 AM
To: Holly Lütz
Cc: Christopher Gibson
Subject: Statement from Rockland County Clerk

Categories: Follow-up

Jeff

Jeffrey Carucci

Statewide Coordinator for E-Filing

Office of Court Administration

60 Centre Street

NY NY 10007

JCarucci@NYCourts.gov

(212) 256-7778

From: Paul Piperato <PiperatP@co.rockland.ny.us>
Sent: Monday, November 10, 2014 10:48 AM
To: Donna Silberman; Jeffrey Carucci
Subject: Re: EFiling request

Jeff

While I do not have a formal report ,I can say that e-filing has save the County of Rockland at least $100,000 a year. The amount of hours spent docketing, stamping, numbering file and filing it self, is worth over and above that $100,000. figure. We have actually reassigned duties of two of our court staff.
I also feel once you have redesigned your RJI sytem to carry over information from the NYCEF system in the Chief Clerks office, you will realize the same saving in the courthouse.

Attorneys have been very positive about the OCA system,stating ,they have also realized savings in not having to hire process servers and find the OCA system simpler then the federal filing system.
There only complaint is that they still have to provide working copies to the judges.

Have a great day.

Paul

Rockland County Clerk Paul Piperato
Clerk, Supreme & County Courts
County Records Management Officer
Rockland County Courthouse
1 South Main Street, Suite 100
New City, NY 10956
PHONE: (845) 638-5134
FAX: (845) 638-5647
EMAIL: piperatp@co.rockland.ny.us
WEBSITE: www.rocklandcountyclerk.com

Supreme Court
of the
State of New York

John F. Werner, Esq.

NEW YORK COUNTY COURTHOUSE
60 CENTRE STREET
NEW YORK, NY 10007-1474

October 3rd, 2014

Dear Counsel:

I write as a member of the Advisory Committee on Civil Practice of the Chief Administrative Judge of the State of New York ("Advisory Committee"). The New York State Unified Court System ("UCS") will shortly be presenting to the Legislature a proposal for extending and expanding the Court System's electronic filing program, which, as you know, is implemented through the New York State Courts Electronic Filing System ("NYSCEF"). UCS will be preparing a report of its own reflecting its perspective on the operation to date of NYSCEF. On a separate but related track the Advisory Committee has been asked to report on the actual experience of practitioners with NYSCEF and to garner from them, based on that experience, any recommendations they might have for improving and expanding NYSCEF. It is possible that a more formal survey on this subject will in coming months be circulated among practitioners and bar associations, but whether or not such a more formal survey is undertaken, the Advisory Committee is now seeking comments from practitioners about extension and expansion of the e-filing program, including on:

- - expansion of the e-filing program to additional counties across the state, both in Supreme Court and in other courts;

- - consensual vs. mandatory e-filing, with consideration given to the fact that some courts and/or county clerks are themselves now digitizing hard copy filings;

- - simplification of the process of extending and expanding e-filing in the future;

- - whether a rationale other than the capacity of any given court now exists for excluding certain action types from NYSCEF;

- - expansion of the e-filing program to the appellate courts, both the Appellate Divisions and the Court of Appeals, through a single platform, e.g., the NYSCEF application now used in the trial courts; and

- - the functioning of the NYSCEF application generally.

Thus, I would very much appreciate receiving by e-mail, at jwerner@nycourts.gov, any comments or suggestions you might have on these important matters or on any other aspect of the extension and expansion of e-filing in the State courts. In order for the Advisory Committee to begin its own consideration of these important issues it would be helpful if we had your thoughts thereon sooner rather than later, and in that vein we would welcome receiving them on or before Thursday, October 16th, 2014, but in no event later than Wednesday, November 12th. I apologize for not being able to afford more time to reply to this particular request, but we certainly look forward to receiving any comments you may have on these matters which are obviously so critical to practice in our courts. If you are unable, for whatever reason, to reply to this request, I trust there will be other opportunities in future for you to participate in this very important discussion.

Thank you very much for your attention and your interest,

Yours truly,

John F. Werner, Esq.
Member of the Advisory Committee on
Civil Practice of the Chief Administrative
Judge of the State of New York

60 Centre Street
Suite 700
New York, NY. 10007

E-mail address: jwerner@nycourts.gov

JW-716

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007-2601

ZACHARY W. CARTER
Corporation Counsel

ERIC EICHENHOLTZ
Chief, Labor and Employment
(212) 356-2430
FAX: (212) 356-2439
eeichenh@law.nyc.gov

November 12, 2014

BY E-MAIL (jwerner@nycourts.gov)
John F. Werner, Esq.
New York State Unified Court System

Re: Expansion of New York State Electronic Filing System

Dear Mr. Werner:

I write on behalf of the New York City Law Department in response to your October 3, 2014 e-mail inviting comment about the New York State electronic filing ("NYSECF") system and its proposed expansion.

As you are aware, the Law Department (also known as the Office of the Corporation Counsel) represents the City and its agencies in substantially all civil litigation. The City of New York has more than 19,000 cases pending in the New York State Uniform Court System. As such, the Law Department is (and will continue to be) a large user of the NYSECF system. Attorneys at the Law Department have reported that they have generally found the NYSECF system to be beneficial. As a general matter, we have found it particularly useful to have the ability for attorneys to file, serve and receive electronic copies of Court filings through the system. This promotes efficiency and economy for the Courts as well as litigants involved in a case. We also believe that Article 78 proceedings should be subject to NYSECF, as apparently is the practice in at least some counties.

The Law Department believes that an expansion of the NYSECF system to the Appellate Divisions would also be highly beneficial. Such expansion would be particularly useful if the trial documents could be immediately accessible and be available to aid the preparation of a record on appeal.

However, there are some areas in which the Law Department believes the NYSECF system needs improvement, particularly with respect to the system's flexibility. The area of most concern is that the NYSECF system only permits an individual attorney's e-mail to be associated with a case and that attorney's e-mail address cannot be removed from the system. In some of the Law Department's more high volume practices, particularly tort actions pending

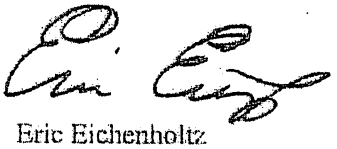
in Supreme Court, the cases are handled horizontally. In other words, an attorney is only assigned to handle one aspect of the litigation (such as a motion, deposition or conference). The current e-mail notification functionality of the NYSECF system simply does not work with cases litigated in this manner. If the Law Department were to have every attorney who files papers or otherwise participates in these horizontal cases to become associated with the case on NYSECF, the sheer volume of unnecessary notifications would create confusion and uncertainty. Attorneys would receive e-mails on hundreds of cases that are no longer assigned to them and, in turn, there would be many cases were important notifications were missed.

We believe there are many possible solutions to this problem. For example, rather than requiring an association with a specific attorney, entities such as the Law Department could provide a special address for cases handled horizontally. Thus, we respectfully submit that prior to the Court expanding and mandating e-filing, it work with offices like the Law Department that handle cases in this manner.

Similarly, our office has had difficulty with regard to filing confidential materials using the NYSECF system. We look forward to the adoption of defined protocols for doing so. In any expansion of the NYSECF system, we would ask for greater flexibility and functionality to limit access to confidential materials.

Thank you for your consideration of our comments.

Respectfully submitted,



Eric Eichenholtz

John F. Werner

From: Gerry Roth <GRoth@HHStein.com>
Sent: Tuesday, October 07, 2014 5:45 PM
To: John F. Werner
Subject: commetns regarding NYSCEF

HI Mr. Werner. Thank you for your e-mail. I wanted to offer you some comments about the e-filing system.

My firm handles a good volume of mortgage foreclosure actions. We now use NYSCEF whenever possible to commence new cases. While it took a while to get used to, I think it is a great idea and it helps us track our pending motions and ex parte applications. We are all for it. I do have a few concerns, however:

1) **WHY DO WE NEED TO SEND IN/PROVIDE WORKING COPIES OF MOTION PAPERS?** It doesn't seem like all the judges and clerks are on board, and their requirements for e-filed cases are inconsistent. My biggest problem is that many judges require us to send to them 'working copies' of all motion papers that are e-filed – some judges have gone so far as to deny motions b/c working copies were not timely provided. Doesn't this defeat the whole purpose of e-filing? What is the point of using the e-filing system if we still have to send hard copies of motions to the court *in addition* to e-filing them? In a sense, this is creating double the work for us - why would I want to continue to use the e-filing system if I know I still have to send hard copies of motions to the court in addition to e-filing them? I thought the point was that we would not have to send hard copies if we e-filed. I understand that some judges might want to look at paper instead of a computer, but why should we bear the cost of that? For example, in Queens County CMP they won't submit an e-filed motion unless working copies with proof of e-filing attached are submitted at the calendar call! That means I have to appear in court for every motion I make in Queens county, even if unopposed, and file hard copies of motions even after I e-filed them! ! Why would I want to do that? We need more consistency to this extent.
2) In certain counties, e-filing is actually slowing up the process for us. In some counties (Kings, Suffolk, Erie to name a few), it sometimes takes months after we e-file an RJI or motion for the motion or a f/c conference to be scheduled or show up on the court's calendar. I didn't think the point of e-filing was to slow it down. IF these counties are not equipped to handle e-filed docs with the same efficiency that they handle hard files, then there is something wrong with the system. In these counties, we are actually considering stopping e-filing because of these delays
3) The system would work great if all signed orders/judgments were scanned in and e-filed when they are supposed to - but unfortunately that does not always happen, and we are left searching the county clerk's offices for such orders. E-filing was supposed to cure that problem.

Thanks for your consideration.

Gerry Roth
Stein, Wiener & Roth, LLP
One Old Country Road
Suite 113
Carle Place, NY 11514
(516)-742-1212 ext. 303
groth@hhstein.com

Owen G. Wallace

From:	Strecker, Edward <Edward.Strecker@friedfrank.com>
Sent:	Tuesday, October 07, 2014 11:53 AM
To:	Owen G. Wallace
Subject:	FW: Request from John Werner
Attachments:	[Untitled].pdf

Hi Owen. Re: the below request, my suggestion to the Committee is to push for expanding NYSCEF into the category of Article 78 proceedings. I'm not sure why they have continued to keep these cases out of the NYSCEF world. Also, of course, it would be great to see the AD1 and AD2 get on board with e-filing – either through NYSCEF, or some variation of the CourtPASS (NYSCOA) platform.

Edward A. Strecker
Managing Clerk
edward.strecker@friedfrank.com | Tel: +1.212.859.8248 | Fax: +1.212.859.4000

Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza New York, NY 10004
friedfrank.com

From: Baffa, Joan A. [mailto:jabaffa@debevoise.com] **On Behalf Of** MACA
Sent: Tuesday, October 07, 2014 11:41 AM
To: 'Robert Abrams'; 'Suzanne Alenick'; 'Hayley Allis'; 'Michael Antonivich'; 'Estela Arias'; 'Patricia Ashman'; 'Hector Ayala'; 'Tom Backiel'; 'Christine Baez-Perez'; Baffa, Joan A.; 'Gino Barbera'; Beeken, Timothy K.; 'Christina Belanger'; 'Brittany Bell'; 'Jessica Bengels'; 'Saul Berger'; 'Jason Bernstein'; 'Ken Bigliani'; 'Thomas Bivona'; 'Bryan Block'; Borek, John A.; 'Patricia Botti'; 'John Bove'; 'Edward Brandweln'; 'Jennifer Brown'; 'Charles Brustman'; 'Mahirl Buffong'; 'Eric Burnside'; 'Gail Burwa'; 'Dennis Cairns'; 'Joseph Call'; 'Jennifer Candelario'; 'Robert Candella'; 'Christopher Carrion'; 'Jennifer Chang'; 'Su Cheung'; 'John Clancy'; 'Joseph Clyne'; 'Paul Colbourne'; 'Venus Collins'; 'Edurin Colon'; 'Daniel Conniff'; 'Richard Conza'; 'Michael Cooper'; 'Laura Coppola'; 'Kade Coutain'; 'Julius Crockwell'; 'Brendan Cyr'; 'Frank D'Agostino'; 'Mary Ann D'Amato'; 'Sybrandt Davis'; 'Steven De Jesus'; 'John Del Giorno'; 'Martha DelGiudice'; 'Joseph Dell'Aquila'; 'Joseph Denison'; 'Vitold deStronie'; 'Jo Ann DiSanti'; 'David Doré'; 'Colin Doyle'; 'James Drozdale'; 'Marc Duffy'; 'James Dunbar'; 'Christopher Dunleavy'; 'Neil Ellman'; Erosa, Manuel Luis; 'Milton Fay'; 'Rachel Feld'; 'Rodney Felder'; 'Alexis Fernandez'; 'Marie Ferrara'; 'Michael Feuer'; 'Nicholas Ficorelli'; 'Fermin Figueroa'; 'Matthew Finnegan'; 'Kim Fitzgerald'; 'Yancy Fleetwood'; 'Alfredo Flores'; 'Donald Flynn'; 'Brenda Foster'; 'John Francavillo'; 'Eleni Frasiolas'; 'Michael Friedman'; 'Jeff Gaillard'; 'Charles Gallagher'; 'Alberto Garcia'; 'Gerold Gardner'; 'Ronnie Garvey'; 'Joe Giraldo'; 'Hector Gonzalez'; 'Juan Gonzalez'; 'Evelyn Green'; 'Keith Greer'; 'Harvard Gregory'; 'Marcus Griffin'; 'Jeannine Grudzien'; 'Eric Grunspan'; 'Kristen Gutierrez'; 'Jorge Guzman'; 'John Hanner'; 'Vern Harris'; 'Allen Healy'; 'Edward Hendrickson'; 'Jesus Hernandez'; 'Brendan Hickey'; 'Sylvester Hinds'; 'Glenn Huzinec'; 'David Jacobson'; 'Bryan Jankay'; 'Laini John'; 'Sonja Johnson'; 'Lamont Joseph'; 'Todd Kammerman'; 'Daniel Keenaghan'; 'Francis Kelleher'; 'Allison Kelley'; 'Henry Kennedy'; 'Willa-Jeanne Kiritz'; 'Stephen Kubinec'; 'Nicholas La Forge'; 'Gregory Lachaga'; 'Paul Lang'; 'Richard LaRosa'; 'Janelle Lattimore'; 'Elaine Lau'; 'David Lawrence'; 'Curt Layne'; 'Lane Lerner'; 'David Liebov'; 'Seth Lipton'; 'Anthony Lopez'; 'Luis Lopez'; 'Milagros Lopez'; 'Jeffrey Lum'; 'Kathy Lynn'; 'Antonio Malaspina'; 'Michael Malloy'; 'Toby Mann'; 'Leo Manning'; 'Paul Mapp'; 'Nicholas Marcantonio'; 'Ray Marchitello'; 'David Marcus'; 'John Marsala'; 'Mary Jane McAleavy'; 'Tyrone McBride'; 'Jerome McCain'; 'John McCullough'; 'Peter McGowan'; 'William McKay'; 'Onika McLean'; 'Maura McLoughlin'; 'Susan McNamara'; 'Lawrence Mehringer'; 'Evan Melluzzo'; 'Saverino Mercadante'; 'Edward Miller'; 'Nasrin Mohammad'; 'Maria Molinelli'; 'Lyn Montgomery'; 'Brian Moran'; 'Brad Mulder'; 'Dennis Murphy'; 'Ime Nelson'; 'Roy Nelson'; 'Michael Nicholson'; 'Dan Norber'; 'Robert Novick'; 'Khabira Oakes'; 'Stacy O'Brien'; 'Genny O'Haire'; 'Aaron Orcutt,'; 'David Ortiz'; 'Jessica Ortiz'; 'Kelly Owen'; 'Anthony Pabon'; 'Harry Packman'; 'Jennifer Perez'; 'Jonah Perry'; 'Karen Pettapiece'; 'E. Pina'; 'Clara Pizzarello'; 'Sylvia Pode'; 'Bernard Pound'; 'Poppy Quattlebaum'; 'MJ Quinn'; 'Elvin Ramos'; 'Karl Reda'; 'Charles Reed'; 'Sandy-Matthew Reisig'; 'Natasha Reizis'; 'Kenneth Renta'; 'Owen Ridges'; 'David Rivera'; 'Victor Rivera'; 'Tyneka Robinson';

Owen G. Wallace

From: Lum, Jeffrey T. <jlum@morrisoncohen.com>
Sent: Tuesday, October 07, 2014 12:55 PM
To: Owen G. Wallace
Subject: Thoughts in response to John Werners 10/3/14 Expansion of E-Filing Letter

Dear Owen:

I believe a positive improvement to the NYSCEF system would be adding an area where Appearance dates and Motion Dispositions are summarized would greatly enhance the ability of practitioners to review the status of their cases.

Currently return dates and conferences have to be checked by other means, a possible link created to show calendar or motion dispositions within the case would simplify matters greatly, and reduce the need to rely on outside vendors to follow dispositions.

If an electronically created Calendar/motion disposition upgrade or link is not practical, another possible solution may simply be for the court to file on the docket some sort of simple disposition notice, stating when an appearances date is scheduled or adjourned.

I also observe there should be more standardization in e-filing policies between the different courts, the main E-filing help desk (at 60 Center) is very good at what they do, but on occasion we have to further contact the individual courts where the cases are pending to resolve some matters.

Lastly, if E-filing can also be expanded to other courts including Civil or on the Appellate level, it should be fully pursued.

Thanks for the opportunity to be heard,

Jeffrey Lum
Assistant Managing Clerk
Morrison Cohen LLP
909 Third Avenue
New York, New York 10022
Telephone: (212) 735-8659
Fax: (212) 735-8708
Email: jlum@morrisoncohen.com
Website: www.morrisoncohen.com

Owen G. Wallace

From: Quattlebaum, Poppy <Poppy.Quattlebaum@cwt.com>
Sent: Wednesday, October 08, 2014 7:18 PM
To: Owen G. Wallace
Subject: FW: Comments on John Werner's letter

We have conferred in my office and agreed that:

1. Expansion of e-filing to additional counties and action types, limited only by individual court capacities, should be made mandatory. This of course presupposes

the introduction of software restricting access in cases such as matrimonials to tne firms representing the parties.

2. Expansion of e-filing through a single platform should be expanded to the Appellate Divisions and The Court of Appeals. Perhaps even with uniform log-ins and passwords?

John F. Werner

From: Grigg, Natalie A. <NGrigg@woodsoviatt.com>
Sent: Wednesday, October 08, 2014 1:38 PM
To: John F. Werner
Subject: NYSCEF system

John,
In response to the correspondence dated October 3, 2014 regarding the NYSCEF, below is our commentary:
As you are aware, there are 13 counties that are able to efile using this system. My department currently handles foreclosure actions throughout NYS. Use and availability of the efiling system in those counties has made commencement and handling of the cases extremely easy. We have been able to move the files more expeditiously in some counties that otherwise could have a significant delay if documents were mailed. We have found the system itself to be very user friendly and simple to use.

Please let me know if you would like additional information or commentary.

Best,
Natalie

Woods Oviatt Gilman LLP
"The art of [illegible]"

Natalie A. Grigg, Esq.
Attorney Phone: 585-362-4521
Attorney Fax: 585-362-4621
E-mail: ngrigg@woodsoviatt.com

700 Crossroads Building
2 State Street
Rochester, New York 14614
Firm Phone: 585-987-2800
Firm Fax: 585-454-3968
www.woodsoviatt.com

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John F. Werner

From:	Gerry Roth <GRoth@HHStein.com>
Sent:	Tuesday, October 14, 2014 5:30 PM
To:	John F. Werner
Subject:	RE: Extension of the New York State Courts E-Filing System (NYSCEF) Legislation -- REMINDER

HI Mr. Werner. Thank you for your e-mail. I wanted to offer you some comments about the e-filing system.

My firm handles a good volume of mortgage foreclosure actions. We now use NYSCEF whenever possible to commence new cases. While it took a while to get used to, I think it is a great idea and it helps us track our pending motions and ex parte applications. We are all for it. I do have a few concerns, however:

1) **WHY DO WE NEED TO SEND IN/PROVIDE WORKING COPIES OF MOTION PAPERS?** It doesn't seem like all the judges and clerks are on board, and their requirements for e-filed cases are inconsistent. My biggest problem is that many judges require us to send to them 'working copies' of all motion papers that are e-filed – some judges have gone so far as to deny motions b/c working copies were not timely provided. Doesn't this defeat the whole purpose of e-filing? What is the point of using the e-filing system if we still have to send hard copies of motions to the court *in addition* to e-filing them? In a sense, this is creating double the work for us - why would I want to continue to use the e-filing system if I know I still have to send hard copies of motions to the court in addition to e-filing them? I thought the point was that we would not have to send hard copies if we e-filed. I understand that some judges might want to look at paper instead of a computer, but why should we bear the cost of that? For example, in Queens County CMP they won't submit an e-filed motion unless working copies with proof of e-filing attached are submitted at the calendar call! That means I have to appear in court for every motion I make in Queens county, even if unopposed, and file hard copies of motions even after I e-filed them! ! Why would I want to do that? We need more consistency to this extent.
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3) The system would work great if all signed orders/judgments were scanned in and e-filed when they are supposed to - but unfortunately that does not always happen, and we are left searching the county clerk's offices for such orders. E-filing was supposed to cure that problem.

Thanks for your consideration.

Gerry Roth
Stein, Wiener & Roth, LLP
One Old Country Road
Suite 113
Carle Place, NY 11514
(516)-742-1212 ext. 303
groth@hhstein.com

John F. Werner

From: Heather Rogers <hrogers@davidsonfink.com>
Sent: Thursday, October 16, 2014 4:49 PM
To: John F. Werner
Subject: RE: Extension of the New York State Courts E-Filing System (NYSCEF) Legislation -- REMINDER

Mr. Werner:

In general, we think the advent of eFiling is a good idea. The issues are few, but would make the system much better if corrected. First, the program is not universally used or applied. Each county seems to handle parts of the eFiling system differently, aside from where it has been rolled out and where it has not. We are often getting notifications from certain judges that require that we also submit hard copies directly to them. Frankly, this is more work than it was before we did eFiling as we have to eFile and then provide hard copies as we would if we didn't eFile.

Additionally, some title companies have identified a potential issue with a gap created when it takes extra time for a notice of pendency to be accepted into the land records, causing a Notice of Pendency to have a different date than the date it was eFiled.

Finally, if you are idle too long, or are away from your computer for a period of time, the NYSCEF system will prompt you to type in a Captcha code in order to get back into your account. However, even if you type in the code correctly, the system will not allow you to search an index number or file anything until you have closed out and logged back in all over again. This is terrible and should be addressed.

Also, we should be able to access some sort of master list that allows you to see all of the codes available in each of the different drop-down menus you need to select values from during the e-filing process. This would save the hassle of logging into the system, querying the case, selecting the county, selecting if a document is related to any other previously filed document, all for the trouble of guessing what to select as the document type from the drop-down menu on the third screen. In general, there should be better resources available online to aid people with titling their documents. The CLE resources provided are pretty much all the same; copies of the consent to e-file form, copies of hard copy e-file request forms... It's unhelpful. When I don't know what to call a document, I have to call the e-file resource center and they always have an answer, but it's faster and less of a waste of their time to just put these answers online.

There is much room for improvement with the e-file system, but there are some really great aspects as well. I think overall it helps to save us a tremendous amount of time, and a good amount of money (not having to hire abstractors to obtain docs, not having to mail a check to the county clerk, etc). Also if we e-file a document, it's filed. UPS can't lose it and the court can't misplace it.

Thanks for allowing us to opine. If you have any questions, please feel free to contact me directly.

Davidson Fink LLP
ATTORNEYS AND COUNSELORS AT LAW

Heather C.M. Rogers

John F. Werner

From: Jr Migliaccio <Jr.Migliaccio@aexp.com>
Sent: Thursday, October 16, 2014 6:19 PM
To: John F. Werner
Subject: RE: Extension of the New York State Courts E-Filing System (NYSCEF) Legislation -- REMINDER

Dear Mr. Werner,

I am the managing attorney for American Express Legal, the in-house litigation unit for American Express ("AXP"). I was very enthusiastic regarding the implementation of E-Filing because I had hoped that it would reduce the need for the amount of paper generated with respect to our filing motions for either summary or default judgment. While I do believe that E-Filing makes sense for the future, in the short term it is proving to have no real advantage for AXP.

Probably because of the type of litigation in which we concentrate, consumer credit card cases, many Judges have demanded that we attach bank statements going back to a zero ($00.00) balance when we file motions for either summary or default judgments to substantiate our motions. In some cases we have had to file motions with as much as 2,250 pages of bank statements going back a number of years. We then E-File these motions only to receive notification from the Judges that they require a hard copy of the motion we have just E-Filed. This is a duplication of work which should have not been necessary once the motion is electronically filed.

I can understand the reason why the Judges are demanding hard copies of our E-Filed motions: Firstly, reading an almost 2,500 page motion with Card Member Agreements and Bank Statements is extremely uncomfortable for anyone sitting at a computer screen – even for a short period of time; Secondly, since the general Court budget has been slashed many Judge's chambers do not have sufficient paper supplies to print out a 2,500 page motion.

Notwithstanding, the problematic logistical situation in which the Courts and AXP find themselves, I still do believe that E-Filing is the way of the future and support its expansion throughout every Court in New York State.

I hope these comments are helpful in some way,

Respectfully submitted,

Anthony J. Migliaccio, Jr., Esq,
Director and Managing Attorney
American Express Legal

From: John F. Werner [mailto:jwerner@nycourts.gov]
Sent: Tuesday, October 14, 2014 5:23 PM
Subject: Extension of the New York State Courts E-Filing System (NYSCEF) Legislation -- REMINDER

Reminder:

If you have not had a chance to read the attached and respond thereto, I would very much appreciate your doings so sooner rather than later. Some offices may be coordinating responses, and that is fine, but if you do not believe your thoughts on this very important subject will be subsumed in such a collective response, please take the very few minutes necessary to share with us your own thoughts on extension, expansion, etc., of e-filing. We cannot improve the e-filing program unless we hear from you and your counterparts your thoughts on this subject are very important to us.

Owen G. Wallace

From: Bryan Jankay <Bryan.Jankay@Shearman.com>
Sent: Friday, October 17, 2014 12:20 PM
To: Owen G. Wallace
Cc: Ira Wiener
Subject: RE: Request from John Werner

Hi Owen,

On the electronic filing systems for most Federal Courts, attorneys can anonymously add additional cases to their accounts ("cases of interest") in order to receive filing notifications, even if they do not appear in the additional cases.

In the NYSCEF system the only way to receive filing notices is to consent to be an attorney, you cannot add additional cases as mentioned above.

It would be great if this feature could be added to the NYSCEF system.

Thank you.

Sincerely,
Bryan J. Jankay
Law Clerk

Shearman & Sterling LLP
599 Lexington Avenue Room 451
New York, NY 10022
T +1.212.848.4000 | D +1.212.848.4870 | M 1.917.574.5720 | F 1.646.848.4870
Bryan.Jankay@shearman.com | www.shearman.com

From: Ira Wiener
Sent: Wednesday, October 08, 2014 1:07 PM
To: New York - LT Managing Atty's Office
Subject: FW: Request from John Werner

I know that you are all very busy, but if you have any suggestions for improving (and expanding) NYSCEF that you want to mention in response to this request, please send those suggestions to Owen Wallace and copy me, or if you'd rather run it by me, we can send one email (or no emails) from us to Owen Wallace. Thank you.

Ira E. Wiener
Managing Attorney

Shearman & Sterling LLP
599 Lexington Avenue
Room 460
New York, NY 10022
D +1.212.848.4780 F +1.646.848.4780
iwiener@shearman.com | www.shearman.com

From: Baffa, Joan A. [mailto:jabaffa@debevoise.com] **On Behalf Of** MACA
Sent: Tuesday, October 07, 2014 11:41 AM

Owen G. Wallace

From:	Norber, Dan <Dan.Norber@kayescholer.com>
Sent:	Friday, October 17, 2014 5:42 PM
To:	Owen G. Wallace
Subject:	RE: Request from John Werner
Attachments:	KS -- Suggestions-Comments re NYSCEF.PDF

On behalf of myself and Lee Gregory, attached please find Kaye Scholer's suggestions.

(2 pages follow)

Subject: FW: Request from John Werner

All,

John Werner has asked for our assistance. The New York Unified Court System will shortly be presenting to the Legislature a proposal for extending and expanding the Court System's electronic filing system. The attached letter sets out a sampling of issues upon which the Advisory Committee is seeking comments, and also invites any other comments or suggestion regarding the expansion of e-filing. Ideally, we'd like to submit our members' comments through an opinion letter issued by the Rules Committee of MACA. Such a coordinated response would seem to be of the most benefit to the Advisory Committee. To that end it would be greatly appreciated if any comments/suggestions be sent to Owen Wallace, as chair of the Rules Commmitee at owallace@ebglaw.com. Owen will then compile the comments for submission. The comments are requested by October 16th. John apologizes for the quick turnaround. I know we are all swamped but if we can take a little time in the next few days to send some thoughts to Owen, it would be very helpful.

Thanks,
Maura

Maura McLoughlin | Managing Attorney
Cahill Gordon & Reindel LLP
80 Pine Street, New York, NY 10005
t: +1.212.701.3907 | f: +1.212.269.5420 | mmcloughlin@cahill.com

1. **Expansion of the e-filing program to additional counties across the state, both in Supreme Court and in other courts.**

- We would recommend expansion of the e-filing in all Supreme Courts throughout the state.
- And encourage expansion of e-filing to the NYC Civil Courts
- Would also strongly encourage at least consensual e-filing of Article 78 proceedings through all courts.
- We also suggest expansion of e-filing into the Surrogate's court, starting with a Pilot Program or discretionary e-filing for a period of time.

2. **Consensual v Mandatory e-filing, with consideration given to the fact that some courts and/or county clerks are themselves now digitizing hard copy filings.**

- We would encourage consensual e-filing as the first step towards eventual mandatory e-filing throughout the state Supreme Courts, for easy service of documents.

3. **Simplification of the process of extending and expanding e-filing in the future.**

- See #2.

4. **Whether a rationale other than the capacity of any given court now exists for excluding certain action types from NYSCEF**

- Only to maintain client confidentiality of parties (e.g, infant compromises, Art. 81s, Family Court proceedings, matrimonial proceedings), OR
- Courts with large numbers of pro se parties (e.g. Housing Court)

5. **Expansion of the e-filing program to the appellate courts, both the Appellate Divisions and the Court of Appeals, thorough a single platform, e.g., the NYSCEF application now used in the trial courts.**

- Strongly agree that one unified system should be developed, incorporating both the Appellate Divisions and the Court of Appeals (although the Court of Appeals may disagree based on its development of the CourtPass system.)

6. **The functioning of the NYSCEF application generally.**

- Provide greater flexibility/organization to the filing "events" so that documents can be more accurately described on the docket.

- Streamline the process of e-filing individual documents under seal (rather than the entire case file) so that direct assistance is not required from NYSCEF clerks in order to seal.

- For online fee payments to be accepted in real time, rather than the waiting for the County Clerk to process the payment.

- Similarly, automatic issuance of an index number upon the completion of filing commencement documents.

- To confirm that the online consent to e-filing and e-service unambiguously constitutes a formal notice of appearance of counsel.

John F. Werner

From: Joel Ditchik <joel@ditchik.com>
Sent: Monday, October 20, 2014 1:50 PM
To: John F. Werner
Cc: Christopher Gibson
Subject: Comments on Expansion of E-Filing

Dear Mr. Werner:

I am in receipt of your October 3rd, 2014 letter, in which you request comments from practitioners about the extension and expansion of the e-filing program.

I am a "tax certiorari" attorney, and as such, have been utilizing the Court's e-filing system for many years. Generally speaking, I find both the system, and the Court personnel who administer it and who assist us in the filing process, to be excellent. The tax cert e-filing system is easy to use, fairly flexible, and provides the confirmations of successful filings (and other information) necessary for us to feel comfortable using it. The Court personnel are responsive and knowledgeable, and they understand that each filer seeking their assistance brings a different level of comfort and technical knowledge to the process, and they respond accordingly.

With respect to the specific issues your letter raises, I am generally of the view that consensual filing, rather than mandatory, is preferable, and that if the e-filing system is made easy enough to use, most or all practitioners will choose to use it without being compelled to do so. In the tax certiorari area, the online filing application is simple to use, and offers significant advantages when compared with paper filing. Likewise, I cannot think of a good reason as to why the program should not be extended to all counties throughout the state.

Unfortunately, the focus of my own practice on tax certiorari limits my ability to respond to the other issues raised in your letter. I would, however, be pleased to discuss any of these matters with you at your convenience, should you wish to do so.

Respectfully,

Joel Ditchik
Ditchik & Ditchik, LLP
370 Lexington Avenue - Suite 1611
New York, NY 10017
(212) 661-6400
(212) 661-9473 (fax)
(917) 841-4900 (cell)
joel@ditchik.com

MAYER·BROWN

Mayer Brown LLP
1675 Broadway
New York, New York 10019-5820

Main Tel +1 212 506 2500
Main Fax +1 212 262 1910
www.mayerbrown.com

John A. Marsala
Direct Tel +1 212 506 2721
Direct Fax +1 212 849 5721
jmarsala@mayerbrown.com

October 28, 2014

John F. Werner, Esq.
Advisory Committee on Civil Practice of the
Administrative Judge of the State of New York
60 Centre Street
Suite 700
New York, NY 10007

Re: Expanding NYSCEF

Dear Mr. Werner:

I have been a member of the New York Managing Attorney and Clerks Association for more than 33 years, and have been Managing Clerk at Mayer Brown LLP for the past 23 years. During that time I have witnessed the birth and evolution of electronic filing in the New York state courts via NYSCEF. From it's inception I was impressed by NYSCEF's user-friendly interface and easy registration process. Equally impressive, in view of the cut-backs in court staffing and funding, has been the NYSCEF staff's eliciting of comments from and implementation of suggestions by the legal community in ways to enhance the NYSCEF system. The E-Filing Resource Center has proven to be an invaluable wealth of knowledge and assistance, whether it's providing training on the use of NYSCEF, to providing a response to a time sensitive issue regarding resolution of discrepancies or omissions in the system. While the transition to such a revolutionary change is never an easy process, I feel that the progression to mandatory e-filing in the New York Supreme court was overwhelmingly a change for the better. I wholeheartedly endorse the expansion of mandatory e-filing throughout the state court system, as well as the integration of the NYSCEF system in the Appellate Divisions to facilitate the filing of briefs and transmission of state court records.

Sincerely,

John A. Marsala
Managing Clerk

Owen G. Wallace

From: Beeken, Timothy K. <tkbeeken@debevoise.com>
Sent: Wednesday, October 29, 2014 4:03 PM
To: Owen G. Wallace
Subject: RE: Expansion of NYSCEF/Presentation to State Legislature

Owen,

Here are Debevoise MAO's comments:

"Whether a rationale other than the capacity of any given court now exists for excluding certain action types from NYSCEF?" Types of action that typically involve parties proceeding pro se should not be on NYSCEF, because (i) a record that has only one party's filings on line isn't useful and (ii) there is no staffing for the courts to scan and upload pro se filings. Also, if confidential cases, such as matrimonial, family law and prisoner cases are to be filed via NYSCEF, the system has to be made to limit access to those filings to the parties and their counsel, the court and any other person with the right to see them.

"Expansion of e-filing to the appellate courts" We are VERY in favor of this measure, and urge that the appellate divisions be allowed only very limited customizations so that the system is consistent statewide. Court clerical personnel should not be empowered to reject electronic filings, as that practice in other courts has proven far more costly than beneficial.

"Functioning of the NYSCEF application generally." We generally love it and would ask for the following modifications:

ALL documents filed via NYSCEF should be available with the court's filing endorsement across the top. At present, letters and certain other documents cannot be viewed or printed with that endorsement information.

RJI filing. The court has to stop frequently changing the rji forms and procedures. Spend the time to get it right, then don't touch it for 5 years. Frequent changes create traps and are contrary to the interests of justice and its sound administration.

There needs to be the ability to correct an error without having to start over. The example we're thinking of is you forget to label an exhibit, if you try to go back to fix the system kicks you out. If there were separate buttons for "upload" and "file," that probably would fix the problem.

Give filers the alternative to file exhibits together in a single, bookmarked PDF. We understand the utility to the court of having separate PDFs for each exhibit, but it's very onerous on the parties and the same result can be achieved with bookmarks.

Court procedures that require a party to indicate the motion sequence number on the face of their moving papers are ineffective when there is a deadline for multiple parties to make motions on the same day, because in that instance where multiple motion sequences will start at the same time you can't know until you file which sequence number will be assigned to your specific motion. One solution is to abandon the rule that motion sequence numbers must be placed on the face of the

moving papers by the party and instead program NYSCEF to include the motion sequence number in the filing endorsement across the top of the document. The parties still could include the motion sequence number on their oppositions and replies (although if it's in the endorsement maybe the court wouldn't find it necessary to require the parties to include it, too).

The ability to filter search results would make NYSCEF's search feature far more useful. We would filter by date, lawyer, judge, etc.

The ability to search using a partial name, so we can get hits that aren't perfect matches. We'd also like to be able to run word searches, searches by judge and searches within a specific date range.

And that's it from us. Thanks for coordinating the responses.

Tim

From: Owen G. Wallace [mailto:OWallace@ebglaw.com]
Sent: Tuesday, October 28, 2014 10:46 AM
To: Beeken, Timothy K.
Subject: RE: Expansion of NYSCEF/Presentation to State Legislature

I have not submitted comments yet. The initial urgency was relaxed a bit. I hope to send in our comments by early next week – 11/12/14 is the deadline.

EPSTEIN
BECKER
GREEN

Owen G. Wallace | Managing Attorney / Director of Legal Support Services
t 212.351.4834 | f 212.878.8788
OWallace@ebglaw.com

250 Park Avenue · New York, NY 10177
t 212.351.4500 · www.ebglaw.com

From: Beeken, Timothy K. [mailto:tkbeeken@debevoise.com]
Sent: Tuesday, October 28, 2014 10:43 AM
To: Owen G. Wallace
Subject: RE: Expansion of NYSCEF/Presentation to State Legislature

Hi Owen,

I realize I never passed our comments along to you. Did you already submit the MACA response?

Tim

From: Owen G. Wallace [mailto:OWallace@ebglaw.com]
Sent: Friday, October 17, 2014 12:02 PM
To: McLoughlin, Maura
Cc: 'Bove, Jack'; 'Murphy, Dennis'; Kennedy, Henry; 'Conza, Richard V.'; Poppy.Quattlebaum@cwt.com; 'McGowan, Peter'; Ira Wiener; judith.striggro@snrdenton.com; Beeken, Timothy K.
Subject: RE: Expansion of NYSCEF/Presentation to State Legislature

John F. Werner

From: Patricia A. Blair <patricia@fultonfriedman.com>
Sent: Monday, November 03, 2014 11:21 AM
To: John F. Werner
Subject: E-filing Comments

Hello Mr. Werner,
I regret that I did not comment prior to your preferred deadline. I hope my comments are still helpful to your undertaking.

- The NY e-filing portal is very user friendly. Our staff has no issues creating new cases.
- Response time to new case submission is very timely. We quickly are given an index number and filing date or a reason for rejection.
- The process to correct rejections does not work well. The rejection notice indicates that you do not need to file a new case, but to remove the notice of commencement and upload the correct documents. However, you are only permitted to upload a single document for correction even if several attachments are required for the initial pleading to be correct.
- The method of payment could be improved. It is not really designed for high volume filers. Using a credit card limits the number of cases we can process in a given day and often leads to a potential fraud alert with the credit card issuer when the same dollar amount is processed repeatedly within a short period of time. Some suggested alternatives include:
    - Allowing us to enter checking account information for processing
    - Storing payment information to be used repeatedly to avoid reentry with each submission
    - Processing a single financial transaction for all case filed within a single filing session
    - Setting up a single collateral account to be used by the firm across all e-filing jurisdictions. The balance to be displayed when filing so firm can replenish when necessary. Online replenishment preferred over mailing payment by check.
- The removal of authorized agent process is flawed. Despite submission of revocation forms, a majority of the paralegals previously authorized by the managing attorney of the firm (myself) remain on notices associated with the firm's filings. I spoke to a representative on the phone about the process and my goal when I submitted multiple revocation forms but was unable to accomplish desired outcome. It would be more efficient if attorneys had a way to update their authorized agents online either via the e-filing portal or within NY Court's attorney registration portal.

Thank you for requesting my feedback as you look to expand e-filing. It is appreciated that user input is taking into consideration.

Have a good day.

Patricia A. Blair
Patricia A. Blair, Esq. (NY, MI)
Chief Operating Officer
Fulton, Friedman & Gullace, LLP
28 E. Main Street, Suite 500
Rochester, NY 14614
585-797-1498
866-563-0809 ext 20225

MANAGING ATTORNEYS AND CLERKS ASSOCIATION, INC.

November 12, 2014

VIA EMAIL

John F. Werner, Esq.
Member of the Advisory
Committee on the Civil Practice
of the Chief Judge of the
State of New York
60 Centre Street, Suite 700
New York, New York 10007

Re: NYSCEF Experiences And Comments

Dear Mr. Werner:

In response to your October 3, 2014, letter seeking comment on user experiences with NYSCEF, the Board of the Managing Attorneys and Clerks Association asked our members for feedback and comments with respect to expansion of NYSCEF. Below is a brief synopsis of the responses we received.

The members of MACA tend to be heavy users of NYSCEF. The feedback we received overwhelmingly supports expansion of NYSCEF, not only to more counties statewide, but also to the Appellate Divisions, and the Court of Appeals. In addition to supporting expansion of the e-filing system, the comments indicate support for a uniform filing system, with the various Courts being limited in the amount of customization so the system is consistent state wide. An expansion of the categories of cases subject to e-filing is also supported by the MACA members who responded. For example, Article 78 proceedings should be subject to NYSCEF, in addition to Surrogates Court filings, matrimonial filings, and Guardianship filings, subject of course to the Court's ability to limit access to the respective files to parties, counsel of record, and Court personnel.

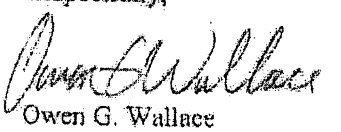
Additional comments, in no particular order, include the request for on-line fee payments to be processed in real time, and likewise, the simultaneous issuance of Index Numbers when an

action is commenced via NYSCEF. The desire for NYSCEF to either show appearance dates or have a direct case link to WebCivilSupreme so that anyone seeking case information can essentially have one point of access. Some attorneys, for varying reasons, monitor cases on which the attorney has not actually appeared or consented to represent a party. Currently, the only way to do so is a fee based monitor system. The NYSCEF system should enable attorneys to set up such monitors.

With respect to filing documents, filers would like the ability to file a single document under seal without having to call the clerk each time, and without having to have the entire case sealed. Also only certain documents filed on the NYSCEF system are endorsed at the top of the front page with the filing information. It would be nice if all filed documents were endorsed with the filing information at the top of the first page.

The above constitutes only a portion of the comments that we received from our membership. I have attached hereto the comments as originally received so that you can see them in full. Please let me, or any member of the Board of Directors of the Managing Attorneys and Clerks Association, know if we can be of further assistance with respect to your committee's presentation to the State Legislature.

Respectfully,



Owen G. Wallace
Managing Attorney
Epstein Becker & Green, P.C.

Attachments

cc: Board of Directors of the Managing Attorneys and Clerks Association

EXHIBIT B

EXHIBIT B

E-FILING - 2015 LEGISLATIVE RECOMMENDATION

(CPLR §§304, 2103, Article 21-A (new); Ct.CAct §11-A(new); Jud. L. § 212(2)(s)(1)(i)(new); NYCCiv.Ct. Act §2103-a (new); NYUDCt.Act §2103-a (new)

E-filing was first authorized in New York by legislation in 1999 as a pilot program for civil cases in specified counties on a voluntary basis. The Committee supported that pilot and has continued to review it and to support the expansion of the e-filing program since its inception. In 2015, the New York Legislature must re-authorize the e-filing program.

The Committee recommends that the e-filing statutes be re-consolidated from the Unconsolidated Laws to the practice chapters, including enactment of civil e-filing authorization in the Civil Practice Law and Rules. The Committee believes that there is no persuasive argument to keep the e-filing statutes in the Unconsolidated Laws.

The Committee recommends that the e-filing statutes should confer plenary authority on the Chief Administrative Judge with expansion and implementation issues addressed solely by the Chief Administrative Judge by rule. The Committee believes that there has been extensive e-filing experience by practitioners, county clerks and court clerks through the pilot and the continued expansion of the e-filing program in the various counties. The implementation of e-filing to date fully supports broader authority in the Chief Administrative Judge.

Further, the Committee believes that, based upon such experience, there is no need to allow the county clerk of any particular county to reject e-filing. It has been reported to the Committee by practitioners in particular counties that there is great disappointment over the lack of an e-filing program in those counties and the Committee encourages further efforts to implement e-filing in those counties. The Committee recognizes that the Chief Administrative Judge will be attentive to concerns raised by the county clerks, but ultimate authority to implement e-filing should rest with the Chief Administrative Judge. The cost-savings and court efficiencies attendant with e-filing have been amply demonstrated, and it should be the policy of the State to move forward with e-filing statewide.

The Committee takes no position with regard to making permanent the e-filing in family and criminal courts, as such recommendation may be beyond its jurisdictional purview and those courts may face specific issues with regard to implementation of an e-filing system. However, the Committee does recommend expansion of e-filing into all four categories of previously

excepted classes of cases, *i.e.*, proceedings in the Election Law; Domestic Relations Law for matrimonial proceedings; Article 78 proceedings; and Mental Health Law proceedings. In each of these classes of cases, the Chief Administrative Judge should have the authority and flexibility to address any practical concerns by rule. Further, the Committee recommends that, with the exceptions noted above, e-filing be made permanent in all cases and all types of actions, that the Chief Administrative Judge be given plenary authority, generally, and that the e-filing statutes be located in the practice acts.

The Committee also recommends that e-filing should be fully adopted by the appellate divisions. The Committee notes that, while the Chief Administrative Judge promulgates rules for the trial courts, the Chief Administrative Judge's role with regard to the appellate division rules on e-filing may be advisory. The Committee believes that, for the benefit of the bench and bar, the implementation of the appellate division e-filing program should be through a single (NYCEF) platform and through a single set of court rules applicable to all appellate divisions.

The Committee recommends that the e-filing authorization for civil cases be re-codified into the Civil Practice Law and Rules. In addition, it is the recommendation of the Committee that there be continuing provision for an annual report on e-filing to the legislature. The Committee believes that this reporting requirement should not appear in the CPLR, but rather, in the Judiciary Law. Further, the statute as proposed and enacted should confer plenary authority on the Chief Administrative Judge with expansion issues addressed solely by the Chief Administrative Judge by rule.

In conclusion, the Committee submits for consideration its legislative proposal on e-filing in civil matters in the CPLR, which would effect a simple, general delegation of authority to the Chief Administrative Judge to enact mandatory e-filing in civil matters statewide, with the authority to promulgate rules to implement the statute.

Proposal:

AN ACT to amend the civil practice law and rules, the court of claims act, the judiciary law the New York city civil court act and the New York uniform district court act in relation to use of electronic means for the commencement and filing of papers in certain actions and proceedings

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

Section 1. Subdivision (b) of section 304 of the civil practice law and rules is amended to read as follows:

(b) Notwithstanding any other provision of law, [such] filing [may] shall be accomplished by [facsimile transmission or] electronic means [, as defined in subdivision (f) of rule twenty-one hundred three] where applicable as provided in article 21-A of this chapter and where and in the manner authorized by the chief administrator of the courts by rule and filing may be accomplished by facsimile transmission where and in the manner authorized by the chief administrator of the courts by rule.

§ 2. Paragraph (7) of subdivision (b) of rule 2103 of the civil practice law and rules is amended to read as follows:

7. By transmitting the paper to the attorney by electronic means where and in the manner [authorized] provided by the chief administrator of the courts by rule [and, unless such rule shall otherwise provide, such transmission shall be upon the party's written consent] as provided by article 21-A of this act. The subject matter heading for each paper must indicate that the matter being transmitted electronically is related to a court proceeding.

§ 3. The civil practice law and rules is amended by adding a new article 21-A to read as follows:

ARTICLE 21-A —FILING OF PAPERS IN THE COURTS BY ELECTRONIC MEANS

Section

§ 2110. Definitions. For purposes of this chapter, "facsimile transmission" and "electronic means" shall be as defined in subdivision (f) of rule 2103 of this chapter.

§ 2111. Filing of papers in the trial courts by facsimile transmission and by electronic means.

(a) Notwithstanding any other provision of law, the chief administrator of the courts, with the approval of the administrative board of the courts, may promulgate rules in all classes of cases authorizing a program in the use of filing electronic means in the supreme court, the court of claims, the civil court of the city of New York, the district courts, the surrogate's courts and the court of claims for: (i) the commencement of civil actions and proceedings, and (ii) the filing and service of papers in pending actions and proceedings.

(b) The chief administrator may promulgate rules providing counsel or an unrepresented party an exemption from electronic filing rules.

(c) Notwithstanding the foregoing, a court may exempt upon application for good cause shown counsel or an unrepresented party from electronic filing rules.

§ 2112. Filing of papers in the appellate division by electronic means. Notwithstanding any other provision of law, the appellate division in each judicial department may promulgate rules authorizing a program in the use of electronic means for: (i) taking an appeal to such court from the judgment or order of a court of original instance or from that of another appellate court, (ii) making a motion for permission to appeal to such court, (iii) commencement of any other

proceeding that may be brought in such court, and (iv) the filing and service of papers in pending actions and proceedings.

§ 4. The court of claims act is amended by adding a new section 11-a to read as follows:

§ 11-a. Use of facsimile transmission and electronic filing authorized.

1. Notwithstanding any other provision of law, the chief administrator of the courts, with the approval of the administrative board of the courts, may authorize a program in the use of facsimile transmission and electronic means in the court as provided in article 21-A of the civil practice law and rules.

2. For purposes of this section, "facsimile transmission" and "electronic means" shall be as defined in subdivision (f) of rule 2103 of the civil practice law and rules.

§ 5. Subdivision 2 of section 212 of the judiciary law is amended by adding a new paragraph (s) to read as follows:

(s)(1) ***(i)*** Not later than April first in each calendar year, the chief administrator of the courts shall submit to the legislature, the governor and the chief judge of the state a report evaluating the state's experience with programs in the use of electronic means for the commencement of actions and proceedings and the service of papers therein as authorized by law and containing such recommendations for further legislation as he or she shall deem appropriate.

§ 6. The New York city civil court act is amended by adding a new section 2103-a to read as follows:

§ 2103-a. Use of electronic filing authorized.

1. Notwithstanding any other provision of law, the chief administrator of the courts may authorize a program in the use of electronic means in the civil court of the city of New York as provided in article 21-A of the civil practice law and rules.

2. For purposes of this section, "electronic means" shall be as defined in subdivision (f) of rule 2103 of the civil practice law and rules.

§ 7. The New York uniform district court act is amended by adding a new section 2103-a to read as follows:

§ 2103-a. Use of electronic filing authorized.

1. Notwithstanding any other provision of law, the chief administrator of the courts may authorize a program in the use of electronic means in the civil court of the city of New York as provided in article 21-A of the civil practice law and rules.

2. For purposes of this section, "electronic means" shall be as defined in subdivision (f) of rule 2103 of the civil practice law and rules.

§ 8. This act shall take effect September 1, 2015.