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

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

January 2006

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 2006 Report, the Advisory Committee recommends a total of thirteen (13) measures for enactment by the 2006 Legislature. Of these, eight (8) measures previously have been endorsed in substantially the same form, one (1) is a modified measure, and four (4) are new measures.

Part II sets forth and summarizes the four new measures proposed for 2006. They are designed to: (1) permit the use of unsworn declarations in lieu of affidavits, as is permitted in the federal courts (CPLR 2109); (2) permit an injured party in a tort claim to bring a direct declaratory judgment against an insurer (CPLR 3001); (3) clarify when a claim against a public authority accrues (Public Authorities Law §2881); and (4) require motions to dismiss for failure to state a cause of action and summary judgment to be brought no later than 120 days after the filing of a note of issue, except where the court decides to extend the time for good cause shown or in the interests of justice (CPLR 3211(e), 3212(a)).

Part III sets forth and summarizes the modified measure proposed for 2006. This measure would clarify that there is no right to subrogation for collateral source payments made in the context of a settlement of a lawsuit governed by CPLR 4545 (CPLR 4545(a), (b), (c), (e)).

Part IV summarizes the previously endorsed measures not enacted into law in 2005, but once again recommended by the Committee in substantially the same form. These measures address: (1) pre-judgment interest after offers to compromise in personal injury actions (CPLR 3221, 5001(a)(b)); (2) extending the time in which a voluntary discontinuance may be obtained without court order or stipulation (CPLR 3217(a)(1); (3)) dealing with the time of service problem when a court order extending the time for filing is granted pursuant to CPLR 304 (CPLR 306-b); (4) increasing the maximum penalty for failure to obey a judicial subpoena from $50 to $150 (CPLR 2308(a)); (5) amending

CPLR 3122, governing the use of subpoenas duces tecum to make it clear that a court may order the production of medical records without the patient's consent (CPLR 3122(a)); (6) permitting a New York City Civil Court Judge presiding over a CPLR 325(d) case to issue a subpoena to compel the attendance of an incarcerated person (CPLR 2302(b)); (7) exclude certain releases from the scope of the General Obligations Law, particularly voluntary discontinuances for which no monetary consideration was paid (GOL 15-108(d)); and (8) providing additional notice to the mortgagee in residential mortgage foreclosure proceedings (RPAPL § 1320, CPLR 3215 (g)(3)(iii)).

In Parts II, III and IV, individual summaries of the proposals are followed by drafts of appropriate legislation.

Three proposals recommended by the Committee were enacted in 2005: (1) a proposal designed to reauthorize and expand the court system's electronic filing pilot (L. 2005, c. 504); (2) a proposal designed to address venue problems in the appeal of Lemon Law arbitrations (L. 2005, c. 611); and (3) a proposal to eliminate the requirements that leave to replead be requested in opposition papers (L. 2005, c. 616).

Part V sets forth the Committee's principal regulatory proposals. The first regulatory proposal is designed to instill greater civility into the conduct of depositions by adding a new Part 221 of the Uniform Rules for the Trial Courts to govern certain abuses of deposition practice not currently addressed by the CPLR. The second regulatory proposal seeks to add a provision to section Part 202.7 of the Uniform Civil Rules for the Supreme and County Courts to insure that a party seeking a TRO must either notify the other party of the application or explain to the judge why notice would be impracticable or would defeat the purpose of the order. The third regulatory proposal is designed to address the consequences of the dishonoring of a check or other form of payment used to pay for an index number. The fourth regulatory proposal would amend Part 202.26 of the Uniform Rules for the Supreme and County Courts to insure that a judge has the power to compel a representative of an insurance company or lienholder to attend a pre-trial settlement conference, either in person or by telephone.

Part VI of the report summarizes previously endorsed legislative and regulatory proposals that have been withdrawn since they have failed to pass for a number of years, but which the Committee still feels are important. They can be resurrected if the opportune time arises.

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

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

Several other matters were brought to the Committee's attention during the course of 2005 which required considerable study and activity by the Committee. For example, the Committee, 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 expand recent legislation and regulations permitting the Chief Administrative Judge to conduct a pilot program providing for the filing of court papers by fax or electronic means in selected locations throughout the state.

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 Worker's Compensation Reform Act of 1996]), bills that alter substantive rights or shorten statutes of limitations should specify by stating, for example, that they apply to injuries occurring, actions commenced or trials commenced after a certain date.

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

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

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II. New Measures

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

Some time ago, the Committee recommended the amendment of CPLR 2106 (affirmation of truth of statement by attorney, physician, osteopath or dentist), which permits certain professional persons to substitute an affirmation for an affidavit in judicial proceedings, to replace the use of an affidavit for all purposes in a civil action by the use of an affirmation -- a procedure modeled upon the federal declaration procedure system (28 USC §1746; unsworn declarations under penalty of perjury). Due to lack of legislative interest, the proposal was withdrawn. However, because of recent complaints from commercial litigants with international cases who must go to extraordinary lengths to get affidavits notarized overseas and the importance of maintaining New York as a forum for international commercial disputes, the Committee has decided to resurrect it.

In New York itself, notarial fees have increased (L. 1991, c. 143) and, in many circumstances, notaries are hard to find by persons wanting immediately to make an affidavit, occasioning many unnecessary delays. It is increasingly difficult to find notaries outside of central business districts, and when found, usually in banks, they often refuse to notarize for anyone not known to a branch officer. For the poor especially, this often results in unnecessary cost and delay. In addition, the Committee is advised that some persons have religious objections to swearing but have no such objections to affirming.

Within New York, the oath or affirmation that is required to qualify a statement as an affidavit must be administered "by any person authorized to take acknowledgments of deeds by the real property law." CPLR 2309(a). Where the oath of the affiant is administered in another American state, it may be administered by any person who qualifies as a notary under the law of that state. Real Property Law §299. However, New York courts differ as to whether such an affidavit must be accompanied by a "certificate of conformity" establishing the qualifications of the notary; compare Discover Bank v. Kagen, 8 Misc.3d 134(A) (N.Y. Sup.Ct., App. Term 2005), requiring the certificate of conformity, with Citibank (South Dakota) N.A. v. Santiago, 4 Misc.3d 138(A) (N.Y. Sup. Ct., App. Term 2004). A careful practitioner therefore attempts to obtain the certificate, known to the bar as a "flag," which both delays the process of obtaining an affidavit and often requires the assistance of local counsel where the oath is given.

The situation with affidavits to be made abroad is far more burdensome. Under Real Property Law §301, an oath given abroad can be administered by an American consular officer, a judge or mayor (presumably of the municipality in which the oath is given), a list of Americans resident in the foreign country, or a "notary public." In civil

law countries, a notary is a lawyer with special training and credentials. Notarial services tend to be very expensive and often require a good deal of time of the would-be affiant. There are often questions of the equivalence of person administering the oath, known by such terms as a "notaire" or "huissier," to a New York notary, which in turn leads the prudent practitioner to seek a certificate of conformity under the elaborate process set out in Real Property Law §301-a, or an "apostille," a document used to validate foreign documents under an international treaty to which the United State is a signatory. See Matter of Will of Eggers, 122 Misc.2d 793 (Surr. Ct. Nassau Co. 1984). The problems caused by these concerns over obtaining affidavits in foreign countries, and once obtained, being able to use them in New York litigation, bode ill for the growing popularity of the Commercial Division for international commercial disputes.

The Committee agrees with a proposal of the New York State Bar Association Commercial and Federal Litigation Section, which is contained in its report "On Permitting Use of Affirmation By All Persons" issued in October, 1995. Based upon that proposal, this measure has been amended to avoid a repeal of existing CPLR 2106 by inserting the words "any person" and deleting from the present language of Rule 2106 "an attorney admitted to practice in the courts of the state or a physician, osteopath or dentist authorized by law to practice in the state, who is not a party to an action...."

Furthermore, in response to a concern expressed by the Committee on Civil Practice Law and Rules of the State Bar Association, the proposal has been amended to require the affirmant to affirm the date it was signed.

The Committee had previously recommended that the Penal Law also be amended to add a new section 210.46 to create a class E felony for making a false statement contained in an affirmation, thus making the penalty for a false affirmation the same as a false statement in an affidavit. At present, the current penalty for making a false statement in an affidavit with a jurat is a class E felony, while the penalty for making a false statement in an affirmation is a class A misdemeanor. On reconsideration, however, the Committee has decided that such an amendment is not necessary since the filing of a material false statement before a public official (e.g., a judge), made with the intent to mislead that official is the performance of his official function, such as a false affirmation, is already a Class E Felony. See Penal Law § 210.40. The Committee has revised the language in the bill text to emphasize that fact.

Proposal

AN ACT to amend the civil practice law and rules in relation to unsworn affirmation of truth of statement under penalty of perjury

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

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

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

> "I affirm under the penalties of perjury that the foregoing is true and I understand that this document may be filed in an action or proceeding in a court of law."

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

2. Permitting an Injured Party in a Tort Claim to Bring a Direct Declaratory Judgment Action Against an Insurer (CPLR 3001)

The Advisory Committee proposes an amendment to CPLR 3001 to specifically allow an injured party to bring a declaratory judgment action directly against an insurance company before the injured party secures a judgment against the tortfeasor-insured.

Often, the party most interested in an early determination of the extent of insurance coverage is the injured plaintiff. A defendant tortfeasor who has limited resources may lack the means or the incentive to seek a declaratory judgment of coverage from an insurer. The plaintiff has an interest in determining before final determination of liability in a tort action, whether the defendant has sufficient insurance coverage to make such litigation worthwhile. In Lang v. Hanover Ins. Co., 3 N.Y.3d 350 (2004), the New York Court of Appeals held that such a direct action was not allowed at common law and that Insurance Law § 3420, which grants an injured plaintiff the right to sue a tortfeasor's insurance company to satisfy a judgment obtained against the tortfeasor, does not authorize an action for declaratory relief before the plaintiffs obtains such a judgment. The purpose of this amendment is to specifically remedy that gap in the law.

Proposal

AN ACT to amend civil practice law and rules to allow a direct declaratory judgment action against an insurer

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

Section 1. Section 3001 of the civil practice law and rules, as added by section 308 of the laws of 1962, is amended to read as follows:

§ 3001. Declaratory judgment. The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds. A party who has brought a claim against another party may bring a declaratory judgment

action for a determination of the existence or extent of coverage owed by an insurer to the party against whom the original action is brought.

§ 2. This act shall take effect immediately.

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

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.

Proposal

AN ACT to add a new section to the public authorities law to define the dates of accrual of contract claims

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

Section 1. The public authorities law is amended by adding a new section 2281 to read as follows:

§ 2881. Certain actions or special proceedings against public authorities.

Notwithstanding any contrary provision of law, in the case of an action or special proceeding against a public authority for monies due or arising out of a contract, accrual

of such a claim shall be deemed to have occurred as of the date payment for the amount claimed was denied.

§ 2. This act shall take place immediately.

4. Setting the Time for Motions to Dismiss for Failure to State a Cause of Action and Summary Judgment (CPLR 3211(e), 3212(a))

By Chapter 492 of the Laws of 1996, the Legislature amended Rule 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 that 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. The Committee approves of that amendment; indeed, it was the Committee's recommendation that spurred the legislative change.

In recent years, court decisions have demonstrated that further amendment is needed. In Santana v. City of New York, 6 Misc. 3d 642 (Civ. Ct., N.Y. Co. 2004), the court permitted a motion to dismiss for failure to state a cause of action, made pursuant to Rule 3211(a)(7), after the time permitted for a motion for summary judgment. Currently, CPLR 3211(e) allows such a motion to dismiss to be made at any time, thereby authorizing motions delaying trials.

This proposal would place the same time limitation on motions made pursuant to Rule 3211(a)(7) that would apply to motions for summary judgment under Rule 3212. Since a party should be aware of the basis for a Rule 3211(a)(7) motion at the pleading stage, there would be no prejudice resulting from a rule requiring such a motion to be made no later than a summary judgment motion.

The Committee has also considered whether a 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. In Brill v. City of New York, 2 N.Y.2d 648 (2004) the Court of Appeals 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 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. The Committee has, 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. This proposal is the result.

The Committee has modeled its proposal after CPLR section 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, 2005 WL 3543706 (N.Y. A.D. 3d Dept.), 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.

The Committee believes that this proposal continues the policy that it strongly supports of ending dilatory practice while providing an alternative other than the two that the Court of Appeals found unsatisfactory in Brill.

Proposal

AN ACT to amend the civil practice law and rule rules, with regard to the time for the making of motion to dismiss for failure to state a cause of action and motions 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. 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 paragraphs two [, seven] or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted[; an]. A motion based upon a ground specified in paragraph seven shall be made by a date set by the court, 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 court, for good cause shown or in the interests for justice, may extend the time for making such motion. An objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waved 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 paragraphs 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 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, 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]; provided however, that the court, for good cause shown or in the interests of justice, may extend the time for making such motion.

§ 3. This act shall take effect immediately and apply to all pending actions.

III. Modified Measures

1. Clarifying That There Is No Right to Subrogation for Collateral Source Payments Made in the Context of a Settlement of a Lawsuit Governed By CPLR 4545 (CPLR 4545(a), (b), (c), (e))

The Committee recommends that CPLR 4545 be amended to clarify that, when a case covered under the statute settles, collateral source payors may seek reimbursement only when such a right is provided by statute. As such, the amendment is intended to foreclose results that it believes the Legislature, when enacting the statute, never intended.

CPLR 4545 provides that a plaintiff who has a personal injury, wrongful death, or property damage action cannot recover damages for any expense or loss that was or will be covered by a collateral source, such as his or her health insurance. The statute, which for historical reasons has three different subdivisions (one for medical malpractice actions, one for actions against public employers, and one for all other actions), exempts those collateral sources that constitute liens against the plaintiff's recovery (e.g., workers' compensation payments).

The statute originally was enacted in response to the medical malpractice crises of the 1980's. It was hoped that by precluding plaintiffs from recovering for those damages compensated by other sources, recoveries could be reduced and malpractice premiums significantly lowered. Another legislative goal was to avoid "windfall" "double recoveries." Later, because these goals were considered salutary in other types of cases, the Legislature made the statute applicable to all previously unaddressed property damage, personal injury and wrongful death actions.

In the small minority of cases that actually go all the way to verdict and judgment, the statute appears to work fairly well. However, significant problems have arisen in the context of settlements because of two gaps in the statutory language: one regarding settlements of personal injury and wrongful death actions, and the other regarding subrogation claims that are from the same personal injury or wrongful death action.

Regarding the "subrogation gap," although the Legislature specified that a plaintiff could not recover for a loss that had been reimbursed by a collateral source payment that did not constitute a lien on the recovery, the Legislature did not expressly say that the health insurer or other collateral source payor could not sue in subrogation for those such damages.

In this context, familiar principles of common law hold that a party who asserts a subrogation claim, the subrogee, "stands in the shoes" of the party from which the claim arises, the subrogor. Under this general principle, the subrogee's rights derive from and cannot be greater than those of the subrogor. This would mean that, where a plaintiff cannot himself or herself assert a claim against a third person, nor could the plaintiff's insurance company (the subrogee) assert that claim.

Although the legislative history is silent on this point, the Committee believes that it is likely that the Legislature did not address subrogees' rights because it knew that their rights are derivative and assumed that their rights would automatically be diminished along with those of the plaintiff. Yet, the statute did not expressly say that such a principle was desired or expected.

There is, in consequence, a split of authority as to the impact of the statute on subrogation claims. There is some authority for the proposition that an insurer (or any other entity that made collateral source payments to the plaintiff) can sue the tortfeasor for the very damages that the statute prevents the plaintiff from recovering. See e.g. Kelly v. Seager, 163 A.D.2d 877 (4th Dep't 1990); Excellus Health Plan, Inc. v. Federal Express Corp., 5 Misc.3d 727 (Supr. Ct. Onondaga Co. 2003), aff'd 11 A.D.3d 948 (4th Dep't 2004). But there is also some authority for the opposite view, the view that the Legislature intended that the doctors, the municipalities, and the other groups who complained of escalating tort liability costs achieve real relief. See Oxford Health Plans, Inc. v. Augustino Deli and Caterers, Inc., 282 A.D.2d 728 (2d Dep't 2001).

Of course, if the statute provided or were construed as providing that the plaintiff's subrogee could recover funds from the defendant even when the plaintiff was personally barred from doing so, any savings achieved by the defendant would be temporary and illusory, for the defendant would ultimately have to pay the same amount of money that it would have been required to pay if the statute had never been enacted. This concern that the "subrogation gap" could effectively thwart the statutory intent is now particularly acute by virtue of two recent decisions in which the Court of Appeals implied, without actually reaching the merits, that such a subrogation claim (i.e., a claim in which the subrogee seeks to recover damages that the subrogor would be barred from recovering by current CPLR 4545) was not meritless on its face. Allstate Insurance Company v. Stein, 1 N.Y.3d 416 (2004); Blue Cross and Blue Shield of New Jersey, Inc. v. Phillip Morris USA, Inc., 3 N.Y.3d 200 (2004).

Apart from raising concerns as to whether tort defendants may be denied a benefit that the Legislature intended they have, the "subrogation gap" has led to an array of procedural complications that threaten to increase litigation expense (both for plaintiffs and defendants), inhibit settlements, and delay disposition of personal injury and

wrongful death actions. Reflective of the underlying uncertainty as to whether the plaintiff's subrogee may now have greater rights than the plaintiff himself or herself, there is also uncertainty as to whether such subrogees can formally intervene into ongoing personal injury and wrongful death actions, and, effectively veto any settlement that does not include full repayment of whatever sums were previously paid to the plaintiff. Some years ago, the Third Department held that subrogees could not inject themselves into the litigation or "veto any result that was not favorable to their interest." Berry v. St. Peter's Hosp., 250 A.D.2d 63, 68 (3d Dep't 1998). However, only last year, the Fourth Department twice ruled, each time by a 3 to 2 vote, to the contrary. Kaczmarski v. Suddaby, 9 A.D.3d 847 (4th Dep't 2004); Omiatek v. Marine Midland Bank, N.A., 9 A.D.3d 831 (4th Dep't 2004). Additionally, the Court of Appeals suggested in 2004 (but only in dictum) that intervention is possible (Allstate v. Stein, 1 N.Y.3d at 423).

If the statute provided or was construed as providing that subrogees could intervene in the underlying action or that they could veto any settlement not to their liking, then a simple "one-on-one" case involving a two-car collision or a trip over a pavement defect could become a five-party action if three different insurers or other payors had covered parts of the plaintiff's various resultant expenses or losses. In such event, the defendant would likely end up paying exactly what it would have paid had the statue never been enacted in the first place, except that the defendant and the plaintiff, and the court as well, would now find it more costly to litigate the claim.

Regarding the so-called "settlement gap," although the statute precludes plaintiff from obtaining a "double recovery" at the trial, it says nothing about whether plaintiff can obtain a "double recovery" by way of settlement. The Committee suspects that the Legislature focused solely on the trial because, 1) it assumed that no rational defendant would every pay more in settling a claim than he or she could be forced to pay at the trial itself, and 2) there was no perceived need to restrict the parties' freedom to settle actions.

The "settlement problem" occurs when the plaintiff settles an action and the plaintiff's subrogee then proceeds against the plaintiff for repayment of funds that plaintiff was not legally entitled to recover from the defendant and which therefore would not have been included in any settlement. The problem arises from a Court of Appeals' ruling in which the court held that the statute does not govern settlements, with the consequence that settlement of the underlying suit can give rise to an ancillary dispute as to whether the settlement the plaintiff obtained did or did not include compensation for those funds that plaintiff could not have collected at a trial. Teichman v. Community Hosp. of Western Suffolk, 87 N.Y.2d 514 (1996).

To address the above-noted problems, the Committee proposes to amend CPLR 4545 to provide that:

1) The only payments as to which the collateral source payor may seek reimbursement are those payments as to which there is a statutory right for reimbursement (such as for Medicaid, Medicare, or workers' compensation payments);

2) By entering into a settlement agreement, the plaintiff shall not be considered to have taken an action in derogation of the contract or subrogation rights of the collateral source payor; and

3) It will be conclusively presumed that a settlement does not include collateral source payments that could not be recovered at trial.

The Committee's proposed amendments to subdivisions (a), (b) and (c) are intended to eliminate confusion as to what constitutes a collateral source payment for purposes of section 4545, and make it clear that a collateral source payor may seek reimbursement only where there is a statutory right. While the current statute specifically identifies certain kinds of collateral source payments as illustrations of the payments that may fall within the statute's scope, and while the Committee's proposed amendment entails the deletion of that list, this was simply because the merely illustrative list becomes unnecessary once the subject class is clearly defined. Under the bill, however, the specified examples would continue to be treated as collateral sources subject to offset except to the extent any of them were subject to statutory reimbursement to the payor.

The final two sentences of subdivisions (a), (b) and (c) have been added to make it clear that the plaintiff may prove the amount of the particular category of loss at trial, and that the deduction will be made following the verdict. This represents not a change, but a clarification of existing law.

This measure could reduce state and municipal liability in certain cases in which the State or its subdivisions is sued in tort. The measure should, by reducing disincentives to settlement, also reduce the burdens on the courts. Finally, the measure should reduce state and municipal litigation costs in certain cases in which those entities are defendants. The measure would take effect immediately and affect all cases not yet reduced to judgment.

AN ACT to amend the civil practice law and rules, in relation to the impact of collateral source payments upon tort claims for personal injury, property damage or wrongful death, and upon related subrogation claims

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

Section 1. Subdivision (a) of section 4545 of the civil practice law and rules, such subdivision as amended by section nine of chapter 485 of the laws of 1986, is amended to read as follows:

(a) Action for medical, dental or podiatric malpractice. In any action for medical, dental or podiatric malpractice where the plaintiff seeks to recover for the cost of medical care, dental care, podiatric care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source [such as insurance (]except for life insurance[), social security (except those benefits provided under title XVIII of the social security act) workers' compensation or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff)], and except for those payments as to which there is a statutory right of reimbursement. If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. In order to find that any future cost or expense will,

with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of obligations as may be required by such agreement. Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict. The plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff's recovery.

§ 2. Paragraph one of subdivision (b) of section 4545 of the civil practice law and rules, such subdivision as added by section two of chapter 701 of the laws of 1984, is amended to read as follows:

1. In any action against a public employer or a public employee who is subject to indemnification by a public employer with respect to such action or both for personal injury or wrongful death arising out of an injury sustained by a public employee while acting within the scope of his public employment or duties, where the plaintiff seeks to recover for the cost of medical care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such cost or expense was replaced or indemnified, in whole or in part, from a collateral source provided or paid for, in whole or in part, by the public employer except for those payments as to which there is a statutory right of reimbursement[, including but not limited to paid sick leave, medical benefits, death

benefits, dependent benefits, a disability retirement allowance and social security (except those benefits provided under title XVIII of the social security act) but shall not include those collateral sources entitled by law to liens against any recovery of the plaintiff]. If the court finds that any such cost or expense was replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the contributions of the injured public employee for such benefit. Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict. The plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff 's recovery.

§ 3. Subdivision (c) of section 4545 of the civil practice and rules, such subdivision as added by section 36 of chapter 220 of the laws of 1986, is amended to read as follows:

(c) Actions for personal injury, injury to property or wrongful death. In any action brought to recover damages for personal injury, injury to property or wrongful death, where the plaintiff seeks to recover for the cost of medical care, dental care, custodial care or rehabilitation services, loss of earnings or other economic loss, evidence shall be admissible for consideration by the court to establish that any such past or future cost or expense was or will, with reasonable certainty, be replaced or indemnified, in whole or in part, from any collateral source [such as insurance (]except for life insurance[), social security (except those benefits provided under title XVIII of the social security act),

workers 'compensation or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff)], and except for those payments as to which there is a statutory right of reimbursement. If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement. Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict. The plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff 's recovery.

§ 4. Section 4545 of the civil practice and rules is amended by adding a new subdivision (e), to read as follows:

(e) No right of reimbursement for certain collateral source payments. A collateral source payor which has made payment to a person who had a claim founded

on personal injury or wrongful death shall have no right to seek reimbursement from either the plaintiff or the tortfeasor unless the right to seek said reimbursement is set forth by statute. When an action within the scope of this section settles, it shall be conclusively presumed that the settlement does not include any compensation for those losses or expenses that would have been deducted, pursuant to this section, from any verdict that the plaintiff might have obtained. By entering into a settlement agreement, a plaintiff shall not be deemed to have taken an action in derogation of the non-statutory right of any person who supplied the collateral source payments; nor shall a plaintiff 's entry into such agreement constitute a violation of any contract between the plaintiff and the person who supplied the collateral payments. Except where there is a statutory lien or statutory subrogation right, no defendant entering into such a settlement shall be subject to a claim for reimbursement by any person who supplied the collateral source payments.

§ 5. This act shall take effect immediately and shall apply to all trials and settlements after the effective date.

IV. Previously Endorsed Measures

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

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

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

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

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

might be prompted to delay settlement if the accrual date were later. Interest would be computed on awards only, since settlements are concluded with interest in mind, and the imposition of additional interest where settlements are achieved would be inequitable.

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

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

Proposal

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

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

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

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

the claimant fails to obtain a more favorable judgment, [he] the claimant shall not recover costs or interest from the time of the offer, but shall pay costs from that time. An offer of judgment shall not be made known to the jury.

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

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

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

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

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

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

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

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

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

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

Currently, subdivision (a) of CPLR 3217 provides:

Rule 3217. Voluntary discontinuance

(a) Without an order. Any party asserting a claim may discontinue it without an order

1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier, and filing the notice with proof of service with the clerk of the court; or

2. by filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorneys of record for all parties, provided that no party is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has an interest in the subject matter of the action; or

3. by filing with the clerk of the court before the case has been submitted to the court or jury a certificate or notice of discontinuance stating that any parcel of land which is the subject matter of the action is to be excluded pursuant to title three of article eleven of the real property tax law.

Paragraph (1) sets forth the standards for obtaining a voluntary discontinuance without a court order at the outset of a case. Paragraphs (2) and (3) set forth the rules for discontinuing a case after disclosure has been completed before the case has been submitted to the jury.

The need for flexibility becomes particularly acute in the early stage of a case. At present, a party alleging a cause of action in a complaint, counterclaim, cross-claim, or petition may only unilaterally discontinue it without court order or stipulation by serving and filing the requisite notice on all parties "at any time before a responsive

pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier . . . " CPLR 3217(a)(1). The proponent of the claim has a very limited period of time to exercise his or her unlimited right to discontinue the cause of action. The twenty-day limitation applies even: (1) if the responsive pleading has not yet been served; and (2) if the time to respond is thirty days. See CPLR 3012(c). In addition, the service of an amended pleading pursuant to CPLR 3012(c) will not preclude the application of the twenty-day period. See, Fox v. Fox, 85 A.D.2d 653, (2d Dept. 1981). Effectively, no party may unilaterally discontinue an action by notice beyond twenty days after service of the pleading asserting the claim.

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

This modification will also bring the CPLR into line with the Federal Rules of Civil Procedure which permits a party to discontinue any time before an answer is due. See Federal Rules of Civil Procedure 41(a). Apparently, when the former Rules of Civil Procedure in New York were modified by the enactment of the CPLR in 1962 the flexibility of the prior practice rule 3217 was eliminated. That flexibility should be reinstated.

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

Proposal

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

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

Section 1. Paragraph 1 of subdivision (a) of rule 3217 of the civil practice

law and rules, such rule as amended by Chapter 736 of the laws of 1989, is amended to read as follows:

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

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

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

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

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

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

The laudable purpose of this exception clearly was to provide a safeguard against the expiration of the statute of limitations on a date, usually a weekend, when the county clerk's office is closed and timely filing to commence the action or proceeding could not be made. However, this section 304 exception can be and often is utilized in situations where a party requires a restraining order to prevent the occurrence of an event on a holiday or weekend when filing cannot occur but immediate service is critical. In this limited situation, although the action or proceeding has been commenced, service often must be made before the order can be filed. At least one court has held that under these circumstances service was premature and re-service was required because section 306-b mandates service after filing.

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

Proposal

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

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

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

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

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

4. Increasing the Maximum Penalty for Failure to Obey a Judicial Subpoena From $50 to $150 (CPLR 2308(a))

Many of the fines and penalties originally set forth in the CPLR when it was enacted in 1962 have become woefully inadequate. One of the most important of the penalties set forth in the CPLR is that for failure to obey a judicial subpoena. At present, the most a judge can assess someone who fails to comply with a judicial subpoena is $50 - - a sum which will not serve as deterrent to anyone much less a well-heeled party.

The Committee recommends that CPLR 2308(a) be amended to make the maximum penalty for disobeying a judicial subpoena $150. This amount was reduced from the $500 recommended in 2004 since legislative counsel felt that it was too high. The proposed $150 fine is at least a slightly more onerous penalty, but not one which will be unduly burdensome for an impecunious party.

Proposal

AN ACT to amend the civil practice law and rules, in relation to increasing increase the maximum penalty for failure to obey a judicial subpoena

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

Section 1. Subdivision (a) of section 2308 of the civil practice law and rules is amended to read as follows:

(a) Judicial. Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court. If the witness is a party the court may also strike his or her pleadings. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding one hundred fifty dollars and damages sustained by reason of the failure to comply. A court may issue a warrant directing a sheriff to bring the witness into court. If a person

so subpoenaed attends or is brought into court, but refuses without reasonable cause to be examined, or to answer a legal and pertinent question, or to produce a book, paper or other thing which he or she was directed to produce by the subpoena, or to subscribe his or her deposition after it has been correctly reduced to writing, the court may forthwith issue a warrant directed to the sheriff of the county where the person is, committing him or her to jail, there to remain until he or she submits to do the act which he or she was so required to do or is discharged according to law. Such a warrant of commitment shall specify particularly the cause of the commitment and, if the witness is committed for refusing to answer a question, the question shall be inserted in the warrant.

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

5. Amending CPLR 3122, Governing the Use of Subpoenas Duces Tecum, To Make It Clear That a Court May Order the Production of Medical Records Without the Patient's Consent (CPLR 3122(a))

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

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

Shortly thereafter, a judge in Richmond Civil Court in Campos v. Payne (N.Y.C. Civil Court, Richmond Co., N.Y.L.J. 10/14/03, p.20, col. 1) held that the limitations imposed by CPLR 3122 left him without authority to order the production of medical records pursuant to a trial subpoena on the eve of trial without the patient's signed authorization. That was not the Committee's intent in recommending the amendment of CPLR 3122 and we do not believe the Legislature had that intent in adopting the Committee's recommendation then. The Committee believes the result in Campos is inadvisable since courts must always be able to obtain records needed to resolve litigation. The proposed amendment would clearly provide that the court has the authority to order the production of medical records without the patient's consent.

The proposed amendment also involves a possible uncertainty caused by the federal privacy law, the Health Insurance Portability and Accountability Act

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

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

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

Thus, in a situation where the person whose medical information is being sought refuses to authorize its release, or the provider itself is afraid that it has not received sufficient authorization to release the records, and the court needs the records to adjudicate a claim, there is some question whether a court order will suffice, given the terms of CPLR 3122 and the ruling in Campos v. Payne. The proposed amendment to CPLR 3122(a) resolves that uncertainty by providing that a medical provider served with a subpoena duces tecum must respond if served with a demand and either an accompanying authorization for the release of the medical record or a court order.

Proposal

AN ACT to amend the civil practice law and rules, in relation to conforming section thirty-one hundred twenty-two with the new federal health records privacy protection law

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

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

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

failure to respond to or permit inspection as requested by, the notice or subpoena duces tecum, respectively, or any part thereof.

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

§ 2. This act shall take effect immediately.

6. Permitting a New York City Civil Court Judge Presiding Over A CPLR 325(d) Case To Issue a Subpoena to Compel the Attendance of an Incarcerated Person (CPLR 2302(b))

The Committee recommends that CPLR 2302(b) be amended to permit a New York City Civil Court judge to compel the attendance of an incarcerated person in connection with trying a CPLR 325(d) case. It has been brought to the Committee's attention that, occasionally, New York City Civil Court judges, presiding over a Supreme Court case which was removed pursuant to CPLR 325(d), need to subpoena an incarcerated person - - usually a witness.

A Supreme Court justice has authority to compel the attendance of a prisoner pursuant to a writ of habeas corpus under CPLR 7002, but other judges do not. To insure that other types of judges with more limited jurisdiction are able to do so, subdivision (d) of CPLR 2302 permits a Court of Claims, Surrogate's Court, or Family Court judge to do so. However, that provision does not include New York City Civil Court judges.

Since the need for an incarcerated witness or party to testify in a CPLR 325(d) case in Civil Court may be every bit as legitimate as the need for an incarcerated person to testify in those other courts, the Committee recommends that CPLR 2302(b) be amended to permit judges of the New York City Civil Court to subpoena an incarcerated person in such cases.

Proposal

AN ACT to amend the civil practice law and rules, in relation to issuance of a subpoena to compel the attendance of an incarcerated person when needed in certain cases

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

Section 1. Subdivision (b) of section 2302 of the civil practice law and rules, as amended by chapter 336 of the laws of 2004, is amended to read as follows:

(b) Issuance by court. A subpoena to compel production of an original record or document where a certified transcript or copy is admissible in evidence, or to

compel attendance of any person confined in a penitentiary or jail, shall be issued by the court. Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice to the person having custody of the record, document or person confined. A subpoena to produce a prisoner so confined shall be issued by a judge to whom a petition for habeas corpus could be made under subdivision (b) of section two of this chapter or a judge of the court of claims, if the matter is pending before the court of claims, or a judge of the surrogate's court, if the matter is pending before the surrogate's court, or a judge of the family court, if the matter is pending before the family court, or a judge of the New York City civil court, if the matter is pending before the New York City civil court and it has been removed thereto from the supreme court pursuant to subdivision (d) of section three hundred twenty-five of this chapter.

§2. This act shall take effect immediately.

7. Amending General Obligations Law § 15-108 to Exclude Certain Releases From Its Scope, Particularly Voluntary Discontinuances For Which No Monetary Consideration Was Paid (G.O.L. 15-108(d))

The Committee recommends that G.O.L. §15-108 be amended so as to exclude certain releases from its scope, most importantly including those instances in which the plaintiff voluntarily discontinues his or her suit against a particular defendant without receiving any monetary consideration for that release. This would encourage plaintiffs to voluntarily release those defendants who appear not to bear any liability, which would in turn reduce the litigation costs of those ostensibly blameless defendants. The amendment would also make many summary judgment motions unnecessary, and would thus reduce the burden on the court system.

Section 15-108 of the General Obligations Law prescribes the consequences which ensue when a tort plaintiff releases from liability one or more, but fewer than all, of the alleged tortfeasors. In broad strokes, current G.O.L.§15-108 applies when a plaintiff settles with a "tortfeasor" (usually, but not invariably, a defendant). In such event, current subdivisions (b) and (c) provide that the settling tortfeasor can neither seek contribution from the other tortfeasors nor be held liable for contributions to the others, the underlying theory being that the settlor has brought his or peace. The settling tortfeasor can, however, seek indemnification from the other tortfeasors, and may also be sued therefor.

A significant issue arises when, during the course of discovery, it appears that a defendant whom plaintiff initially thought might bear some liability was, in fact, blameless. Because the plaintiff and plaintiff's counsel generally do not want superfluous parties that must be served with every single document and consulted about court dates and deadlines, the plaintiff would generally like to give such a defendant his or her "walking papers." Of course, that is also what the ostensibly blameless defendant would like - - to be released immediately and without incurring any further attorney's fees. It is also what the court system would prefer to happen.

There is, however, a problem. If the plaintiff were to release the apparently blameless defendant, and if one of the remaining defendants were to prove at trial that the released defendant was indeed partially at fault for the plaintiff's damages, then the defendants still left in the case would be entitled to a reduction of their liability. See Killeen v. Reinhardt, 71 A.D.2d 851, 419 N.Y.S.2d 175 (2nd Dept. 1979). In that case, the plaintiff's magnanimous discontinuance would result in a reduction of the plaintiff's damages, and in undercompensation. Such a reduction, which in theory could amount to a significant percentage of plaintiff's economic and non-economic loss, could occur even though the plaintiff did not receive any consideration for the

discontinuance, and it could occur even if none of the facts or claims establishing the culpability of the released defendant had been asserted, or known, when plaintiff discontinued.

This feature of G.O.L. §15-108 may be a trap to those unfamiliar with the statute, but it is well known to experienced plaintiff's counsel. Their reaction is precisely what one would expect. Knowing that a voluntarily discontinuance can cost the plaintiff thousands or even millions of dollars if new facts and new theories point the finger of blame at the released defendant, and also knowing that there is no risk of any such penalty if the ostensibly blameless defendant instead moves for and receives summary judgment from the court, the plaintiff's attorney will typically answer a request for a discontinuance by saying, to extricate yourself, you must make a summary judgment motion.

In this situation in which an ostensibly blameless defendant seeks to drop out of the lawsuit, the other defendants might not mind if that occurs . . . provided that they, the other defendants, can commence their own third-party claims if and when it seems wise to do so, for they too are concerned that a defendant who now appears blameless may later appear to bear some responsibility. The problem, from their perspective, is that they will not be allowed that choice. If plaintiff discontinues against the ostensibly blameless defendant, then, per the current statute, that defendant cannot be sued for contribution. And if the ostensibly blameless defendant moves for and receives summary judgment, then that defendant is forever free from liability . . no matter what turns up later on. For these reasons, the remaining defendants are virtually forced to oppose the summary judgment motion, even if they would have preferred to provisionally allow the movant to leave, so long as there is any arguable basis for opposition.

Thus, what might have been a consensual discontinuance instead becomes a contested motion, and, perhaps, after the motion is resolved, a contested appeal.

The proposed amendment would eliminate three kinds of releases from the statute's scope, but only two of the exclusions constitute changes as compared to current law.

First and foremost, discontinuances given without monetary consideration would be removed from the statute's scope, meaning that a plaintiff could discontinue without risk of being penalized for doing so. This would help the ostensibly blameless defendants to get out of the case as quickly and as inexpensively as possible. Removing such discontinuances from the scope of the statute would also free the other

defendants to bring their own contribution claims against the released party at whatever point they deem that advisable.

Second, by limiting the statute to those releases that "completely or substantially" terminate the dispute against the released defendant, the new subdivision would effectively exclude "high-low" agreements in which the parties agree to confine the damages to an agreed range. The subdivision would also effectively exclude agreements in which the parties merely narrow the issues (perhaps, by conceding liability, or jurisdiction) without fully resolving the action.

The exclusion of high-low agreements constitutes a change, although the current rule is not well-settled. The exclusion of other issue narrowing agreements may or may not constitute a change; the current rule is not clear enough to say. In any event, the "completely or substantially terminates" limitation is not the main point of the amendment, and is not likely to have as pronounced an impact as the "greater than one dollar" limitation. However, the Committee advocates the "completely or substantially terminates" provision because there is no policy reason why issue-narrowing agreements should be deterred or why such agreements should engender windfall consequences for the other parties.

The exclusion of post-judgment settlements would be a codification of current law. The Court of Appeals long ago ruled that the statute does not apply to post-judgment settlements, and that rule has never been seriously questioned since then. The proposal codifies that rule because (1) the rule sensibly allows the plaintiff to accept a partial payment from one defendant who may have no other assets except for his or her personal possessions, and to do so without unintentionally releasing the other defendants, and (2) adoption of a new, statutory exclusion that did not expressly recognize the existent, common-law exclusion could conceivably be construed as a rejection of it.

Proposal

AN ACT to amend the general obligations law, in relation to the impact of litigation settlements upon the remaining parties to the action

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

Section 1. Section 15-108 of the general obligations law is amended by adding a new subdivision (d), to read as follows:

(d) Releases and covenants within the scope of this section. A release or a covenant not to sue between a plaintiff or claimant and a person who is liable or claimed to be liable in tort shall be deemed a release or covenant for the purposes of this section only if:

(1) the plaintiff or claimant receives, as part of the agreement, monetary consideration greater than one dollar,

(2) the release or covenant completely or substantially terminates the dispute between the plaintiff or claimant and the person who was claimed to be liable, and,

(3) such release or covenant is provided prior to entry of judgment.

§2. This act shall take effect 30 days after such time as it shall have become law, and it shall apply to all releases or covenants not to sue effected on or after such effective date.

8. Providing Additional Notice to the Mortgagor in Residential Mortgage Foreclosure Proceedings (RPAPL §1320, CPLR 3215(g)(3)(iii))

The Committee recommends that a new section1320 of the Real Property Actions and Proceedings Law ("RPAPL") be added and that CPLR 3215(g)(3)(iii) be amended to provide additional notice to the mortgagor that a foreclosure action has been commenced. This recommendation has been made by members of the Judiciary who believe that unsophisticated homeowners currently do not receive sufficient notice that they are about to lose their homes through foreclosure.

To address this issue, the Committee recommends the creation of a new section of the RPAPL, §1320, which would add a special summons requirement in private residence mortgage foreclosure cases. This new provision would be applicable to mortgage foreclosures on residential property containing not more than three units. In addition to the usual requirement applicable to a summons in the court, a bold face notice written in plain English would now have to accompany the summons commencing the foreclosure action. This document would provide an explicit warning that if the defendant does not come to court and answer, his or her real property could be taken. It informs the recipient that the entire balance of the mortgage loan is now due, and recommends that the defendant immediately engage an attorney or go to the local court's Office for the Self-Represented for assistance.

This proposal also would amend CPLR 3215(g)(3)(iii) to extend the requirement that there be a second notice to a defaulting defendant in a residential mortgage foreclosure proceeding before a default judgment can be issued. Currently, under CPLR 3215(g)(3)(i), a second summons must be sent to a defendant when a plaintiff seeks to obtain a default judgment due to the non-appearance of a natural person based upon a failure to pay a contractual obligation. This summons must be sent by first class mail to the defendant's place of residence, or if that is unknown, to his last known place of employment, or if that is unknown, his last known residence. Although this second notice requirement would seem to include residential mortgage contracts, subdivision (iii) of the same statute states that the extra notice need not be given when the action affects title to real property. The Committee's proposal would simply limit the last exception, and exclude from its ambit residential mortgage contracts.

Proposal

AN ACT to amend the real property actions and proceedings law and the civil practice law and rules, in relation to procedures, provide additional notice to mortgagees that a foreclosure action has been commenced

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

Section 1. The real property actions and proceedings law is amended by adding a new section 1320 to read as follows:

§1320. Special Summons Requirement in Private Residence Cases

In an action to foreclose a mortgage on a residential property containing not more than three units, in addition to the usual requirements applicable to a summons in the court, the summons shall contain a notice in boldface in the following form:

NOTICE

YOU ARE IN DANGER OF LOSING YOUR HOME

If you do not respond to this summons and complaint by delivering a copy of the answer or the attorney for the person or entity who holds your mortgage who filed this foreclosure proceeding against you, a default judgment may be entered and you could lose your home.

Speak to an attorney or go to the court where your case is pending for further information on how to answer the summons and protect your property. Sending a payment to your mortgage company will not stop this foreclosure action.

You must respond by delivering a copy of the answer on the attorney for the person or entity who holds the mortgage. If you have any questions on how to replead, speak to an attorney or a clerk of the court.

§2. Subparagraph (iii) of paragraph 3 of subdivision (g) of section 3215 of the

civil practice law and rules, as amended by chapter 100 of the laws of 1994, is amended to read as follows:

(iii) This requirement shall not apply to cases in the small claims part of any court, or to any summary proceeding to recover possession of real property, or to actions affecting title to real property, except residential mortgage foreclosure actions.

§3. This act shall take effect immediately.

V. Recommendations for Amendments to Certain Regulations

1. Improving the Conduct of Depositions (22 NYCRR 221.1 et seq.)

The Committee recommends that a new section of the Uniform Rules for the New York State Trial Courts be promulgated to ensure that depositions are conducted as swiftly and efficiently as possible and in an atmosphere of civility and professional decorum. The experience of the members of the Committee indicates that certain problems are endemic to deposition practice in the state courts. These problems occur perhaps to a greater degree than is the case in the Federal courts, where magistrates or the judges themselves have the time to police the discovery process closely. The existing rules permit counsel to engage in actions that obstruct the search for truth and make the process of discovery more time-consuming, less efficient and more expensive than it needs to be.

For example, frequent use is made in New York of so-called speaking objections, objections accompanied by, or made in the form of, speeches which exceed what is necessary to preserve an objection to form. At a minimum, these speaking objections interfere with the smooth flow of the deposition and cause delay. At times, the speeches have the effect of signaling to the witness how a question ought to be answered and, indeed, that is often their purpose.

Further, some attorneys believe that it is permissible to direct a witness not to answer a question whenever the attorney finds the question objectionable. And some attorneys claim a right to consult with the client-deponent during questioning so as effectively to coach the deponent whenever the questioning turns inconvenient.

It is also not unusual for attorneys, for tactical reasons or because of overzealousness or rudeness, deliberately to interrupt and burden depositions with comments about the adversary's case. See 8A C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure § 2113, at 95 (2d ed. 1994) ("Disruptive or oppressive behavior by attorneys during depositions has emerged as a serious concern."). Some attorneys even stoop to invective and insult. See, e.g., Corsini v. U-Haul International, Inc., 212 A.D.2d 288, 630 N.Y.S.2d 45 (1st Dept. 1995)(complaint dismissed on appeal because of improper conduct); In re Schiff, 190 A.D.2d 293, 599 N.Y.S.2d 242 (1st Dept. 1993); Uncivil Conduct in Depositions, 2 NY Litigator 29 (Nov. 1996), quoting R. Adler, Reckless Disregard 158 (1986)("It is not altogether unusual ... to proceed as rudely and ferociously as possible.").

Abuse of the deposition process causes serious damage. It undermines the foundations of the discovery process, causes delays in case management, and impairs the standing of the legal profession.

Currently, CPLR 3113 and 3115 provide the basic framework for how depositions practice should be conducted. CPLR 3113, entitled "Conduct of Examination," concerns itself with the persons before whom the deposition may be taken, the administration of the oath, the posing of objections, the continuity of the examination, and written questions read by the examining officer. CPLR 3115 elaborates on CPLR 3113, providing further details on what objections may be made during depositions.

However, neither of these rules, nor any other section of the CPLR, directly addresses these areas that are frequently abused: "speaking objections," directing a witness not to answer, or interrupting a deposition to communicate with the deponent. Because of the absence of treatment of these issues in the CPLR and the importance of adequately addressing them to improve deposition practice, enhance civility, and speed case resolution, the Committee recommends that these matters be governed by regulations that supplement the statutory provisions.

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.

A summary of the proposed rules is set forth below.

In addressing the first abuse, "speaking objections," it should be noted that CPLR 3115 currently provides that most objections are preserved for trial - - a salutary principle which facilitates an orderly, fair and efficient deposition. The proposed regulation would go further and provide that objections that are not required to be made, should not be made during depositions. The proposal would limit the

opportunity for the interposition of objections that are preserved for trial solely in order to make the taking of the deposition difficult or expensive for the inquiring attorney. Similarly, the proposal would require that when objections are made they be stated succinctly and not be framed so as to suggest an answer to the witness, and, except as otherwise provided, the amendment would prohibit statements or comments that interfere with the questioning.

Objections to the form of a question, at the option of the inquiring attorney, would have to be accompanied by a statement of the claimed defect in form or the basis for a perceived error or irregularity. The obligation placed on the objecting counsel to articulate a rationale for an objection would create a disincentive for the misuse of objections and facilitate the quick and inexpensive correction of minor problems. At the same time, requiring the articulation of the defect only when requested by the questioner will minimize the opportunity for abuse.

To address the second abuse, the proposed rule would establish reasonable and clear limits on the practice of directing a witness not to answer a question. While the proposal is principally directed to the attorney representing the deponent, it also applies to other counsel as well. The new rule would restrict when an attorney could issue such a directive to instances in which (1) a privilege or right of confidentiality, which would be eviscerated by the giving of the testimony, is at stake; (2) it is necessary to enforce a court order; or (3) a question is not merely improper but is plainly so and would cause substantial prejudice to any person if answered. In order to discourage abuse of this power, the objecting attorney is obliged to explain the basis for the action being taken. The proposal would make clear that, even when a proper direction is issued, the direction cannot be an excuse to put an end to the questioning or to cause a delay insofar as questions not in controversy are concerned. The defending attorney may issue a directive under the specified circumstances and may seek a protective order with regard to the offending question, but the parties are obligated to continue the session on other matters unless the inquiring attorney agrees to adjourn at that point. This promotes efficiency and fairness and limits delay and expense.

Lastly, to address the third abuse, the proposed rule would prohibit an attorney from interrupting a deposition to communicate with a deponent, except under similar narrow circumstances. An attorney would be prohibited from interrupting a deposition to consult with his or her client unless all parties consent, except when a privilege or right of confidentiality is at stake, to enforce the provision of a court order, or to address a question which is plainly improper and would cause significant prejudice to any person if answered.

The attorney defending a deposition would continue to have the right to seek a protective order in the event that the inquiring counsel were in some fashion to exceed the bounds of proper conduct.

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, provide bright lines to guide counsel, and will inhibit the abuse of the deposition process that too often mars the litigation process in New York.

Proposal

Part 221. Uniform Rules for the Conduct of Depositions

§ 221.1 Objections at Deposition

(a) Objections in general; statements or comments.

No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of rule 3115 of the civil practice law and rules would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken and the answer shall be given, and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to article 31 of the civil practice law and rules.

(b) Speaking objections restricted

Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by rule 3115 or by this rule, during the

course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

§221.2 Refusal to answer when objection is made

A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefor. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

§221.3 Communication with the deponent

An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

2. Notice of Application for a Temporary Restraining Order (22 NYCRR 202.7(f))

CPLR 6313(a) provides that if, on a motion for a preliminary injunction, a plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice.

The aim of a preliminary injunction is to prevent injury or to preserve the status quo between parties to litigation pending final judgment. The aim of a TRO is to accomplish the same ends while application is being made for a preliminary injunction. Given this function, it frequently is assumed that each instance of an application for a TRO is one in which the urgency of the interim injunctive relief being sought is too great to allow for time spent to notify the other side. In the experience of most judges, however, completely dispensing with such notification is not warranted: many cases do not involve such urgency, and no prejudice will ensue to any party where steps are taken to give notification of the application for the order.

Unless the application for a TRO provides information regarding the necessity for ex parte relief - - or the lack thereof - - the judge to whom the application is presented has no basis on which to weigh the advisability of restraining the defendant before the defendant can be heard. Because an initial restraint often has a significant effect on the course of the litigation, and places the defendant at a tactical disadvantage, the consideration of a TRO ex parte should be the exception and not the common practice.

Therefore, the Committee recommends that the Uniform Rules for the Trial Courts be amended to add a new subdivision (f) to Part 202.7 requiring that the party seeking a TRO demonstrate in its application that he or she will suffer significant prejudice if notice is given to the other party. In the absence of a showing of significant prejudice, the affirmation contained in the application must demonstrate that a good faith effort has been made to notify the party of the time, date and place that the application will be made. This proposal has been modified slightly this year to conform to the newly issued Uniform Commercial Division Rules, which can be found at 22 NYCRR 202.70 (See+ 202.70(g)(10)).

Summary proceedings under Article 7 of the Real Property Actions and Proceedings Law, in which TRO's or "stays" are frequently sought by unrepresented tenants threatened with imminent eviction, are exempted from the proposed rule 202.7(f).

Proposal

§202.7 Calendaring of Motions; Uniform Notice of Motion Form; Affirmation of Good Faith.

202.7(f) Upon an application for an order to show cause or motion for a preliminary injunction seeking a temporary restraining order, the application shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by the giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application. This subdivision shall not be applicable to orders to show cause or motions in special proceedings brought under Article 7 of the Real Property Actions and Proceedings Law.

3. Addressing the Dishonoring of a Check or Other Form of Payment Used to Purchase an Index Number (22 NYCRR 202.70)

The Committee recommends that the Uniform Rules for the Supreme Court and the County Court (22 NYCRR 202.70) be amended to deal with a small operational problem which can have thorny consequences, i.e., what happens when a party tenders payment for an index fee, and after the papers are filed and an index number is assigned, the payment is dishonored?

In 1996, the Court of Appeals held that the outright failure to pay the filing fee in a Supreme Court action causes the filing to become a nullity since it was never properly commenced. (Matter of Gershel v. Porr, 89 N.Y.2d 327 (1996). In Meiselman v. McDonalds Restaurant, 305 A.D. 382 (2d Dept. 2003) app. den., 100 N.Y.2d 637 (2004), a pro se plaintiff paid the index fee with a check just before the expiration of the statute of limitations. The check was subsequently returned for insufficient funds and remained unpaid. One year later, the plaintiff purchased a new index number and refiled the papers after the statute had expired.

The Nassau County Supreme Court held that the action was never properly commenced in 1999 since a filing under CPLR 304 and 306-a had not taken place because the required fee was never recovered. Therefore, the recommencement of the action in 2000 was not timely. The Second Department concurred.

The Committee, agreeing with the result in Meiselman, believes that a party tendering a check (or other form of payment) to pay an index fee that is subsequently dishonored should be given a reasonable opportunity to correct the defect. It inquired into the practices of the county clerks in several counties around the state and found that it was common practice for county clerk staff to notify an attorney right away when payment for an index fee which had been tendered was dishonored, and give the attorney an immediate opportunity to make good on the payment.

The Committee feels that the better practice is to provide a 60-day grace period for the filer if the payment for a filing fee has been dishonored. Thus, it recommends the creation of a new provision of the Uniform Rules of the Trial Courts to allow for a 60-day grace period which is set forth below. If the repayment of the fee does not take place within 60 days of the transmittal of a notice that the index fee payment has been dishonored, the filing will be considered ineffective and the action or proceeding will not be considered to have been commenced.

This does not result in an extension of the statute of limitations since, under CPLR §304, a "filing" occurred upon the "delivery" of the pleading and fee to the county clerk.

Proposal

A new section 202.70 of the Uniform Rules for the Supreme Court and the County Court would be created, to read as follows:

> Notwithstanding any other provision of law, upon receiving notice that a check or other form of payment of a filing fee imposed pursuant to CPLR 8018, 8020, and 8022 has been dishonored, the county clerk shall promptly notify the filing party that payment has been dishonored, and if the dishonor is corrected within 30 days of notice, the filing should be effective as of the date of the original tender.

4. Insuring That a Judge Has Clearly Stated Authority to Compel an Insurance Company Representative or Lienholder to Attend a Pre-Trial Settlement Conference in Person or by Telephone (22 NYCRR 202.26(e))

The Committee recommends that 22 NYCRR §202.26(e) be amended to expressly authorize the court to direct that parties, representatives of parties, insurers or lienholders attend a pre-trial conference, either in-person or telephonically.

Even though some other states have court rules that expressly authorize the trial or conference judge to direct the appearance of non-party insurers, lienholders, and other such persons (see, e.g. Mich. Court Rules §240(F)), New York does not. This is unfortunate, especially with respect to non-party insurers, since many cases often do not settle because the attorneys appearing for one or more insured defendants lack authority from the insurance company to settle. We understand that many judges and litigators believe that if a representative of the insurance company were required to attend a pretrial conference and discuss settlement, many cases which now settle on the eve of trial or during jury selection would actually settle at the stage of the pretrial conference.

Courts routinely direct non-parties to appear at trial and non-parties may also be directed to release a file, appear for a deposition, make a payment from a particular fund, and so on. Courts can also sanction a non-party (after due process is provided) for their failure to obey such a directive. Matter of Alex, S., 283 A.D.2d 433, 723 N.Y.S.2d 889 (2nd Dep't 2001).

Relatively recently, the Second Department, Appellate Division had an opportunity to address the question of whether a court had the power to sanction insurers for failure to comply with court orders. See, Saastomoinen v. Pagano, 278 A.D.2d 218 (2nd Dep't 2000). The Court in Saastomoninen held that the court did not have the power to impose sanctions because the sanction rules, which are in derogation of common law and must be construed narrowly, do not specifically allow for the imposition of sanctions on non-parties. The Court in Saastomoinen did not hold that the courts lack inherent power to direct insurers to comply with court orders. The decision in Saastomoinen is consistent with the Court of Appeals's decision in A.G. Ship Maintenance Corp. v. Lezak, 69 N.Y.2d 1,(1986) where the Court held that the courts of New York had an inherent power to impose sanctions, but could not do so in the absence of a court rule.

The proposed amendment would be limited in scope and would merely authorize the court to direct non-parties to appear at the conference. The Committee does not propose any amendment to the sanction rules.

The amendment would fulfill two principal functions. First, in the situation in which it is the party's insurer (rather than the party or the party's counsel) who is effectively controlling the litigation, the court could direct the insurer to appear. The Committee's expectation is that the court will direct the party's insurer to be present only when the party and the party's counsel collectively lack authority to control the course of the action. Where the in-person appearance of the non-party insurer is deemed inconvenient, the court can direct that the insurer appear telephonically.

The amendment would additionally authorize the court to require the appearance of parties, lienholders and other interested persons where the court deems such to be appropriate. A court might direct a party to appear where, for example, the court questions whether the party truly understands his or her legal position or options. The presence of a lienholder, where there is a significant lien, could be useful in resolving or removing an impediment to settlement, and may also serve to protect the lienholder's interests.

Finally, this amendment would also remove a comma from the first line of Section 202.26(e), to avoid confusion as to the meaning of the first sentence. We understand the intent of the first sentence is to allow attendance only of those attorneys who are fully familiar with the action. The sentence is not intended to bar non-attorneys from appearing. The placement of the comma after "attorneys" in the current rule may create a misimpression as to the rule's intent.

Proposal

§202.26 - Pre-Trial 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 pre-trial 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 then 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 submissions of documents on suitable alternate proof of damages. Failure to comply with this paragraph may be deemed a default under CPLR 3404. Absence of an attorney's file shall not be an acceptable excuse for failing to comply with this paragraph.

VI. Summary of Other Previously Endorsed Recommendations

A. Legislative Proposals

1. Affirmative Defense Premised Upon Article 16 (CPLR 1603, 3018(b))

This measure, last recommended by the Committee in its 2004 report, seeks to amend CPLR 1603 and 3018(b) to resolve a technical disagreement between decisions of the Second and Fourth Departments which is unlikely to reach the Court of Appeals for resolution. The proposal would require reliance on Article 16 to be pleaded as an affirmative defense.

Under this proposal, CPLR 3018(b) would be amended to require a defendant to raise a CPLR 1603 reduction claim as an affirmative defense. This would be analogous to the defense of comparative negligence (i.e. reduction of liability by virtue of the plaintiff's own contribution to the accident or occurrence). The primary consequence of the amendment is that the plaintiff then would be entitled to receive in advance a bill of particulars with respect to the Article 16 defense. Thus, the amendment would limit the risk of surprising the plaintiff at the trial with new factual claims not asserted in any pleading. CPLR 1603 also would be amended to the same effect.

2. 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.

Because of prior difficulties in obtaining passage of this full proposal, it was withdrawn, and a simpler proposal addressing one of the critical problems generated by G.O.L. 15-108 was substituted for the 2006 Legislative Session. That proposal seeks to exclude certain releases from its scope for which no monetary consideration has been paid.

This older, 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.

3. Clarification of Commencement of an Action against a Body or Officer-Period of Limitations (CPLR 217(1))

This measure, which was part of the Committee's legislative program for many years, seeks to amend CPLR 217(1) to make it clear when the period of limitations commences to run within which an aggrieved party may bring a proceeding to review a determination made by or a refusal to act by a public agency, body or officer. The proposal was last presented in 2004. At present, although CPLR 217 provides that the period begins when the determination or refusal becomes final and binding, that point often factually is ambiguous, and much litigation takes place to determine the point of "finality."

The measure would provide in a new paragraph (b) of CPLR 217(1) that whenever a body or officer mails or delivers in accordance with its procedures, a written determination or refusal to a person or the person whom he or she represents in law or in fact, that person must commence the proceeding within four months, or any applicable shorter time, from the mailing or delivery by the body or officer of written notice stating that the determination or refusal is final and that the person is entitled to seek court review of such determination or refusal. The proposal was amended in 1997 to clarify that the two-year tolling provision of this section for persons under a disability applies to these mailings as well.

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

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

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

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

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

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

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

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

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

(Public Officers Law §17(1)(n)); and provide for confidentiality in certain court-annexed ADR proceedings (CPLR 4510-a).

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

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

Lastly, the Committee recommends the issuance of four rules of the Chief Administrator to provide the operational underpinnings for a broad-based court-annexed ADR program. The Committee recommends additions to the Uniform Rules for the Supreme and County Courts which deal with the following: (1) ADR by appointment of a referee to hear and determine; (2) ADR by court-annexed mediation and neutral evaluation; (3) ADR by court-annexed voluntary arbitration; and (4) the institution of a mandatory settlement conference. A more complete description of these proposed rules can be found below in the Temporarily Tabled Regulatory Proposals section below.

7. Neglect to Proceed (CPLR 3216, 3404)

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

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

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

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

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

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

order as may be just. If the case is marked off the trial calendar, it must be restored in 90 days or else be deemed abandoned.

8. Simplification of the Calculation of Interest on Judgments Against Certain Public Corporations, Municipalities, and the State of New York (Law §175(5) State Finance Law §16, Unconsolidated Laws §2501, Public Authorities Law § 2046-i)

This proposal would amend General Municipal Law §3-a, Public Housing Law § 157(5), State Finance Law §16, Unconsolidated Law §2501, and Public Authorities Law §2046-i to clarify the method by which interest may be calculated on judgments against certain governmental entities for which a specific interest rate has not been fixed by statute. It was included in the Committee's 2004 report.

Section 5004 of the CPLR sets forth the basic rule for the calculation of the interest rate on judgments, stating that "[i]nterest shall be at the rate of 9 per centum per annum, except where otherwise provided by statute." Thus, the rate of interest on judgments is generally deemed to be 9% unless a statute clearly states otherwise. Statutes, such as section 3-a of the General Municipal Law, state that the interest rate shall not exceed 9%. Until very recently, most courts interpreted those statutes as requiring a 9% rate as well. However, the New York State Court of Appeals, in its decision in Rodriguez v. New York City Housing Authority, 91 N.Y.2d 76 (1997), ruled otherwise, holding that such statutes require the trial judge to determine what a fair rate of interest would be, with the 9% rate being presumptively fair in the absence of evidence to the contrary.

Rodriguez thus adds yet another issue to be litigated in these types of cases. (See, e.g., Guido v. State, 87 Misc.2d 647 (N.Y.C. Cl. 2000), Auer v. State, 289A.D.2d 626 (3rd Dept. 2001). The Committee believes that this is wasteful both of judicial resources and of the resources of the affected governmental entities. In addition, the current statute is likely to lead to indefensibly inconsistent results.

The Committee recommends that the current open-ended provision ("shall not exceed nine per centum per annum") be replaced with a fair interest rate that would be premised upon a commonly published index, but which would be capped at 9%. Under the Committee's proposal, interest could then be assessed ministerially, and without controversy. The proposal would assess interest at the tax overpayment rate. That rate, which is defined in section 1906(e)(2) of the Tax Law to be the federal short-term rule plus two percentage points, rounded to the nearest full percent, is the rate that the State of New York currently pays on tax refunds. The Commissioner of Taxation and Finance currently computes and publishes the rate on a quarterly basis.

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

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

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

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

Because oral stipulations in open court are valid and binding in all other types of litigation, the Advisory Committee believes that the First and Second Departments' practice is the preferable one. The Committee also believes that the conflict should be resolved statutorily. It therefore recommends §236(B)(3) of the DRL be revised by adding to the end of the first sentence of subdivision (B) the phrase "or if such an agreement is made orally in open court, and transcribed by a stenographer and approved by the court." This recommendation is endorsed by the Chief Administrative Judge's Committee on Matrimonial Practice.

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

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

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

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

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

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

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

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

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

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

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

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

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

from producing evidence or testimony at trial concerning transactions or communications with the decedent.

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

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

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

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

13. Addressing Delay in Payment of a Settlement Occasioned by the Requirement for Court Approval of Settlements in Certain Cases (CPLR 1207, 1208, 5003-a)

This proposal, last included in the Committee's 2004 report, seeks to amend CPLR §5003-a, captioned "Prompt payment following settlement." This provision sets forth times within which a settling defendant must pay all sums due following the

tender of a release and stipulation of discontinuance of the action. Difficulties arise, however, with cases involving an infant, an incompetent or a death, where the release cannot be tendered without court approval. Usually it takes at least several weeks, and occasionally several months or longer between the proposed settlement and court approval. Thus, the anomaly exists that the only litigants who do not receive their settlement monies "promptly" are the litigants who are under the courts' protection.

The Advisory Committee on Civil Practice, together with the Advisory Committee on Surrogate's Court Practice, recommend that the CPLR (§§ 1207, 1208, 5003-a) and the Surrogate's Court Procedure Act (§2220) be amended to permit interest to accrue where there is a delay in a proposed settlement of claims by an infant, incompetent, or in a wrongful death action caused by the need for court approval.

The interest rate set forth in the proposed amendments is 4% or the statutory interest on a judgment, whichever is less. Interest begins to run from the fifteenth day, or in the case of a state or municipal entity from the sixty-first day, following the day that the proposed settlement is entered into and continues to run until the day that the order or judgment is signed. Provision is also made for annuity payments. Once the order or judgment is signed, the defendant will then have 14 days, or in the case of a state or municipal entity 60 days, to make payment.

The date and terms of the proposed settlement must be set forth in a writing or court transcript, a copy of which shall be provided to the court in order to calculate the days of interest.

Lastly, a new subdivision (b)(9) of Uniform Surrogate's Court Rule §207.38 was also recommended to conform this section governing compromises with the proposed new law. It is set forth below in the Temporarily Tabled Regulatory Recommendations section.

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

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

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

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

This proposal would not alter in any way the substantive law of workers' compensation. The 1996 Omnibus Workers' Compensation Reform Act already limits claims for contribution and indemnification against an employer to only those cases involving "grave injuries." In cases where there are not grave injuries, the employer is not liable as a matter of substantive law, and therefore this provision would not affect such employers at all. In those cases involving grave injury, the Legislature has made a policy determination that the employer should be subject to potential third-party liability. This provision would ensure that the employer's share of liability would not be dependent upon the fortuity of the solvency of the third-party plaintiff. This provision would therefore more fully effectuate the legislative judgment that employers should be subject to third-party liability in those cases involving grave injury.

15. Setting a Timeframe for Expert Witness Disclosure
(CPLR 3101(d)(1))

This proposal, last included in the Committee's 2004 report, recommends that CPLR 3101(d)(1) be amended to provide a minimal deadline for expert disclosure (i.e., sixty days before trial), a time frame which could be expanded to give earlier expert

disclosure in certain commercial cases or as the need arises in other cases, if directed by the court.

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

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

Many states have adopted some part of the Federal Rules' liberal expert disclosure requirements, including a specific deadline for expert disclosure prior to trial. For example, at least 24 states require depositions of experts; and at least a dozen states require written reports from experts.

The Committee feels that this more liberal rule would avoid "trial by ambush" and permit more efficient preparation for trial and management of cases.

A new provision of the Uniform Rules for the Supreme and the County Courts, section 202.20-d, has also been proposed which would require the parties to attend a mandatory settlement conference conducted by someone other than the presiding judge (e.g., an outside attorney, a court attorney, or a Judicial Hearing Officer) no later than 60 days before trial. This proposal which is set forth in the Temporarily Tabled Regulatory Recommendations section below, provides that in cases in which the parties participate in the mandatory settlement conference, the time for service of a response to an expert demand pursuant to CPLR 3101(d)(1)(iv) shall be the later of 60 days before trial or 10 days following the date of the mandatory settlement conference. Subparagraph (iv) of CPLR 3101(d)(1) has therefore been amended to state that "Unless otherwise provided by a rule of the chief administrative judge or by order of the court," the expert disclosure shall be made no later than 60 days before trial.

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

This proposal is a companion recommendation to Item 16 set forth above. The Committee feels that even if the wholesale amendment treatment of CPLR 3101(d)(1) is difficult to achieve, given political realities, it would still recommend that the Legislation make possible more extensive expert discovery under certain circumstances in commercial cases. The availability of such disclosure would promote fairer and more efficient preparation and processing of these cases. This proposal was last recommended in the Committee's 2004 report.

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. Subdivision (d)(1)(iii) 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, 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., The Hartford v. Black & Decker, 221 A.D.2d 986, (4th Dept. 1995); Adams Lighting Corp. v. First Central Ins. Co., 230 A.D.2d 757, (2d Dept. 1996); Rosario v. General Motors Corp., 148 A.D.2d 108 (1st Dept. 1989).

Especially in substantial commercial cases, however, these rules are unduly restrictive and prevent full and adequate preparation of the case. The testimony of an expert about such things as how stock should be valued or whether the financial analysis of the Board of Directors was sound under the circumstances is often central in larger commercial cases. By contrast, in personal injury cases, the existence and extent of physical injuries are revealed by objective tests and methods, such as x-rays and ultra-sound, and medical charts exist to provide concrete historical data, allowing testifying experts to reach determinations of their own without the imperative of disclosure beyond that provided for in section 3101(d)(1)(i).

Issues in commercial cases, however, are often more elusive. Where large sums are at stake, necessary, further disclosure will not add a disproportionate expense to the case. Additional disclosure of experts in these cases, when needed, will also assist parties to prepare their cases more effectively, thereby making summary judgment motion practice (which is more common in these cases than in many others), the preparation for trial and the trial itself, more efficient and cost-effective. By permitting additional focus upon the merits of the case in advance of trial, the proposal would also encourage early settlements, which are less expensive to the parties and the court system than later ones.

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 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 commercial cases. Since 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, so that there will be no uncertainty about the reach of the statute.

The Committee's earlier proposal for the establishment of a time frame for expert disclosure, set forth above, would apply to cases other than those that would be governed by this new subdivision (d)(1)(iii)(B).

17. 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.

18. 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.

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). 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.

The Committee's proposal closely tracks the current federal rule, with a few small exceptions.

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

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

The Committee was informed that the bar was experiencing increasing difficulty in obtaining the trial testimony of medical providers, both as treating physicians and medical experts, because the experts' schedules were extremely busy and unpredictable. Recognizing the difficulties that medical providers do have in controlling their schedules, the Committee recommends that CPLR 3101(d)(1), governing the scope of disclosure for expert testimony in preparation for trial, be expressly amended to permit the party offering the medical provider's testimony to

take the deposition by videotape or audiotape of the witness in advance in order to preserve his or her testimony for trial in case the witness subsequently becomes unavailable.

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

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

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

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

20. 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.

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

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

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

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

In the spring of 2003, the Court of Appeals issued its decision in the Tran appeal. 99 N.Y.2d 383 (2003). It overruled the First Department. Siding with the Second, Third, and Fourth Departments, the Court held that the amendment to CPLR 3101(i) requiring "full disclosure of any films, photographs, videotapes or audiotapes . . . " of a party to the action meant that such items should be turned over as soon as they were requested - - even if it was before the party surveilled could be deposed. The court acknowledged that such a policy might increase the potential for tailored testimony, but felt constrained to adhere to a "plain meaning" interpretation of the legislation enacted in 1993. However, the Committee believes that the view articulated by the First Department is the better policy since it is more likely to prevent fraudulent claims. Thus, the amendment proposed would expressly limit a court's discretion regarding the sequence of discovery. Such a step would minimize the potential of tailor-made testimony and support New York's preference for more in-depth discovery and honest and forthright explanations of the evidence, rather than gamemanship.

22. 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 section 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.

23. 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 section 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 caselaw 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.

24. 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 $5000 "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).

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

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

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

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

Although it is relatively easy for a plaintiff to obtain and maintain the benefits of this potentially powerful restraining device, it also is easy for the plaintiff to lose these benefits. The courts have sought to provide compensatory protection for property owners by insisting that plaintiffs strictly comply with the statutory requirements for filing and maintaining notices of pendency. As a general matter, there are no second chances for plaintiffs who fail to seek timely extension of a notice of pendency prior to

expiration of its three-year term. This prohibition against filing a second notice of pendency recently was reaffirmed in Matter of Sakow, 97 N.Y. 2d 438 (2002), where the Court of Appeals rejected an attempt to file a second notice of pendency after an initial notice was vacated and no stay of the order vacating it was obtained pending the outcome of what ultimately was a successful appeal.

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

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

The proposal adjusts current practice as to posting of bonds by expressly prohibiting any requirement of a bond from defendant as part of an order vacating the notice after a preliminary hearing (proposed CPLR 6514(f)), in that such an order will issue only after a finding that neither the merits nor the equities of plaintiff's situation can justify a notice of pendency under any circumstances. The proposal would amend CPLR 6515 to permit a defendant to seek an order vacating the notice upon posting a bond without regard to the merits of plaintiff's claim, enabling the court to vacate a notice even if there is some merit to plaintiff's claim, but only if plaintiff's interests can be adequately protected with a bond.

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

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

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

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

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

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

It appears that the Legislature rejected the alternative of outright repeal in favor of modifying Article 50-A, at least in part because it felt that malpractice defendants should be entitled to the savings that would arise when a malpractice plaintiff dies sooner than the jury had anticipated. In any event the Legislature was resistant to the

alternative of repeal. The Committee accordingly reset its focus in light of this changed landscape, and submitted a new proposal early in the 2004 legislative session. The Committee's proposed amendment of the periodic payment schemes was predicated on the template set forth in newly enacted CPLR 5031. In essence, the Committee recommended that the same basic scheme that was devised for malpractice actions be extended to all personal injury and wrongful death actions, but that certain changes be made in the process. The most significant features of this second proposal were that: (1) the "new" CPLR Article 50-A, which only applied to medical malpractice actions, would be amended to apply to all actions for personal injury, wrongful death, and property damages, and the current CPLR Article 50-B would be repealed; (2) the old $250,000 future damages threshold would be restored; (3) the statute would be amended to provide that the parties could settle a case on such terms as they wished; and (4) the new CPLR Article 50-A would be amended to provide that, when a lump sum payment is made in wrongful death actions for the plaintiff's future damages, the payment should be made in the present value.

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

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

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

1. <u>The "old" $250,000 future damage threshold would be restored</u>.

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.

27. Equalizing the Treatment of Collateral Sources in Tort Actions (CPLR 4111, 4213, 4545)

This proposal, last recommended by the Committee's in its 2005 report, recommends that CPLR 4545 be amended to eliminate an anomaly in the treatment of collateral sources in tort actions. More specifically, the Committee proposes the repeal of subdivisions (a) and (b), which govern the offset of damages for collateral sources in medical malpractice actions and against public defendants, respectively. This will result in the standardization of the treatment of collateral sources doctrine by leaving in effect subdivision (c) of the section, which governs "any action for personal injury, injury to property or wrongful death," and allows all defendants in such actions to offset against awards for past and future costs and expenses any amounts which have been or will be replaced by past or future payments for collateral sources, such as insurance. Currently, while past and future awards in cases against private defendants may be reduced by collateral sources, in cases against public employers under subdivision (b), only past awards may be so reduced. See, Iazzetti v. The City of New York, 94 N.Y.2d 183 (1999).

This proposal would standardize the treatment of collateral sources not only by requiring that they be set off as to past and future awards regardless of the identity of the defendant, but in certain other respects as well. Currently, personal injury awards in actions against public defendants are offset under subdivision (b) only by collateral sources "provided or paid for, in whole or in part, by the public employer." The offset for collateral sources is reduced in such actions by the amount of any contributions made by the public employee for the collateral source benefit. This treatment would be

replaced by the approach taken as to all other defendants under the current subdivision (c), which requires an offset for the most common sources of collateral sources, whether or not funded by the employer, and reduces the offset by the amount paid by the plaintiff for premiums for the two-year period immediately prior to the accrual of the action. The proposal would make clear that section 4545 applies in wrongful death actions alleging medical malpractice (as it does in all other wrongful death actions). Upon the repeal of subdivisions (a) and (b), the reference to subdivision (c) will be eliminated since it will be the sole remaining provision of section 4545.

With the repeal of CPLR 4545(a) and (b), there will no longer be a need for CPLR 4111(d) and (e) or for certain portions of CPLR 4213(b), and accordingly, the Committee recommends that they be repealed as well. CPLR 4111 and 4213(b) currently differentiate among medical malpractice actions, actions against public employers and other tort actions in prescribing the requirements for itemized verdicts and judicial decisions. With the repeal of CPLR 4545 (a) and (b) (i.e., with the standardizing of treatment of collateral sources for these types of actions), there will no longer be a need for distinguishing among these actions in the rendering of itemized verdicts and decisions. Repeal of these sections would leave rule 4111(f) and the balance of section 4213(b) as the standardized requirements for verdicts and decisions in all personal injury actions, including actions against public employers and medical malpractice actions.

B. Regulatory Proposals

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

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

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

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

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

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

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

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

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

5. Interest on Settlement of Wrongful Death Cases in Surrogate's Court (22 NYCRR 207.38(b)(9))

This proposed rule would amend section 207.38(b)(9) of the Uniform Rules for Surrogate's Court to conform to the proposed changes set forth in (Section IV) to CPLR 1207, 1208, and 5003-a, as well as Surrogate's Court Procedure Act §2220(6), to permit interest to accrue when there is a delay in a proposed settlement of a claim by an infant, incompetent, or a wrongful death action caused by the need for court approval.

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

2. 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.

3. The Committee, through its Subcommittee on Technology, continues to review the need for additional statutory and regulatory changes needed to best implement legislation authorizing the Chief Administrative Judge to conduct a pilot program permitting the filing of court papers by fax or electronic means in selected locations throughout the state.

VIII. Subcommittees

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

- Subcommittee on Alternative Dispute Resolution
  Chair, Thomas F. Gleason, Esq.

- Subcommittee on Appellate Jurisdiction
  Chair, James J. Harrington, Esq.

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

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

- Subcommittee on Contribution and Apportionment of Damages
  Chair, John T. Frizzell, 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 Contempt Law
  Chair, John Werner, Esq.

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

- Subcommittee on Elimination of Demands in Tort Cases
  Chair, Jeffrey E. Glen, Esq.

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

- Subcommittee on Evidence
  Chair, James J. Harrington, Esq.

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

- Subcommittee on Expert Disclosure in Commercial Cases
  Chair, Mark C. Zauderer, Esq.

- Subcommittee on the Individual Assignment System
  Chair, Robert M. Blum, Esq.

- Subcommittee on Impleader Procedures
  Chair, Robert C. Meade, 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 Monitoring the Implementation of Chapter 216, Laws of 1992
  Chair, Richard B. Long, Esq.

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

- Subcommittee on Motion for Summary Judgment in Lieu of Complaint
  (Chair to be designated)

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

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

- Subcommittee on Preliminary Conference Orders
  Chair, Bert Bauman, Esq.

- Subcommittee on Providing Index Numbers in Actions and Proceedings
  (Chair to be designated)

- Provisional Remedies
  (Chair to be designated)

- Subcommittee on Records Retention
  Chair, John F. Werner, Esq.

- Subcommittee on Review of the American Bar Association Litigation Section's Civil Trial Practice Standards
  (Chair to be designated)

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

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

- Subcommittee on Service of Interlocutory Papers
  Chair, Thomas F. Gleason, Esq.

- Subcommittee on Service of Process
  Chair, Leon Brickman, Esq.

- Subcommittee on Service of Process by Mail
  Chair, Bert Bauman, Esq.

- Subcommittee on Statutes of Limitations
  Chair, James J. Harrington, Esq.

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

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

- Ad Hoc Committee on Interest Rates on Judgments
  Chair, Brian Shoot, Esq.

- Subcommittee on Structured Settlement Guidelines
  Chair, Lucille A. Fontana, Esq.

- Ad Hoc Committee on Alternative Mortgage Foreclosure Procedure
  Chair, David Siegel, Esq.

- Ad Hoc Committee on the Use of the Regulatory Process to Achieve Procedural Reform
  Chair, George F. Carpinello, Esq.

- Ad Hoc Committee on Orders of Protection in Mental Hygiene Proceedings
  Chair, Richard Rifkin, Esq.

Respectfully submitted,

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