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

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

January 2016

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## I. Introduction

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

In this 2016 Report, the Advisory Committee recommends a total of twenty-four measures for enactment by the 2016 Legislature. Of these, fourteen measures previously have been endorsed in substantially the same form, five are modified measures, and six are new measures. In Parts II, III and IV, individual summaries of the proposals are followed by drafts of legislation.

In 2015, three measures recommended by the Committee were enacted into law in the same or substantially similar form: (1) authorizing the Chief Administrative Judge to effect e-filing in all civil cases (CPLR 301(a) et al)) (L. 2015, c. 237 (omnibus measure); (2) establishing uniformity in practice regarding the use of expert affidavits in summary judgment (CPLR 3212(b))(L. 2015, c. 529) and (3) removing the requirement that papers served by mail be mailed within the state (CPLR 2103(f)(1) (L. 2015, c. 572).

Part II sets forth and summarizes the five new measures proposed for 2016. They are designed to: (1) address authentication of materials obtained during discovery (CPLR 4540-a)(new); (2) clarify procedures for a class action (CPLR 901, 902, 908 & 909); (3) address

procedures for relief and substitution of counsel (CPLR 321); (4) allow an appeal as of right to the Court of Appeals on one dissent if the appeal was decided by a four-justice panel (CPLR 5601(a)) and (5) address the procedure for vacating a default judgment where the party in default was not provided with notice (CPLR 3215(g)(1)).

Part III sets forth and summarizes the five modified measures proposed for 2016. These measures would: (1) reinforce the viability of consent as a basis of general personal jurisdiction over foreign corporations authorized to do business in New York State (CPLR 301(a); BCL 1301(e) (new); Gen. Assoc. Law 18(5) (new); Ltd. Liability Co. Law 802(c) (new); Not-for-Profit Corp. Law 1301(e) (new); Partnership Law 121-902(e) (new) and Partnership Law 121-1502(r) (new)); (2) harmonize the law of evidence regarding inadvertent waiver of the attorney-client privilege (CPLR 4550); (3) permit service of a levy upon any branch of a financial institution to be effective as to any account as to which the institution is a garnishee ((CPLR 5222(a), 5225(b), 5227, 5232(a), 6214(a)); (4) address documents subpoenaed for trial in medical malpractice cases (CPLR 2306) and (5) require the pleading of an affirmative defense and a motion to dismiss for objections regarding certain notices of claim (CPLR 3018(b), 3211; Gen. Mun. L. 50-i).

Part IV summarizes the fourteen previously endorsed measures not enacted through 2015, but once again recommended by the Committee in substantially the same form. These measures: (1) address the law of evidence regarding the exclusion of hearsay statements of an agent or employee (CPLR 4551); (2) set a time frame for expert witness disclosure (CPLR 3101(d)(1)); (3) amend an exception to the rule against hearsay to address business records relied upon by experts in civil trials (CPLR 4549 (new)); (4)) enact a waiver of privileged confidential information for exclusive use in a civil action (CPLR 4504(a)); (5) amend the General Obligations Law in relation to the limitation of non-statutory reimbursement and subrogation (Gen. Ob. L. § 5-335); (6) clarify the manner in which the acknowledgment of a written agreement made before or during marriage may be proven in an action or proceeding (D. R. L. §236(B)(3); (7) clarify the meaning of property of a judgment debtor (CPLR 5225(a) & (b)); (8) permit appellate review of a non-final judgment or order in certain circumstances (CPLR 5501(e)

(new)); (9) conform the statutes on the timing of a motion seeking leave to appeal, the automatic stay and the 5-day rule (CPLR 5519)); (3); (4); (10) address certain CPLR Article 16 issues in relation to apportionment of liability for non-economic loss in personal injury actions (CPLR 1601, 1603, 3018); (11) clarify the procedure for a motion to replead or amend and set the time for motions to dismiss for failure to state a cause of action and for summary judgment (CPLR 3211(e), 3212(a)); (12) adopt the Uniform Mediation Act of 2001 (as amended in 2003), to address confidentiality and privileges in mediation proceedings in New York State (CPLR Article 74 (new)); (13) eliminate the uncertainty in the context of an appeal of either an *ex parte* temporary restraining order or an uncontested application to the court (CPLR 5701(a) and 5704(a)) and (14) expand expert disclosure in commercial cases (CPLR 3101(d)(1)).

Part V sets forth the Committee's regulatory proposals. In 2015 one of the Committee's rule proposals was promulgated in substantially similar form, providing a procedure under the principles of comity for the recognition of judgments, decrees or orders rendered by a court duly established under tribal or federal law by an Indian tribe, band or nation recognized by the State of New York or by the United States (22 NYCRR 202.71; eff. June 15, 2015; AO-107-15).

The Committee seeks approval of four regulatory measures in 2016: (1) clarifying the remedies available to the court for failure to appear (22 NYCRR 202.26(e) & 202.27); (2) providing greater flexibility for the court to address confidentiality in the submission of court papers in the Commercial Division of the Supreme Court (22 NYCRR 202.70(g), Rule 9 (new) (see Appendix for Recommended Form of Stipulation and Order)); (3) amending 22 NYCRR 202.48(b) to give the court discretion to accept an untimely submission for good cause shown or in the interest of justice and (4) rescinding the Appendix of Official Forms for the CPLR.

Part VI of the report incorporates from the 2015 Report previously endorsed legislative and regulatory proposals that the Committee still feels are important, but have a lesser likelihood of legislative success and are of lower priority than those recommended for enactment. These proposal are available for review via the specified web-link to the Unified Court System legislative program. They may be resurrected if the opportune time arises.

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

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

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

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

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

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

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

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## II. New Measures

**1**. Addressing Authentication of Materials Obtained During Discovery (CPLR 4550-a)

The Committee recommends adoption of this proposal to eliminate the needless authentication burden often encountered by litigants who seek to introduce into evidence documents or other items authored or otherwise created by an adverse party who produced those materials in the course of pretrial disclosure.

It is fundamental, of course, that the genuineness of a document or other physical object must be established as a prerequisite to its admissibility when the relevance of the item depends upon its source or origin. See Barker & Alexander, *Evidence in New York State and Federal Courts* § 9:1 (2d ed. 2011). But evidence of such authenticity should not be required if the party who purportedly authored or otherwise created the documents at issue has already admitted their authenticity. And if a party has responded to a pretrial litigation demand for its documents by producing those documents, the party has indeed implicitly acknowledged their authenticity. Thus, in such cases, the presentation of evidence of authenticity is a waste of the court's time and an unnecessary burden on the proponent of the evidence. The producing party's simple objection to admissibility for "lack of authentication" in such cases should be summarily overruled. But often it is not, thus warranting remedial legislation. The proposed statute codifies and expands upon caselaw that has been overlooked by many New York courts, practitioners, and commentators.

The idea that a party's production of his or her own papers serves to authenticate them is a specific application of the general rule that the authenticity of a document may be established by circumstantial evidence. See *People v. Myers*, 87 A.D.3d 826, 828 (4th Dep't 2011), *leave to appeal denied*, 17 N.Y.3d 954 (2011). The New York Court of Appeals recognized the probative value of a party's production of its own documents in *Driscoll v. Troy Housing Auth.*, 6 N.Y.2d 513 (1959), where the issue was the authenticity of an unsigned, undated "roster card"

describing the status of a civil service employee. The card was produced by the civil service commission from its files, where it had been kept for eight years. The Court held that "its authenticity must be presumed, or we have presumed wrongdoing rather than honesty on the part of the public official." *Id*. at 519. The Court's ruling was bolstered by the presumption of regularity that attaches to the acts and records of public agencies, but the authentication-by-production doctrine was also recognized with respect to private documents in *Ruegg v. Fairfield Securities Corp.*, 308 N.Y. 313, 320 (1955). There, the Court observed that the authenticity of a copy of a letter "produced from defendant's own files" was "unquestioned."

Several recent federal cases have likewise held that a party can satisfy the requirement of authentication based on the opposing party's production of its own papers during discovery proceedings. For example, the court in *Bieda v. JCPenney Communications, Inc.*, 1995 WL 437689 n.2 (S.D.N.Y. 1995), held that "[t]he mere fact that Defendants here produced most of the documents in question is at least circumstantial, if not conclusive, evidence of authenticity." See also *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1423 (10th Cir. 1991); *Snyder v. Whittaker Corp.*, 839 F.2d 1085, 1089 (5th Cir. 1988); *FTC v. Hughes*, 710 F.Supp. 1520, 1522-23 (N.D.Tex. 1989).

The act-of-production doctrine in Fifth Amendment jurisprudence provides further support for the principle that a party who produces papers in response to a litigation demand for papers written by him or her implicitly authenticates those papers. For example, the Court of Appeals noted in *People v. Defore* that "a [criminal] defendant is protected [by the Fifth Amendment] from producing his documents in response to a *subpoena duces tecum*, for *his production of them in court would be his voucher of their genuineness*." 242 N.Y. 13, 27 (1926), *cert. denied*, 270 U.S. 657 (1926) (internal quotation marks and citation omitted) (italics added). See also *U.S. v. Hubbell*, 530 U.S. 27, 36 (2000) ("By producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.") (internal quotation marks omitted); *Fisher v. United States*, 425 U.S. 391, 412 n.12 (1976) (collecting cases).

In furtherance of the foregoing principles, the proposed new CPLR 4540-a creates a rebuttable presumption that accomplishes two goals. First, when the item at issue is one that has already been produced by a party in the course of pretrial disclosure, and such item purportedly was authored or created by that party, the opposing party is thereby relieved of the need, ab initio, to come forward with evidence of its authenticity. Second, the rebuttable nature of the presumption protects the ability of the producing party, if he or she has actual evidence of forgery, fraud, or some other defect in authenticity, to introduce such evidence and prove, by a preponderance, that the item is not authentic. A mere naked "objection" based on lack of authenticity, however, will not suffice. Shifting the burden of proof to the producing party makes sense because that party is most likely to have better access to the relevant evidence on the issue of forgery or fraud. Furthermore, the presumption recognized by the statute applies only to the issue of authenticity or genuineness of the item. A party is free to assert any and all other objections that might be pertinent in the case, such as lack of relevance or violation of the best evidence rule.

The Committee notes that adoption of the proposed new CPLR 4540-a would not preclude establishing authenticity by any other statutory or common law means. See CPLR 4543 ("Nothing in this article prevents the proof of a fact or a writing by any method authorized by any applicable statute or by the rules of evidence at common law.").

Proposal

AN ACT to amend the civil practice law and rules in relation to the authenticating effect of a party's production of material authored or otherwise created by the party.

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

Section 1. The civil practice law and rules is amended by adding a new rule 4540-a to read as follows:

Rule 4540-a. Presumption of authenticity based on a party's production of material authored or otherwise created by the party. Material produced by a party in response to a demand pursuant to article thirty-one for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility.

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

2. Clarifying Procedures for a Class Action
(CPLR Art. 9)

The Committee has reviewed and supports, with modification, the proposal of the New York City Bar Association to more closely align New York law governing class actions in CPLR article 9 with the provisions of Rule 23 of the Federal Rules of Civil Procedure which were enacted in 2003. Earlier versions of the federal rule adopted innovations developed in New York's law. But the state procedures were last revised in 1975 and should be amended to reflect the significant improvements to the administration of class actions now available to litigants in federal courts but not in New York's courts.

This proposal would result in the amendments described below.

§ 901(b)

The proposal would (1) eliminate the restriction on class actions involving a penalty or minimum recovery, and (2) add language expressly permitting class actions against governmental entities.

First, under current law, where a statute imposes a penalty or minimum amount of recovery, New York law authorizes a class action only if the statute expressly permits a party to file such a lawsuit. This approach simply results in attempts to evade the § 901 restriction and prompts unnecessary litigation about the meaning of and possible waiver of many statutes' penalty or minimum recovery provisions. Equally important, the rule does not apply in federal courts in New York, which results in state-federal forum shopping. The proposal would delete this language.

Second, although state common law once limited class actions against governmental entities, the so-called "government operations rule," court decisions have eroded this rule. The proposal would authorize class actions against governmental entities where all the prerequisites to class certification under § 901(a) are otherwise met.

§ 902

The proposal would (1) eliminate the fixed deadline to move for class certification, and (2) direct appointment of counsel in the class certification order.

Current law requires that a party move for class certification within sixty days of the last responsive pleading. In some actions, whether certification of one or more classes is appropriate under § 901(a) cannot be determined until after limited discovery. The proposal would replace the current fixed sixty-day deadline, which sometimes results in pro forma certification motions, with a requirement that a party move at a practicable time. The amendment would improve the ability of the parties to craft and a court, where appropriate, to certify class definitions. This new subdivision matches the language of Rule 23(c)(1).

Article 9 currently lacks substantive criteria and procedures for the selection of class counsel. The proposal would adopt (with appropriate cross-references within article 9) the language of federal Rule 23(g), which identifies explicit factors for a court to consider when assessing the ability of proposed counsel to represent the class(es), including counsel's experience, the resources for litigating the action, and knowledge of the relevant area(s) of law. Additionally, the proposal would require a court to appoint class counsel when it first certifies the class(es).

§ 908

Section 908 would be amended to address two concerns in the context of prejudgment termination of an action.

First, under current law, a class action may not be dismissed, discontinued, or compromised without both court approval and notice to the class or a prospective class where one has not been certified yet. However, notice can be burdensome and expensive without any corresponding benefit. The proposal would eliminate the mandatory provision of notice and authorize a court to exercise its discretion to direct notice where appropriate to protect the interests of the class or putative class. The amended § 908 would track the comparable language of Rule 23(e), but would retain the existing requirement for judicial approval.

Second, the section would be expanded to include settlement of an action.

§ 909

The committee recommends an amendment to the section governing attorney's fees to prevent any statutory conflict about the basis for a fee award and the standard that governs when the fees are to be paid by a defendant.

First, the common law primarily authorized an award of fees when a plaintiff's efforts created a common fund, by agreement of the parties, or for bad faith by a defendant; statutes also authorized fee awards in certain types of actions. The proposed new language—"that are authorized by law or by the parties' agreement"—would clarify that fees may be awarded as authorized by these traditional common law theories, statute, and other bases in law. *See* Sponsor's Memo, L. 1975 c. 207. This language also appears in Rule 23(h).

Second, the Legislature has authorized fee awards in actions for particular types of claims or defendants. For example, in CPLR 8601(a), the Equal Access to Justice Act adopted in 1990, the Legislature authorized a court to award attorney's fees in actions against the State, but no fees may be awarded if the position of the State was "substantially justified" or where "special circumstances make an award of fees unjust."

The proposed addition of the phrase "to the extent not otherwise limited by law" would direct that, where a specific statute authorizes a fee award to be paid by a defendant, the standards of that more specific statute govern eligibility for and the amount of any fee award, rather than the general fee provision of § 909. *Compare Cobell v. Norton*, 407 F. Supp. 2d 140, 148-89 (D.D.C. 2005) (analyzing fee award and substantial justification under federal EAJA in class action).

The Committee extends its appreciation and gratitude to the State Courts of Superior Jurisdiction Committee, Council on Judicial Administration and Litigation Committee on Class Actions in the New York Courts of the New York City Bar Association for proposing this legislation.

Proposal

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

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

Section 1. Section 901 of the civil practice law and rules, as amended by chapter 207 of the laws of 1975, is amended to read as follows:

§ 901. Prerequisites to a class action. a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interests of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

b. [Unless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained as a class action] Once the other prerequisites under subdivision (a) of this section have been satisfied, class certification shall not be considered an inferior method for fair and efficient adjudication on the grounds that the action involves a governmental party or governmental operations.

§2. Section 902 of the civil practice law and rules, as amended by chapter 207 of the laws of 1975, is amended to read as follows:

§ 902. Order allowing class action [Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained] and appointing class counsel. (a) At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action. An order under this section may be conditional, and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;

2. The impracticability or inefficiency of prosecuting or defending separate actions;

3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;

5. The difficulties likely to be encountered in the management of a class action.

(b) Unless a statute provides otherwise, the order permitting a class action shall appoint class counsel. In appointing class counsel, the court:

1. shall consider:

A. the work counsel has done in identifying or investigating potential claims in the action;

B. counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

C. counsel's knowledge of the applicable law; and

D. the resources that counsel will commit to representing the class;

2. may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

3. may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

4. may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under rule 909; and

5. may make further orders in connection with the appointment.

c. When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under subdivisions (b) and (e) of this section. If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

d. The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

e. Class counsel must fairly and adequately represent the interests of the class.

§ 3. Rule 908 of the civil practice law and rules, as amended by chapter 207 of the laws of 1975, is amended to read as follows:

Rule 908. Dismissal, discontinuance, [or] compromise or settlement. A class action shall not be dismissed, discontinued, [or] compromised, or settled without the approval of the court. [Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs.] The following procedures apply to a proposed dismissal, discontinuance, compromise or settlement:

1. In class actions other than those actions described in subdivision two, notice of the proposal need not be given unless the court finds that notice is necessary to protect the interests of the represented parties.

2. In all actions where a class has been certified and the action was not brought primarily for injunctive or declaratory relief, reasonable notice of the proposal shall be given in such manner as the court directs to all class members who would be bound by such resolution of the action.

3. The content of the notice and the expenses of notification shall be governed by section 904(c) and (d).

4. If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

5. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

6. If the class action was not brought primarily for injunctive or declaratory relief, the court may refuse to approve a dismissal, discontinuance, compromise, or settlement unless it affords a new opportunity to request exclusion from the class to individual class members who had an earlier opportunity to request exclusion but did not do so.

7. Any class member may object to the proposal if it requires court approval under this rule; the objection may be withdrawn only with the court's approval.

§4. Rule 909 of the civil practice law and rules, as amended by chapter 566 of the laws of 2011, is amended to read as follows:

Rule 909. Attorneys' fees. If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorneys' fees that are authorized by law or by the parties' agreement to the representatives of the class and/or to any other person that the court finds has acted to the benefit of the class based on the reasonable value of legal services rendered and if justice requires and to the extent not otherwise limited by law, allow recovery of the amount awarded from the opponent of the class.

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

3. Regarding Relief and Substitution of Counsel (CPLR 321(b), (c) & (d)(new))

The Committee recommends an amendment to clarify the procedures for a change of counsel during litigation, either by substitution of a new attorney with the consent of the party or by withdrawal of an attorney such that a party will become unrepresented. The proposal is intended to resolve ambiguity in the current language and procedural problems arising under the current statute when: (1) a party terminates the attorney-client relationship and elects to proceed *pro se* rather than appear by new counsel; (2) a motion to withdraw by an attorney of record is premised on privileged information; or (3) the attorney of record is a law firm that has dissolved. The proposal would amend the existing subdivisions of CPLR 321(b) to provide distinct procedures for each scenario: under subdivision (b)(1), a party will continue to be represented by an attorney via a substitution of counsel and, under subdivision (b)(2), a party will be *pro se* once the representation ends. The amendments would amend subdivision (c), governing the death or disability of the attorney, to apply only to solo practitioners, and would add a new subdivision (d) to address the responsibilities of the members of a dissolved law firm that had been attorney of record.

**321(b)**

The current language of CPLR 321(b)(1) can be read to mean that an attorney and his or her client may file and serve a consent to change counsel which makes the party his or her own "counsel," when in practice the party is now appearing *pro se*. If the attorney and client fail to file a consent form, then opposing counsel is left uncertain about how to proceed with a party who, on the record, remains represented by an attorney. *See Farage v Ehrenberg*, 124 AD3d 159 (2d Dep't 2014) (enforcement of CPLR 321 "protects adverse parties from the uncertainty of when or whether the authority of an opposing attorney has been terminated"). *See generally* Paul I. Marx, *So You Think You're Relieved? CPLR 321 Representation Conundrum*, N.Y.L.J., Dec. 12, 2014, at 4.

Under the proposal, subdivision (b)(1) would apply only when a party will continue to be represented in the litigation, albeit by a new attorney of record by means of substitution. This subdivision may not be used where the party will continue *pro se* because the term "attorney of

record" does not apply to a self-represented party, thereby eliminating the possibility of a *pro se* representation if a consent is not filed. It includes a new requirement that the incoming attorney or firm also sign the consent to substitution form. The new attorney's signature and endorsement would operate as the appearance of the new attorney of record, thereby serving as notice of the substitution and promptly notifying the court and opposing counsel of the identity of the new attorney.

Subdivision (b)(2) would govern every situation in which withdrawal of an attorney will result in a represented party now appearing *pro se* or in which counsel can be appointed or changed only by order of the court. Thus the subdivision would apply if a party discharges the attorney, i.e., the client "consents" to withdrawal or where the attorney and client cannot agree to terminating the representation. Because a motion would be required, the court can confirm that the circumstances under which the attorney seeks permission to withdraw are consistent with the attorney's ethical obligations when terminating representation under, for example, Rule 1.16 of the Rules of Professional Conduct (RPC). *Cf. Palmieri v. Biggiani*, 108 AD3d 604 (3d Dep't 20143) (reinstating cause of action under Judiciary Law §487 where attorney allegedly deceived court in motion to withdraw); *Diaz v. N.Y. Comprehensive Radiology*, PLLC 43 Misc 3d 759 (S. Ct. Kings County 2014) (reviewing attorney's motion to withdraw for alleged lack of merit to action).

The amended subdivision would permit the court to grant the motion on the papers, including any opposition, alone. However, where a motion to withdraw requires closer scrutiny to determine whether it should be granted or denied, the court might need more information, including possibly confidential information protected by, for example, other provisions of the CPLR or ethics rules governing attorney-client relations. *See* N.Y. State Bar Ass'n Op. 1057 (2015). To prevent public disclosure of any confidential information and to preserve the impartiality of the tribunal presiding over the action, the amended rule would require that, if the court does not grant the motion on the papers alone, then it must refer the motion to another judge, who may require disclosure to the court of the information to determine the motion. When a motion is referred for determination, the papers and proceedings would be sealed to maintain the confidentiality of the information and may be seen only by the party whose attorney

seeks to withdraw.

To assist the court in managing the proceedings and to prevent overreaching by opposing counsel, the subdivision would include an automatic thirty-day stay of proceedings, except as otherwise ordered by the court, to enable a party to exercise the option to retain new counsel after a court approves a motion to withdraw. An explicit authorization for a stay comports with the practice already undertaken by some courts to issue a stay or to rely on the stay in subdivision (c). *See, e.g.*, *Fan v Sabin*, 125 AD3d 498 (1st Dep't 2015) (citing CPLR 321(c)); *Stasiak v Forlenza*, 84 AD3d 1214 (2d Dep't 2011) (citing CPLR 321(c) and order); *Sarlo-Pinzur v Pinzur*, 59 A.D.3d 607 (2d Dep't 2009) (citing CPLR 321(c) stay but noting that court has discretion to proceed where client's voluntary act prompts withdrawal by counsel).

**321(c)**

Subdivision (c) would be amended to apply only to a solo practitioner, whose death, removal, or disability would leave the party without an attorney. Where the attorney of record is a firm, other attorneys in the firm would assume responsibility for termination of the representation. A new subdivision (d), governing dissolution of a firm, would apply in all instances other than a solo practitioner.

**321(d)**

This new subdivision would address those situations in which a party is represented by a firm and the firm itself dissolves. *See* RPC 1.0(h) (definition of "firm" or "law firm"). Under the ethics rules, an attorney is obligated to take reasonable steps to avoid prejudice to the client. *See* RPC 1.16(e) ("[e]ven when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client"); *see also id.* 1.16(d) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."). In applying these precepts to dissolution, courts have held that, although basic principles of partnership law normally would absolve the members of a firm from the obligation to conduct any post dissolution business, the attorney ethics rules impose a continuing post dissolution responsibility. The duty to avoid prejudice to the client of a dissolved firm required the members of the dissolved firm to take steps such as precluding the adverse consequences of

a statute of limitation expiring after the dissolution, *Vollgraff v Block*, 117 Misc 2d 489 (Sup. Ct. Suffolk County 1982), and opposing a motion to dismiss and a motion to require a defendant to post a bond. *RLS Assocs. v United Bank of Kuwait*, 417 F Supp 2d 417 (S.D.N.Y. 2006).

But where a firm is attorney of record, dissolution of the firm ordinarily means no individual attorney affiliated with the firm has the authority to represent the party. Current CPLR 321 provides no express guidance when a firm dissolves about how to withdraw from the action and facilitate the appearance of successor counsel.

New subdivision (d) would address this problem by formally requiring the members of the dissolved firm to protect the client's interests by filing a motion to withdraw. Courts have supported this approach in the past given the responsibility of the members to wind up the firm's business. *See Vollgraff*, 117 Misc 2d 489; *RLS Assocs., LLC*, 417 F Supp 2d 417 (citing *Vollgraff*); *see also* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Jud. Ethics Op. 1988-4 (collecting cases). The former members would be allowed to appoint one from among them with the responsibility for performing this responsibility. If no motion is required because the client has retained new counsel, such counsel can appear as attorney of record by serving a notice of appearance stating that the firm that previously was attorney of record dissolved; in such situation no action is required by a member of the dissolved firm to complete the substitution under subdivision (b)(1).

Proposal

AN ACT to amend the civil practice law and rules, in relation to the substitution or withdrawal of an attorney

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

Section 1. Subdivisions (b) and (c) of section 321 of the civil practice law and rules are amended and a new paragraph (d) is added to read as follows:

(b) [Change] Substitution or withdrawal of attorney.

1. Unless the party is a person specified in section 1201, an attorney [of record] may [be changed] substitute for an attorney of record by filing with the clerk a consent to the [change] substitution signed by the retiring [attorney] and substituting attorneys and signed and acknowledged by the party. Notice of such [change] substitution of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.

2. (i) [An attorney of record may withdraw or be changed] If an attorney of record seeks to withdraw with or without the party's consent, and as a consequence the party will appear without an attorney, or where an attorney of record may be substituted by order of the court in which the action is pending, [upon] the attorney shall make a motion on such notice to the [client of the withdrawing attorney] party, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct. Upon service of such motion, no further proceeding shall be taken, without leave of the court, in the action against the party whose attorney has moved to withdraw, until thirty days after service by any party of notice of entry of the court's order determining the motion.

(ii) If an attorney moving pursuant to this paragraph certifies in writing to the court that the basis for the motion includes information that is confidential, then the motion, unless granted by the court on the motion papers, must be referred to another judge who may require disclosure of such confidential information prior to reaching a decision. Where such a referral is made, the proceedings on the motion shall be closed and its record shall be sealed from all persons, including the referring court, except the party. Any information disclosed pursuant to the referred

judge's direction shall for all other purposes remain confidential.

(c) Death, removal or disability of attorney. If an attorney of record who is a sole practitioner dies, becomes physically or mentally incapacitated, or is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom [he] the attorney has appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs.

(d) Dissolution of law firm. Where the attorney of record is a law firm that dissolves, any successor attorney may appear as attorney of record by serving on all other parties and filing a notice of appearance which states that the firm that was attorney of record dissolved. A member of the dissolved firm may make a motion for withdrawal under the procedures authorized by subdivision (b) of this section.

§ 2. This act shall take effect immediately.

4. Allowing Appeal as of Right to the Court of Appeals on One Dissent if the Appeal was Decided by a Four-justice Panel
(CPLR 5601(a))

The Committee recommends an amendment of CPLR 5601(a) to allow an appeal as of right to the Court of Appeals on one dissent if the appeal was decided by a four-justice panel, a prevalent practice today in the First, Second and Third Departments of the Appellate Division. The amended statute would allow an appeal as of right when there is a dissent on a question of law in favor of the appealing party by one justice if the appeal was decided by a panel of four justices or by two justices if the appeal was decided by a panel of five justices.

When CPLR 5601(a) was amended by L. 1985, ch. 300, eff. Jan. 1, 1986, to limit appeals as of right to the Court of Appeals to cases where there is a dissent by at least two justices of the Appellate Division, it was customary for the Appellate Division to sit and decide appeals with panels of five justices. That is no longer the case. Panels of four justices have been used regularly in the Second and Third Departments for some time and the practice has now been adopted in the First and Third Departments as well.

Since the amendment of 5601(a) in 1985, the obstacles to securing an appeal to the Court of Appeals have increased over the years as that court has more than ever become a certiorari court. Only 10% (14 of 144) of appeals in civil cases decided in 2014 were taken as of right on the basis of two dissents in the Appellate Division. See Annual Report of the Clerk of the Court of Appeals for 2014, Appendix 3 and 5. The Committee believes requiring two dissents to appeal as of right to the Court of Appeals is highly problematic in the current practice environment.

A two-two split decision in the Appellate Division is resolved currently by vouching in a fifth justice to render a three-two decision that, under existing law, confers the right to a further appeal to the Court of Appeals. However, a three-one split seriously disadvantages the losing party who aspires to appeal to the Court of Appeals. The Committee believes that, in practice, where there is one dissent among four the possibility of a second dissent, had there been a five-justice panel, is more likely. With Appellate Division panels of four now commonplace, the dynamic anticipated with panels of five justices is necessarily distorted.

The Committee has ascertained that there are no statistics available to review how many appeals in the Appellate Division are decided by a vote of three-to-one, but it believes that the impact of this amendment to CPLR 5601(a) will not add appreciably to the civil docket of the Court of Appeals.

Proposal

AN ACT to amend the civil practice law and rules, in relation to allowing an appeal to the court of appeals as of right based on one dissent if an appeal was decided by a four justice panel

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

Section 1. Subdivision (a) of section 5601 of the civil practice law and rules is amended to read as follows:

(a) Dissent. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where there is a dissent by at least two justices on a panel of at least five justices or where there is a dissent by one justice on a panel of four justices on a question of law in favor of the party taking such appeal.

§ 2. This act shall take effect immediately and shall apply to any order of the appellate division entered on or after the effective date.

5. Vacating a Default Judgment for Failure to Provide Notice
(CPLR 3215(g)(1))

The Committee recommends an amendment to CPLR 3215(g)(1) to resolve questions under current law regarding the procedure for a party in default who was not provided notice. Also, the Committee believes clarification of current case law is necessary to avoid reliance upon a decision holding that failure to give notice when required "is a jurisdictional defect that deprives the court of authority to entertain a motion for leave to enter a default judgment." *Paulus v. Christopher Vacirca*, 128 A.D. 3d 116, 126 (App. Div. 2d Dept., 2016) The Committee agrees with the decision insofar as it vacated the default, but believes it is error to rule that there was no jurisdiction. The Committee proposes an amendment to require that the party in default who was not served with notice of the default shall be entitled to have the default judgment vacated if that party acts with due diligence upon learning of its entry. No proof of merit shall be required of such a party in support of the vacatur.

This measure would add an additional sentence at the end of 3215(g)(1) to read as follows: "When such notice is required but not given and judgment is entered, an application to vacate the judgment brought by the party entitled to receive notice shall be granted, provided such party acted with due diligence after having obtained knowledge of entry of the judgment."

Proposal

AN ACT to amend the civil practice law and rules in relation to the failure to provide notice of a default judgment.

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

Section 1. Paragraph (1) of subdivision (g) of section 3215 of the civil practice law and rules is amended to read as follows:

1. Except as otherwise provided with respect to specific actions, whenever application is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise. The court may dispense with the requirement of notice when a defendant who has appeared has failed to proceed to trial of an action reached and called for trial. When such notice is required but not given and judgment is entered, an application to vacate the judgment brought by the party entitled to receive notice shall be granted, provided such party acted with due diligence after having obtained knowledge of entry of the judgment.

§ 2. This act shall take effect immediately and shall apply to any application made on or after such effective date.

## III. Modified Measures

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

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

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

In the recent decision of *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014), however, the U.S. Supreme Court held that due process requires more than the doing of business in a state before the courts of that state may assert general jurisdiction. By analogy to the assertion of general jurisdiction over individuals domiciled in the state, the corporation must be "at home" in the state. This means that the only type of local activity by a corporation that will ordinarily qualify

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

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

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

From 1916 to the present, New York courts — State and Federal — have held that a foreign corporation's registration to do business in New York constitutes consent by the corporation to general personal jurisdiction in the New York courts. Judge Benjamin N. Cardozo

wrote in *Bagdon v. Philadelphia & Reading Coal & Iron Co*., 217 N.Y. 432 (1916), that such consent flows from the foreign corporation's statutorily required designation of a New York agent for service of process:

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

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

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

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

supra, 176 Misc. at 159; *Robfogel Mill-Andrews Corp. v. Cupples Co*., 67 Misc.2d 623, 624 (Sup.Ct. Monroe Co. 1971); see also Restatement of the Law (Second) of Conflict of Laws § 44 (1971)), while others have held that a foreign corporation consents to general jurisdiction as a result of both registration "and concomitant designation of the Secretary of State as its agent for service of process" (*Augsbury Corp. v. Petrokey Corp*., 97 A.D.2d 173, 175 (3d Dep't 1983); see also *The Rockefeller University v. Ligand Pharmaceuticals Inc*., 581 F.Supp.2d 461, 466-67 (S.D.N.Y. 2008)). Still others have simply held that becoming licensed to do business in New York constitutes consent to general jurisdiction. *Le Vine v. Isoserve, Inc*., 70 Misc.2d 747, 749 (Sup.Ct. Albany Co. 1972); *STX Panocean (U.K.) Co., Ltd. v. Glory Wealth Shipping Pte Ltd*., 560 F.3d 127, 131 (2d Cir. 2009); *China National Chartering Corp. v. Pactrans Air & Sea, Inc*., 882 F.Supp.2d 579, 596 (S.D.N.Y. 2012); *Steuben Foods, Inc. v. Oystar Group*, 2013 WL 2105894 (W.D.N.Y. 2013) (observing in n.1 that a contrary decision in *Bellepointe, Inc. v. Kohl's Dep't Stores, Inc*., 975 F.Supp. 562, 564 (S.D.N.Y. 1997), has been rejected by the Second Circuit).

Because authorization to do business is not possible today without designation of the Secretary of State as an agent upon whom process may be served (BCL §§304(b)-(c)), the acts of designating the Secretary of State and becoming registered are co-equal in effect. The critical fact is that the corporation has agreed to subject itself to the regulation of the state of New York and thereby has consented to general personal jurisdiction. This is "part of the bargain by which [the foreign corporation] enjoys the business freedom of the State of New York." *Neirbo Co. v. Bethlehem Shipbuilding Corp*., supra, 308 U.S. at 175. For nearly 100 years, foreign corporations have been on notice that becoming licensed to do business in New York is a consent to general personal jurisdiction.

The addition of the proposed new subdivision (e) to BCL §1301 would codify the case law and provide a forceful legislative declaration as to the effect of a foreign corporation's registration to do business in New York. Consent to general jurisdiction is a fair requirement to impose on corporations that benefit from conducting business in New York. Such consent provides the certainty of a forum with open doors for the enforcement of obligations of New York-licensed corporations without the expense and burden of proving jurisdiction on a case-by-

case basis. In *Daimler*, the Supreme Court recognized the value of having an "easily ascertainable" and "clear and certain forum in which a corporate defendant may be sued on any and all claims." 134 S.Ct. at 760.

Post-*Daimler* caselaw strongly supports the validity and value of the proposed measure. The Supreme Court, New York County, held in *Bailen v. Air & Liquid Systems Corp*., 2014 WL 3885949 (Aug.5, 2014), that *Daimler* "does not change the law with respect to jurisdiction based on consent." A corporation consents to New York jurisdiction "by registering as a foreign corporation and designating a local agent." See also *Corporate Jet Support, Inc. v. Lobosco Ins. Group, L.L.C.*, 2015 WL 5883026 (Oct.7, 2015, Sup.Ct.N.Y.Co.) (same).

The Appellate Division, First Department, also relied upon consent principles in *B & M Kingstone, LLC v. Mega Int'l Commercial Bank Co*., 131 A.D.3d 259 (1st Dep't 2015), motion for leave to appeal dismissed, 2015 WL 6457032, to require a Taiwanese bank, a branch of which was registered and doing business in New York, to respond to a post-judgment information subpoena concerning any assets held by certain third-party judgment debtors at the New York branch or any of the bank's non-New York branches. *Daimler* did not preclude the exercise of such jurisdiction. The relevant registration statute, Banking Law § 200, confers jurisdiction for causes of action against a foreign registered bank, or its branches, that arise out of a transaction in New York (id. § 200(3)), but the case here did not involve a cause of action against the bank—only participation in discovery proceedings concerning a judgment against other parties. The bank "consented to . . . regulatory oversight in return for permission to operate in New York. . . . This legal status also confers obligations to participate as [a] third-part[y] in lawsuits which involve [] assets under [its] management." (On a separate point, the IAS court denied the judgment creditor's request to enforce a restraining notice. The separate-entity rule of *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149 (2014), prohibits the enforcement of restraining notices served on New York bank branches with respect to accounts in other branches of the bank located in foreign countries. This aspect of the IAS court's order was not appealed. The Appellate Division stressed that the *Motorola* Court limited its application of the separate-entity rule to restraining notices and turnover orders and therefore did not preclude enforcement of the information subpoena in the instant case.)

Several federal district courts have explicitly held that consent based on corporate registration survives *Daimler* as a constitutional basis for the exercise of general jurisdiction for claims against foreign corporations. See, e.g., *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals Inc*., 78 F.Supp.3d 572 (D.Del. 2015); *Forest Laboratories, Inc. v. Amneal Pharmaceuticals LLC,* 2015 WL 880599 (D.Del. 2015); *Otsuka Pharmaceutical Co. v. Mylan Inc*., 2015 WL 1305764 (D.N.J. 2015); *Perrigo Co. v. Meriel Ltd*., 2015 WL 1538088 (D.Neb. 2015). See also *Beach v. Citigroup Alternative Investments LLC*, 2014 WL 904650 (S.D.N.Y. 2014) (dicta).

To be sure, some federal courts have disagreed. For example, *AstraZeneca AB v. Mylan Pharmaceuticals, Inc*., 72 F.Supp.3d 549 (D.Del. 2014), held that consent jurisdiction and contacts-based jurisdiction—the latter being the matter at issue in *Daimler*—both require due process scrutiny, which corporate registration fails. The *AstraZeneca* court reasoned that one of the premises of *Daimler* was that a corporation is entitled to "some minimum assurance as to where its conduct will and will not render [it] liable to suit," and such notice is absent when registration is treated as consent to general personal jurisdiction. The court also argued that a corporate defendant registered in multiple states could be exposed to suits all over the country, a result that *Daimler*'s "at home" test sought to preclude. See also *Chatwal Hotels & Resorts LLC v. Dollywood Co*., 90 F.Supp.3d 97 (S.D.N.Y. 2015); *Public Impact, LLC v. Boston Consulting Group, Inc*., 2015 WL 4622028 (M.D.N.C. 2015) (applying pre-*Daimler* Fourth Circuit precedent).

*AstraZeneca* was convincingly answered by *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals Inc*., 2015 WL 186833 (D.Del. 2015), where the court held that consent is an entirely separate basis of jurisdiction from that based on minimum contacts. *Daimler* itself indicated that the issue before the Court was the scope of jurisdiction over corporations that had *not* consented to jurisdiction. 134 S.Ct. at 755-56. *Daimler* simply does not overrule or even call into question Supreme Court precedents upholding corporate registration as a constitutional basis for general jurisdiction. *Acorda* also rejected the argument that jurisdiction based on registration creates unpredictability. On the contrary, "[w]hen . . . the basis for jurisdiction is the voluntary compliance with a state's registration statute, which has long and unambiguously been

interpreted as constituting consent to general jurisdiction in that state's courts, the corporation can have no uncertainty as to the jurisdictional consequences of its action." The number of states in which a corporation voluntarily registers to do business is irrelevant. (The split within the Delaware District Court is expected to be resolved in a consolidated appeal of *AstraZeneca* and *Acorda* to the Court of Appeals for the Federal Circuit. See 2015 WL 1467321.)

In short, the developing caselaw firmly supports New York's statutory reaffirmance that a foreign corporation that registers to do business in New York consents to general personal jurisdiction.

It is important to note that the doctrine of forum non conveniens provides a safety valve against unreasonable exercises of jurisdiction, even when corporate defendants are registered in New York. Forum non conveniens, codified in CPLR 327, authorizes courts, in their discretion, to dismiss cases that have no connection to New York. Recently, for example, the court in *Corporate Jet Support, Inc. v. Lobosco Ins. Group, L.L.C.*, 2015 WL 5883026 (Oct. 7, 2015, Sup.Ct.N.Y.Co.), dismissed a New York action against a New York-registered corporate defendant, even though such registration conferred general jurisdiction, because New Jersey was a more appropriate forum: the case involved a New Jersey corporation suing another New Jersey corporation with respect to events that took place in New Jersey. See also *Bewers v. American Home Products Corp.*, 99 A.D.2d 949 (1st Dep't), aff'd, 64 N.Y.2d 630 (1984) (court dismissed on forum non conveniens grounds where English citizens sued New York corporations for personal injuries allegedly caused by defendants' pharmaceutical products that were manufactured, tested, labelled, marketed, prescribed and ingested in England).

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

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

Consistent with the history, policy and caselaw relating to foreign business corporations, this measure also codifies the principle that other types of foreign business organizations consent to general jurisdiction when they do business in New York and, pursuant to statute, expressly appoint the Secretary of State as their agent upon whom process may be served. This measure thus includes foreign joint stock associations and business trusts (see Gen. Assoc. Law §§18; 2(4) (these are the only "associations" that must designate the Secretary of State as agent)); foreign limited liability companies (see Ltd. Liability Co. Law §§301(a); 802(a)); foreign not-for-profit corporations (see Not-for-Profit Corp. Law §§304, 1301, 1304(a)(6)); foreign limited partnerships (see Partnership Law §§121-104; 121-902); and foreign limited liability partnerships (see Partnership Law §121-1502).

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

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

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

Proposal

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

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

Section 1. The civil practice law and rules is amended by adding a new section 301-a to read as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(CPLR 4550 (new))

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

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

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

The current proposal contains minor modifications from the original draft of the proposal. That original draft addressed disclosures made in a "proceeding." CPLR 105(b) provides that the word "action" includes a "proceeding." Therefore the amended proposal refers to disclosures made in an "action." Additionally, the original draft of the proposed statute listed the absence of

"undue prejudice" as one of the conditions for non-waiver of the privilege by inadvertent disclosure, without indicating which party has the burden on that issue. The current proposal makes it clear that the burden is on the party in possession of the inadvertently disclosed material to demonstrate undue prejudice in the nullification of the waiver and return of the material, while retaining the burden on the disclosing party to demonstrate the other grounds for nullifying the waiver.

The current proposal retains the use of the term "undue prejudice," as opposed to adopting the suggestion of the New York City Bar Association Committee on State Courts that it be replaced with the phrase "prejudice arising from the inadvertent disclosure and subsequent restoration of immunity." That suggested language creates unnecessary interpretation issues. The party in possession of inadvertent disclosure will always suffer some prejudice from the restoration of immunity. That party will lose the right to use that disclosed material. The issue in these situations is whether that prejudice will be, in the circumstances of each individual case, unfair. Hence the phrase "undue prejudice" better serves the purpose of the proposed statute. It is a term with which Courts and lawyers are familiar from various contexts, and which is usually applied in this context as well [see, *The New York Times Newspaper Division of The New York Times Company v. Lehrer McGovern Bovis*, Inc., 300 A D 2d 169 (1st Dept. 2002)(A privilege is waived when a document is produced, unless the proponent of privilege demonstrates that "the client intended to maintain the confidentiality of the document, that reasonable steps were taken to prevent disclosure, that the party asserting the privilege acted promptly after discovering the disclosure to remedy the situation, and that the parties who received the documents will not suffer undue prejudice if a protective order against the use of the document is issued" [emphasis added])].

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

Proposal

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

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

Section 1. The civil practice law and rules is amended by adding a new section 4550 to read as follows:

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

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

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

3. Permitting Service of a Levy upon any Branch of a Financial Institution to be Effective as to any Account as to Which the Institution is a Garnishee

(CPLR §§ 5222(a), 5225(b), 5227, 5232(a) and 6214(a))

The Committee recommends that the "separate entity rule," which limits the effect of levies, restraining notices and orders of pre-judgment attachment served upon financial institutions as garnishees to accounts maintained at the branch served, be legislatively repealed so that service of such levies and orders upon any office of the institution will be effective as to any account held by the institution as garnishee, regardless of any nominal identification of the account with a particular office. The original purpose of the rule was to avoid undue interference with ordinary banking transactions and the possibility of a bank suffering multiple liabilities because of the inability for one branch served with a restraining notice or other order to instantaneously notify all other branches. But in the current era when all offices of every financial institution are in instant communication with each other by computer networks, this rule has outlived any usefulness and should be eliminated.

The Committee believes that the now ubiquitous use of computer networks that give all branch offices of a financial institution instantaneous access to central data banks makes the limitation of the separate entity rule obsolete, and its continued existence unnecessarily complicates and limits enforcement of judgments and attachments without any mitigating benefit to concepts of fairness or the functioning of the civil justice system.

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

served on any branch.

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

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

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

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

Accordingly, the Committee recommends that the operative language in the CPLR concerning restraining notices (CPLR 5222(a)), turnover orders for property of the debtor (CPLR 5225(b)) or debts owed to the debtor (CPLR 5227), levy upon personal property (CPLR 5232) and orders of attachment (CPLR 6214) be amended by providing that service upon a financial institution may be made by "serving any office of the financial institution."

Proposal

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

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

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

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

the support collection unit, by regular mail. Service of a restraining notice upon a financial institution shall be made by serving any office of the financial institution.

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

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

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

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

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

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

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

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

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

(a) Method of levy. The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant, by serving a copy of the order of attachment upon the garnishee, or upon the defendant if property to be levied upon is in the defendant's

possession or custody, in the same manner as a summons except that such service shall not be made by delivery of a copy to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318. Service upon a financial institution shall be made by serving any office of the financial institution.

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

4. Addressing Subpoenaed Documents for Trial in Medical Malpractice Cases (CPLR 2305)

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

In this proposal, CPLR 2305 would be amended to add a new subdivision (d) providing that where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records to all opposing counsel and self-represented parties, where applicable, forthwith in the same format.

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

Proposal

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

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

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

(d) Subpoena duces tecum for a trial; service of subpoena and delivery of records. Where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties, where applicable, forthwith.

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

5. Amending Requirements for Pleadings Regarding Certain Notices of Claim (CPLR 3018(b) & 3211; Gen. Mun. L. 50-i)

The Committee recommends amendment of CPLR 3018 and 3211, and also of GML 50-i, so as to (1) extend much the same procedural requirements to notice of claim defenses as now apply to jurisdictional defenses in civil actions, (2) correct an unrelated anomaly concerning notices of claim recently brought to light by a Court of Appeals concurrence, and (3) fill an unrelated and apparently unintended gap in CPLR 3211, concerning motions to dismiss.

Motions To Dismiss On Notice Of Claim Grounds

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

In other words, the same "Use It or Lose It" rule that now applies to objections based upon alleged lack of personal jurisdiction would be extended to procedural objections concerning the notice of claim, albeit with the difference that the movant will have 90 days rather than 60 days to make the motion. A court could extend the deadline "upon the ground of hardship."

The provisions would not alter proceedings in the Court of Claims and would therefore not affect the State of New York.

The Committee believes that these amendments would (1) promote dispositions of actions on their merits and (2) reduce waste of precious judicial resources.

Under current law, a municipal defendant has no obligation to timely raise an objection to the notice. Because of this, the municipal defendant which believes it has a valid notice of claim objection may choose not to assert the objection until the statutory deadline to obtain permission to serve a new notice of claim has passed and the curable defect has thus become incurable. Indeed, there are reported cases in which the municipal entity litigated the case for months or even years before seeking dismissal for the defective notice of claim.

Yet, the purpose of the notice of claim provisions is to provide municipalities with the opportunity to timely investigate claims, not to provide them with the means to tactically obtain dismissals. If the time to correct the error has not passed, there is no reason why the plaintiff

should not be given the opportunity to correct the error. Nor is there any reason why a municipality should be allowed to sit silently through years of litigation — including conferences attended by judges or their staff, motions read and resolved by judges and their staffs, appeals consuming court time and resources, and even trials — before raising a dispositive objection that could have been raised years earlier.

The *Margerum* Anomaly

The Court of Appeals recently ruled in *Margerum v. City of Buffalo*, 24 NY3d 721 [2015] that timely service/filing of a notice of claim was not prerequisite to commencement of suit against the City of Buffalo for alleged violation of the State Human Rights Law.

In concurring with that result, Judge Read noted that the Court of Appeals had earlier ruled that notice of claim was a prerequisite when an individual sought to sue a county for alleged violation of the State Human Rights Law. The reason for the different result was that the General Municipal Law §§ 50-e and 50-i, the statutes that govern service of notice of claim against many municipalities (including cities), are essentially limited to tort actions and/or personal injury and property damage claims. In contrast, actions against counties are governed by County Law § 52(1), which extends to notice of claim requirements to "invasion of personal or property rights, of every name and nature."

Judge Read deemed both rulings correct but wrote "it is hard to believe that the legislature ever intended to create a situation where an action brought against the County of Erie alleging violations of the Human Rights Law would require a notice of claim as a condition precedent to suit, while the same type of action brought against the City of Buffalo would not."

The Committee agrees that there is no valid reason why cities, towns and other municipalities should not be entitled to the same forewarning as counties. The measure would, accordingly, expand the scope of GML § 50-i so as to be identical with that of County Law § 52(1).

Filling An Ostensibly Unintended Gap

CPLR 3211(a) specifies the grounds on which a party may move to dismiss a claim. CPLR 3211(e) specifies the time in which each such motion should be made. However, for no discernable reason, CPLR 3211(e) addresses only ten of the eleven paragraphs in CPLR 3211(a).

It says nothing at all about paragraph eleven. That paragraph authorizes a motion to dismiss on the ground that "the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law."

The proposed bill would amend CPLR 3211(e) so as to expressly address motions premised upon CPLR 3211(a)(11). Such motions could now be made at any time, as with a motion premised upon alleged failure to state a cause of action.

Proposal

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

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

Section 1. Subdivision (b) of section 3018 of the civil practice law and rules, as amended by chapter 504 of the laws of 1980, is amended to read as follows:

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

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

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

1. a defense is founded upon documentary evidence; or

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

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

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

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

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

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

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

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

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

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

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

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

(c) Evidence permitted; immediate trial; motion treated as one for summary judgment. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any

evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

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

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraph two, seven, [or] ten or eleven of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight [or], nine or twelve of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading. An objection based upon a ground specified in paragraph twelve of subdivision (a) is also waived if the objecting party fails to move for judgment on that

ground within ninety days after serving the pleading, unless the court extends the time upon the ground of undue hardship.

(f) Extension of time to plead. Service of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.

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

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

§ 3. Section 50-i of the general municipal law is amended to read as follows:

§ 50-i. Presentation of tort claims; commencement of actions. 1. No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or

school district for [personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of] damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer [firemen] firefighters of any such city, county, town, village, fire district or school district or any volunteer [fireman] firefighter whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this article, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice, or if service of the notice of claim is made by service upon the secretary of state pursuant to section fifty-three of this article, that at least forty days have elapsed since the service of such notice, and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.

2. This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter.

3. Nothing contained herein or in section fifty-h of this chapter shall operate to extend the period limited by subdivision one of this section for the commencement of an action or special proceeding.

4. (a) Notwithstanding any other provision of law to the contrary, including any other subdivision of this section, section fifty-e of this article, section thirty-eight hundred thirteen of the education law, and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or presented, any cause of action against a public corporation for personal injuries

suffered by a participant in World Trade Center rescue, recovery or cleanup operations as a result of such participation which is barred as of the effective date of this subdivision because the applicable period of limitation has expired is hereby revived, and a claim thereon may be filed and served and prosecuted provided such claim is filed and served within one year of the effective date of this subdivision.

(b) For the purposes of this subdivision:

(1) "participant in World Trade Center rescue, recovery or cleanup operations" means any employee or volunteer that:

(i) participated in the rescue, recovery or cleanup operations at the World Trade Center site; or

(ii) worked at the Fresh Kills Land Fill in the city of New York after September eleventh, two thousand one; or

(iii) worked at the New York city morgue or the temporary morgue on pier locations on the west side of Manhattan after September eleventh, two thousand one; or

(iv) worked on the barges between the west side of Manhattan and the Fresh Kills Land Fill in the city of New York after September eleventh, two thousand one.

(2) "World Trade Center site" means anywhere below a line starting from the Hudson River and Canal Street; east on Canal Street to Pike Street; south on Pike Street to the East River; and extending to the lower tip of Manhattan.

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

## IV. Previously Endorsed Measures

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

The Committee recommends that CPLR 3101(d)(1) be amended to provide a minimal deadline for expert disclosure, which could be modified by the court to give earlier or later expert disclosure depending on the needs of the case.

**Current Law**

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

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

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

In other words, virtually every question connected to the timeliness of the disclosure is

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

**The Proposal**

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

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

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

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

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

**What The Proposal Would Not Change**

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

The amendment also would not apply to any "treating physician or other treating health care provider for whose records a patient authorization is given to the opposing party." This would codify the current, judge-made rule that 3101(d)(1) disclosure need not be made of a treating physician for whose records a patient authorization is given to the opposing party. *See Jiang v. Dollar Rent A Car, Inc.*, 91 A.D.3d 603 (2d Dep't 2012); *Casey* v. *Tan*, 255 A.D.2d 900, 900 (4th Dep't 1998); *Rosati v. Brigham Park Co-Op. Apartments*, 37 Misc.3d 1206(A), Slip Op 2012 WL 4748396.

Proposal

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

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

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

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

(v) This subparagraph shall not apply to a treating physician or other treating health care provider for whose records a patient authorization is given to the opposing party.

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

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

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

**Current Law**

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

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

Unfortunately, that rule was greatly limited, especially in the Second Department, by the ruling in *Wagman v Wagman* which dealt with the testimony of a chiropractor who, in reaching an opinion, relied upon a report interpreting the patient's magnetic resonance imaging (MRI) films. Even though doctors and chiropractors routinely rely on such reports in their day-to-day practice of diagnosing and treating their patients, the Second Department ruled that the witness could not rely on the report "without the production and receipt in evidence of the original films thereof or properly authenticated counterparts" (292 AD3d at 87).2

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

– The same court had earlier reached the opposite conclusion. *Torregrossa v. Weinstein*, 278 AD2d 487, 488 [2d Dept 2000] ("John Torregrossa's treating physician was properly allowed to testify with respect to the MRI report

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

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

**The Advisory Committee's View**

Our Advisory Committee believes that the *Wagman* rule (a) unduly obstructs the receipt of opinion testimony, and (b) is out of touch with the manner in which professional opinions are generally formed beyond the bounds of the courtroom.

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because he had personally examined him, and the MRI report is data which is of the kind ordinarily accepted by experts in the field").

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

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

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

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

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

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

**This Measure**

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

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

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

By contrast, because governmental investigative reports are generally not compiled for any litigation purpose, an expert's reliance upon such reports would not render the expert's opinion inadmissible *if* the "report or data [were] of a kind routinely accepted in the profession" as reliable in forming a professional opinion. This measure relates only to reports or data

prepared outside of litigation. It does not address and is not intended to limit the admissibility of evidence that is otherwise admissible by statute or common law [*see*, *e.g.*, *Matter of State of New York v. Floyd Y.*, 22 N.Y.3d (2013)].

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

Proposal

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

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

Section 1. The civil practice law and rules is amended by adding a new section 4549 to read as follows:

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

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

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

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

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

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

The Committee believes a strict requirement to demonstrate such authority to speak may exclude reliable proof of an event, even though the employer as a party might not be treated unfairly by admissibility, either because the statement is true and made by a person with relevant knowledge, or because the employer is able to introduce other proof in opposition to the implications of the hearsay statement. As noted above, the current strict requirement to show speaking authority is contrary to Federal Rule of Evidence. See Barker and Alexander, Evidence in New York State and Federal Courts (2d ed.) 8:26, p. 148.

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

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

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

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

Proposal

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

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

Section 1. The civil practice law and rules is amended by adding a new section 4551 to read as follows:

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

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

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

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

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

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

This measure is intentionally narrow and does not infringe upon the confidentiality between a patient and his or her health care provider. The waiver does not include notes or observations made or recorded in a patient's chart nor a patient's statements made in the emergency room or elsewhere nor any other test results nor any written or verbal communication between the patient and his or her healthcare professional. This permits the trial court to allow

the discovery of and admission into evidence of the results of a test taken after a motor vehicle accident revealing the alcohol or drug contents in the motor vehicle operator's body.

Proposal

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

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

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

(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he or she acquired in attending a patient in a professional capacity, and which was necessary to enable him or her to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services. For the exclusive purpose of use in a civil action, an operator of a motor vehicle in this state shall be deemed to have waived this privilege in regard to the results of any tests administered following a motor vehicle accident which reveal the alcohol or drug contents in such operator's body.

A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this subdivision. For the purposes of this subdivision:

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

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

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

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

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

Section 5-335 was enacted in response to the Court of Appeals' decision in *Fasso v. Doerr*, 12 NY3d 80 (2009). The *Fasso* Court held that the parties to a personal injury lawsuit could not enter into a settlement without the consent of a health insurer that had intervened in the action, thereby upholding the right of the insurer to pursue a subrogation claim. Consistent with CPLR §4545, which bars plaintiffs in personal injury actions from recovering expenses that have been paid for by collateral sources, GOL §5-335, as amended, creates a conclusive presumption that a personal injury settlement does not include compensation for health care costs, loss of earnings or other economic expenses to the extent they have been paid, or are obligated to be paid, by an insurer. It further states that no person entering into a settlement shall be subject to a subrogation or reimbursement claim by a benefit provider with respect to the losses or expenses paid by the provider. The section does not apply to certain benefits specified in sections (b) and (c) of the section.

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

The decision in *Rink v. State of New York*, 27 Misc.3d 1159 (Ct. Claims 2009), *aff'd*, 87 AD 3d 1372 (4th Dept. 2011) demonstrates that further clarification is necessary so that the goals underlying GOL §5-335 can be accomplished. The *Rink* court granted a health insurer's motion to intervene in a pending medical malpractice action, holding that GOL §5-335 addresses only situations in which the tortfeasor has settled an action and not those in which litigation is still pending. The Committee believes that such intervention is impliedly precluded by current law except where intervention is sought to enforce certain benefits specified in subdivisions (b) and

(c) of section 5-335. The measure, adopting the predominant view in the Appellate Divisions, under which intervention by health insurers is precluded (*see Fasso*, 12 NY3d at 89), would make that explicit.

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

Furthermore, the proposal is fully consistent with the purposes underlying the collateral source provisions of CPLR §4545 as well as other 1980s legislation enacted in response to the liability crisis. It would simplify and reduce the cost of litigation and facilitate settlement of claims. Moreover, it would ensure that the burden of payment for health care services, disability payments, lost wage payments or other benefits will be borne by the insurer providing such collateral sources, whether a claim against an alleged tortfeasor is resolved by settlement or judgment.

Proposal

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

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

Section 1. Section 5-335 of the general obligations law, as amended by chapter 516 of the laws of 2013, is amended to read as follows:

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

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

(b) This section shall not apply to a subrogation claim for recovery of additional first-party benefits provided pursuant to article fifty-one of the insurance law. The term "additional first-party benefits", as used in this subdivision, shall have the same meaning given it in section 65-1.3 of title 11 of the codes, rules and regulations of the state of New York as of the effective date of this statute.

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

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

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

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

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

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

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

However, there is a problem with the inflexible nature of the current requirement concerning certification of the acknowledgment. The problem was plainly demonstrated by the Court of Appeals' recent ruling in *Galetta*. In that case, it was undisputed that both parties had signed the subject agreement, and, more than that, that both parties had done so in the presence of a notary who was retained specifically for that purpose. Unfortunately, the notary retained to notarize the husband's signature inadvertently omitted a portion of the "boilerplate" language stating that the notary had confirmed the identity of the signatory, with the consequence that the

notary's certification of the acknowledgment was defective. For that reason, and also because the notary could (understandably) not remember an entirely unmemorable event that had occurred many years earlier, a prenuptial agreement that both parties had undisputedly signed was deemed legally invalid.

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

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

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

Proposal

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

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

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

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

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

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

CPLR 5225(a) provides that a judgment creditor can seek satisfaction of a judgment by moving against the judgment debtor for an order requiring him or her to deliver to the sheriff any money or personal property in which he or she has an interest if he or she is "*in possession or custody*" of that property. Similarly, CPLR 5225(b) allows the judgment creditor to commence a special proceeding against another person "*in possession or custody* of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee." CPLR 5225(b) (italics supplied).

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

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

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

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

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

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

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

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

Proposal

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

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

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

(a) Property in the possession of judgment debtor. Upon motion of the judgment creditor, upon notice to the judgment debtor, where it is shown that the judgment debtor is in possession [or], custody or control of money or other personal property in which he or she has an interest, the court shall order that the judgment debtor pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Notice of the motion shall be served on the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested.

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession [or], custody or control of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the

judgment, to a designated sheriff. Costs of the proceedings shall not be awarded against a person who did not dispute the judgment debtor's interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his or her rights in accordance with section 5239.

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

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

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

This proposal is designed to address two problems that arise under the current law. First, there is substantial confusion in the case law as to what non-final judgments "necessarily affect" a final judgment. This matter was most recently illustrated by the Court of Appeals decision in *Oakes v. Patel*, 20 N.Y.3d 633 (2013), where the Court acknowledged that its rulings as to what "necessarily affects" the judgment "may not all be consistent" (*Id*. At 644) and, in particular, with regard to orders granting or denying the amendment of pleadings, the application of the rule has been "particularly vexing." *Id*. Adding to the problem, the Court in *Oakes* overruled cases setting a bright-line standard that orders relating to amendments of pleadings were never orders necessarily affecting a final judgment, leaving the issue to be decided on a case-by-case basis. *Id*.

This uncertainty in the case law is amply illustrated by two recent articles in the *New York Law Journal [see*, Thomas R. Newman and Steven J. Ahmuty, Jr., The 'Necessarily Affects' Requirement of CPLR 5501 (NYLJ, Nov. 8, 2012); Thomas F. Gleason, Dangerous Interactions: Interlocutory Appeals and Judgments (NYLJ, Nov. 19, 2012)].

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

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

The second problem is the *result* of the Court of Appeals's decision in *Matter of Aho*, 39 N.Y.2d 241 (1976), in which the Court held that an appeal from an interlocutory order immediately terminates with the entry of a final judgment. In certain circumstances, this can eliminate a party's right to appellate review where the non-final order does not "necessarily affect" the final judgment. For example, an order imposing sanctions on an attorney or litigant would not necessarily affect the final judgment, so it would not be subject to review in the context of an appeal from the final judgment. Likewise, an order dismissing a cross-claim or third-party claim for indemnification may not necessarily affect the final judgment and such an appeal would terminate upon final judgment in favor of the plaintiff. Thus, even if an appeal from such an order had been fully briefed and argued, but not decided, at the time of the entry of judgment, appellate review would be foreclosed. Even in the case where the order appealed from necessarily affects the final judgment, the party's appeal would terminate upon entry of judgment, resulting in a tremendous waste of the party's and the court's resources.

Proposal

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

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

Section 1. Section 5501 of the civil practice law and rules, subdivision (c) as amended by chapter 474 of the laws of 1997, is amended to read as follows:

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

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

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

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

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

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

(b) Court of appeals. The court of appeals shall review questions of law only, except that it shall also review questions of fact where the appellate division, on reversing or modifying

a final or interlocutory judgment, has expressly or impliedly found new facts and a final judgment pursuant thereto is entered. On an appeal pursuant to subdivision (d) of section fifty-six hundred one, or subparagraph (ii) of paragraph one of subdivision (a) of section fifty-six hundred two, or subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.

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

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

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

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

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

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

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

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

appeal and that an affidavit of intention to move for permission is not effective to continue the stay).

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

Proposal

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

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

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

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

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

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

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

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

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

**CPLR Article 16**

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

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

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

**Correction of the Anomaly Concerning the Plaintiff's Own Culpability**

The proposed amendment of CPLR § 1601 would correct an anomaly that may occur when the plaintiff is found partially at fault for the subject injuries. As Justice Mark C. Dillon recently noted in the Albany Law Review (73 Alb.L.Rev. 79 [2009]), there is an instance in which a defendant assigned 50% or less of the total culpability can nonetheless derive no benefit under CPLR § 1601.

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

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

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

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

The Committee believes that the Legislature could not have intended the consequences noted above, and, in any event, that apportionment in terms of "culpability" rather than

"liability" would better effectuate the policies that the Legislature sought to promote. The Committee recommends that the statute be amended accordingly.

**Amendment of CPLR § 1603 to Resolve the *Marsala*/*Ryan* Discovery Issue**

The proposed amendments of CPLR §§ 1603 and 3018(b) would not alter the defendant's current rights to limit liability under CPLR Article 16, but would resolve whether the plaintiff is entitled to notice and discovery concerning the claims that the defendant intends to advance at trial. The issue has been the subject of conflicting rulings by the Second and Fourth Departments of the Appellate Division.

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

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

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

As a result of the ruling in *Marsala*, a plaintiff in the Second Department may not discover until the trial itself which non-parties are claimed to be responsible for the subject injuries or in what respect they are claimed to have negligently caused the injuries. When that information becomes evident during the trial itself, it may not be possible to depose witnesses or otherwise seek to conduct discovery regarding the merits of the allegations. Further, while it is possible that the issue concerning the non-party's alleged negligence was directly or indirectly referenced in a deposition, document, or expert disclosure notice, such will not necessarily have occurred and it is even possible that the non-party's very existence and role in causing the injury was known only to the defendant.

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

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

Notably, the proposed amendments relate solely to limitation of liability arising under CPLR Article 16. As such, the amendments do not affect in any way the defendant's ability to defeat the claim entirely on the ground that it is not liable at all. The amendments are intended to confirm that the defendant has the burden of proof in establishing an Article 16 defense.

Proposal

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

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

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

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

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

§1603. Burdens of proof. In any action or claim for damages for personal injury a party asserting that the limitations on liability set forth in this article do not apply shall allege and prove by a preponderance of the evidence that one or more of the exemptions set forth in subdivision one of section sixteen hundred one or section sixteen hundred two applies. A party

seeking limited liability pursuant to this article shall have the burden of alleging and proving by a preponderance of the evidence that its equitable share of the total [liability] culpability is fifty percent or less of the total culpability.

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

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

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

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

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

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

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

orders otherwise. This language fills the void noted by the Second Department in that the 2005 amendment left no specific statutory authorization for a motion to replead or amend.

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

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

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

> "If this practice is tolerated and condoned, the ameliorative statute is, for all intents and purposes, obliterated. If, on the other hand, the statute is applied as written and intended, an anomaly may result, in that a meritorious summary judgment motion may be denied, burdening the litigants and trial calendar with

a case that in fact leaves nothing to try."

The Brill majority opted to require a trial, while the dissent would have chosen to permit the motion to be heard. As the Court recognized, neither result is satisfactory. Guided by our Committee, we have, therefore, attempted to develop a procedure that would continue to discourage late summary judgment motions, but not necessarily require a trial where there are no disputed factual issues.

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

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

Proposal

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

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

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

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

copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading.

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

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

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

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

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

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

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

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

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

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

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

Proposal

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

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

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

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

ARTICLE 74

UNIFORM MEDIATION ACT

Section 7401. Definitions.

7402. Scope.

7403. Privilege against disclosure; admissibility; discovery.

7404. Waiver and preclusion of privilege.

7405. Exceptions to privilege.

7406. Prohibited mediator reports.

7407. Confidentiality.

7408. Mediator's disclosure of conflicts of interest; background.

7409. Participation in mediation.

7410. Relation to electronic signatures in global and national commerce.

7411. Uniformity of application and construction.

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

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

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

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

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

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

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

(g) "Proceeding" means:

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

(2) a legislative hearing or similar process.

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

(i) "Sign" means:

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

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

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

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

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

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

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

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

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

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

(4) conducted under the auspices of:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) a court proceeding involving a felony; or

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

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

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

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

(b) A mediator may disclose:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§7410. Relation to electronic signatures in global and national commerce. This article modifies, limits, or supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U. S. C. § 7001 et seq., but this article does not modify, limit or supersede

§ 101(c) of such Act or authorize electronic delivery of any of the notices described in § 103(b) of such Act.

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

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

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

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

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

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

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

However, it has come to the attention of the Committee that the present wording of subdivisions (a) and (b) of section 5704 has been construed to limit the authority of an individual justice from granting a provisional remedy that was denied in the court below. The Committee believes that the denial of a provisional remedy often gives rise to emergency conditions, necessitating immediate relief from a justice of the Appellate Division. The Committee, therefore, recommends an amendment of section 5704 to add language allowing a single

Appellate Division or Appellate Term justice to grant an order or provisional remedy applied for without notice to the adverse party and refused by the court below.

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

Proposal

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

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

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

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

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

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

§ 5704. Review of ex parte orders or ex parte applications for provisional remedies. (a) By appellate division. The appellate division or a justice thereof may vacate or modify any

order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division; and the appellate division or a justice thereof may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate division.

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

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

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

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

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

The Committee believes that, on balance, the current rules governing expert disclosure work reasonably well in cases other than commercial cases. The issue of expert disclosure, generally, raises diverse opinions in the bar. Therefore, the Committee recommends that CPLR 3101(d)(1)(i) should be modified to permit additional expert disclosure in substantial commercial cases only. The issues addressed by experts in commercial cases are often complex, touching on

nuanced economic, financial and corporate principles, such as how stock or other securities should be valued; how a business should be valued; or whether the financial analysis of a board of directors was sound under the circumstances. In addition to presenting difficult legal and factual issues, commercial cases often involve substantial sums of money or impact corporate governance. Generous expert disclosure is available in virtually all other forums, including all other state courts and the federal courts, *see* Federal Rules Civil Procedure 26. A modern forum for the resolution of commercial disputes is essential for New York to maintain its prominence as an international financial center; unless meaningful expert disclosure is routinely available in commercial actions, New York's efforts to maintain its financial dominance may be seriously compromised. Accordingly, we believe that additional expert disclosure in commercial cases should be permitted to provide the world class forum for the resolution of commercial disputes the State needs.

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

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

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

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

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

Proposal

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

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

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

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

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

§ 2. This act shall take effect immediately.

## V. Recommendations for Amendments to Certain Regulations

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

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

1. Clarifying the Remedies Available to the Court for Failure to Appear
(22 N.Y.C.R.R. 202.26(e) & 202.27)

The Committee recommends that paragraph (e) of Section 202.26 of the Uniform Rules for the Supreme Court and the County Court (22 N.Y.C.R.R. 200 et. seq.) be amended to clarify the remedies which may be available to the Court where the court has required attendance by a party's insurer which has failed to attend on more than one occasion.

The Committee believes that the rule is unclear to the bench and bar. It recommends that the rule be amended to grant a range of remedies to the judge to sanction a non-party insurer because the rule should not encourage the imposition of harsh sanctions upon a party for the insurer's bad faith behavior. The proposal would specify that where the court has imposed upon a party's insurer an obligation to appear for conference and the insurer has failed to do so on more than one occasion, the judge may grant a judgment by default against the defendant party up to the amount of the available insurance coverage provided that: 1) if the defendant was independently in compliance, he or she retains the right to litigate the action on its merits, including liability and damages, for any amounts not covered by the non-appearing insurance carrier's coverage and 2) the defendant or plaintiff retains his or her rights to pursue a claim for bad faith against a non-appearing insurance carrier.

Proposal:

First proposed amendment:

The heading of § 202.26. is amended to read as follows:

Section 202.26. Pretrial Conference and Settlement Conferences.

Second proposed amendment:

Subdivision (e) of §202.26(e) is amended to read as follows:

(e) Where parties are represented by counsel, only attorneys fully familiar with the action and authorized to make binding stipulations, or accompanied by a person empowered to act on behalf of the party represented, will be permitted to appear at a pretrial conference. Where appropriate,

the court may order parties, representatives of parties, representatives of insurance carriers or persons having an interest in any settlement, including those holding liens on any settlement or verdict, to also attend in person or telephonically at the settlement conference. Plaintiff shall submit marked copies of the pleadings. A verified bill of particulars and a doctor's report or hospital record, or both, as to the nature and extent of injuries claimed, if any, shall be submitted by the plaintiff and by any defendant who counterclaims. The judge may require additional data, or may waive any requirement for submission of documents on suitable alternate proof of damages. Failure to comply with this subdivision may be deemed a default under [CPLR 3404] section 202.27. Absence of an attorney's file shall not be an acceptable excuse for failing to comply with this subdivision. Where a representative of an insurance carrier has been directed by the judge to appear for a settlement conference in a case and fails to so appear on more than one occasion, the judge may grant a judgment by default against the defendant whose insurance carrier failed to so appear, up to the amount of the available insurance coverage; provided that (a) if the defendant did not independently violate a directive to appear at a settlement conference, that defendant shall retain the right to litigate the action on its merits, including liability and damages, for any amounts not covered by the non-appearing insurance carrier's coverage, and (b) nothing herein shall be deemed to impair the rights of the defendant or a plaintiff to pursue a claim for bad faith against the non-appearing insurance carrier.

Third proposed amendment:

§202.27 is amended to read as follows:

Section 202.27. [Defaults] Failure to Appear.

At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the [default] failure to appear on the record and enter an order as follows:

a. If the plaintiff appears but the defendant does not the judge may, but is not required to, grant judgment by default or order an inquest, or may make such order as appears just including,

but not limited to, imposing monetary sanctions, issuing orders of precision or holding the defendant or his or her counsel in contempt;

b. If the defendant appears but the plaintiff does not the judge may, but is not required to, dismiss the action and may order a severance of counterclaims or crossclaims, or may make such order as appears just including, but not limited to, imposing monetary sanctions, issuing orders of precision or holding the plaintiff or his or her counsel in contempt;

c. If no party appears, the judge may make such order as appears just.

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

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

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

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

The Committee acknowledges the analysis and reports on this issue by the New York State Bar Association Commercial and Federal Litigation Section ("Sealing Documents in Business Litigation: A Comparison of Various Rules and Methods Applied in Federal, New York State and Delaware Courts" (December 8, 2009)) and the New York City Bar Association Committee on State Courts of Superior Jurisdiction (Model Confidentiality Agreement, "Stipulation and Order for the Production and Exchange of Confidential Information" available at http://www.nycbar.org/Publications/reports).

Proposal

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

Rule 9. Confidentiality Orders.

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

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

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

(*See*, 2014 Report of the Advisory Committee on Civil Practice, Appendix A. Order for the Partial Sealing of a file or Sealing of an Entire File; Appendix B. Stipulation and Order for the Production and Exchange of Confidential Information)

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

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

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

Proposal

§ 202.48. Submission of Orders, Judgments and Decrees for Signature

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

4. Rescinding the Appendix of Official Forms for the CPLR
(Proposed Administrative Order of the Chief Administrative Judge)

The Committee recommends that the Chief Administrative Judge of the Courts issue an administrative order rescinding the Appendix of Official Forms for the CPLR [hereinafter the Forms]. A suggested Order is attached hereto.

In 1967, a few short years after the 1963 effective date of the CPLR, the Judicial Conference was authorized by the then-newly enacted CPLR 107 to "adopt, amend and rescind an appendix of forms," which "shall be sufficient" under the CPLR and "shall illustrate the simplicity and brevity of statement which the civil practice law and rules contemplate." (A 1974 amendment to CPLR 107 transferred the authority of the Judicial Conference to "the state administrator.")

The 1967 Judicial Conference Report to the Legislature indicated that the Forms, then in draft stage, were to focus on the new type of simplified pleading that the CPLR contemplated. (See "Legislative History" attachment.) The emphasis was on "those areas of practice where material changes from prior law are made." The Judicial Conference acknowledged that it intended to borrow heavily from the appendix of forms promulgated for federal practice when the Federal Rules of Civil Procedure were adopted in 1938: "For the most part, the proposed forms are adaptations of the federal forms. . . ." Although the Judicial Conference included no sunset provision for the Forms, it observed that practice forms adopted in Great Britain in 1883 to illustrate the then-recent reform of British court procedure were rescinded in 1964, because "they had achieved their purpose of 'inculcating brevity' and were no longer necessary."

The Judicial Conference adopted 29 forms that became effective September 1, 1968. (See 1969 Sixth Report to the Judicial Conference by Committee to Advise and Consult on the CPLR, "Legislative History" attachment.) They were accompanied by unofficial comments, which are "not deemed part of the Official Forms." Three of the forms deal with summonses, thirteen are forms of complaints in simple personal injury and contract cases, three are devoted to answers, two to verification, one to third-party complaints and answers, two to notices of motion, three to forms of orders, one to papers for CPLR 3031 and another to CPLR 3213. Surprisingly, no

official government publication of the Forms has been located, although the Forms have often appeared in commercial publications (e.g., in the Weinstein Korn & Miller treatise on New York Civil Practice and in West's (McKinney's) CPLR Forms), and Professor David D. Siegel's treatise New York Practice contains a few of the Forms.

The Forms have never been amended since their adoption. As a result, they fail to take account of many subsequent developments in caselaw, rules and statutes, such as the summons with notice required by CPLR 305(b), the pleading of serious injury in automobile accident cases (CPLR 3016(g)), the licensure pleading required by CPLR 3015(e), the defense of culpable conduct in negligence cases (CPLR 1412), and the pleading issues connected to CPLR Article 16 (CPLR 1603). See also § 130-1.1-a of the Rules of the Chief Administrator (signing of all papers by attorney). A 1979 decision of the Court of Appeals approved a pleading of the statute of limitations defense that contained less detail than that called for by one of the Forms covering the same subject matter. (See Immediate v. St. John's Queens Hosp., 48 N.Y.2d 671 (1979); Scholastic Inc. v. Pace Plumbing Corp., 129 A.D.3d 75 (1st Dep't 2015).) Furthermore, the notice of motion forms have been completely superseded by Rule 202.7 of the Uniform Civil Rules for the Supreme and County Courts. Some efforts were made by the Advisory Committee between 1979 and 1980 to promulgate a revised Appendix, but no action was ever taken. (See annual Judicial Conference Reports and Reports of the CPLR Advisory Committee on Civil Practice during the period 1979-1988.)

With the passage of 52 years since the adoption of the CPLR, it is the opinion of the Committee that the Forms have fulfilled their purpose of providing guidance for the drafting of simple pleadings and other litigation papers during the transition from the Civil Practice Act to the CPLR and are no longer needed. The Forms are outdated as a result of statutory, judicial and rules developments, and there is no compelling reason to undertake the task of amendment or expansion. Their illustrative content has been absorbed and updated in numerous reputable commercial publications. Indeed, the Forms are not published in any extant official government document. It is also questionable whether the Official Forms have actually been used to any great extent by practitioners. The lack of interest by the bench and bar in the Forms probably

explains why no action was taken on the revised forms that were drafted and circulated in the early 1980s. The Committee also notes that the Appendix of Forms under the Federal Rules of Civil Procedure, from which the CPLR Appendix was adapted, is scheduled to be abrogated on December 1, 2015, because "[t]he purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled." (2015 Advisory Committee Note, Federal Rule of Civil Procedure 84.) The CPLR Appendix of Forms has likewise outlived its usefulness.

For all of the foregoing reasons, the Committee recommends that the Chief Administrative Judge of the Courts exercise the authority granted by CPLR 107 to rescind the Appendix of Official Forms for the CPLR.

Proposal

**PROPOSED** ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

As regards the Appendix of Official Forms for the CPLR (Civil Practice Law and Rules) [hereinafter "CPLR Appendix"], adopted by the Judicial Conference effective September 1, 1968, I make note that:

(1) Said CPLR Appendix has fulfilled its purpose of illustrating the simplicity and brevity of statement contemplated by the CPLR during the transition in practice under the Civil Practice Act to practice under the CPLR and is no longer necessary;

(2) The Judicial Conference observed, at the time the CPLR Appendix was proposed, that practice forms adopted in Great Britain in 1883 to illustrate the then-recent reform of British court procedure were rescinded in 1964, having fulfilled their purpose;

(3) The Appendix of Forms under the Federal Rules of Civil Procedure, adopted in 1938, from which the CPLR Appendix was adapted, is scheduled to be abrogated on December 1, 2015, having fulfilled its purpose; and

(4) Commercially prepared forms for practice under the CPLR are widely available;

And accordingly I hereby order, pursuant to the authority vested in me by section 107 of the CPLR, that the CPLR Appendix is rescinded, effective immediately.

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

The following previously endorsed legislative and regulatory proposals continue to be endorsed fully by the Committee and are hereby incorporated into and made a part of this 2016 Report in full as set forth in the 2015 Report, which is available via the following link: http://www.nycourts.gov/ip/judiciaryslegislative/index.shtml

### A. Temporarily Tabled Legislative Proposals

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

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

3. Eliminating the Notice of Medical Malpractice Action (CPLR 3406) (See Temporarily Tabled Regulation No.1 below)

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

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

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

7. Amending the Rate of Interest (CPLR 5004)

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

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

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

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

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

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

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

15. Neglect to Proceed (CPLR 3216, 3404)

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

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

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

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

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

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

22. Preserving the Testimony of a Party's Own Medical Witnesses for Use at Trial (CPLR 3101(d)(1)(iii), 3117(a)(4))
(See also Temporarily Tabled Regulatory Recommendation No. 3)

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

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

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

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

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

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

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

## B. Temporarily Tabled Regulatory Proposals

1. Eliminating the Notice of Medical, Dental and Podiatric Malpractice Action and Tailoring the Special Rules for Medical, Dental and Podiatric Malpractice Action (22 NYCRR 202.56)

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

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

## VII. Pending and Future Matters

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

1. The Committee, in its entirety and through its standing Sub-Committee on Electronic Discovery, continues to examine proposals and issues pertaining to electronic discovery. The Subcommittee will continue to consider new developments in the common law along with existing rules, ethical requirements and statutes bearing on this issue.

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

3. The Committee, in its entirety and through its Subcommittee on Technology, continues to work closely with the Technology Division of the Office of Court Administration, court personnel, leaders of the bench and bar, and the federal judiciary to improve and expand recent legislation and regulations permitting the Chief Administrative Judge to conduct a program providing for e-filing of court papers.

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

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

6. The Committee, through its Subcommittee on Alternative Dispute Resolution, is continuing its analysis of CPLR Article 75, mandatory arbitration, contracts of adhesion in the consumer credit context and the Revised Uniform Arbitration Act proposed by the National Conference of Commissioners on Uniform State Laws.

7. The Committee continues to examine guidelines for structured settlements.

8. The Committee continues to review issues concerning the e-situs of property with regard to traditional concepts of *in rem* jurisdiction and enforcement of judgments.

9. The Committee continues to review rules and practice concerning the confidentiality of documents filed in court.

10. The Committee continues to examine periodically the continued occurrence of local rules which require motion papers be sent to the court rather than or in addition to rules requiring filing with the County Clerk.

11. The Committee continues to examining the issues and law regarding deposition and affidavit testimony.

## VIII. Subcommittees

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

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

Subcommittee on Appellate Jurisdiction
Chair, Thomas R. Newman, Esq

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

Subcommittee on Class Actions
Chair, Richard Rifkin, Esq.

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

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

Subcommittee on Confidentiality of Documents
Co-Chairs, Thomas F. Gleason, Esq. & Mark C. Zauderer, Esq.

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

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

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

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

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

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

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

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

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

Subcommittee on Ethics
Chair, Richard Rifkin

Subcommittee on Evidence
Chair, Burton N. Lipshie

Subcommittee on Expansion of Offers to Compromise Provisions
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**Respectfully submitted,**

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