Report of the Advisory Committee on Civil Practice

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

January 2008

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Dedicated to
John T. Frizzell, Esq.
of Buffalo, New York
Member of the Advisory Committee on Civil Practice
1976 to 2007

The personification of intelligence,
wit and kindness whom every
client loved and every lawyer respected.

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 2008 Report, the Advisory Committee recommends a total of 20 measures for enactment by the 2008 Legislature. Of these, 13 measures previously have been endorsed in substantially the same form, one is a modified measure, and six are new measures. In Parts II, III and IV, individual summaries of the proposals are followed by drafts of legislation.

Part II sets forth and summarizes the six new measures proposed for 2008. They are designed to: (1) provide courts greater opportunity for oversight of applications for approval of transfer of a structured settlement (G.O.L. §5-1705); (2) increase the time in which a defect in form must be raised (CPLR 2101); (3) allow a notary public to compare and certify copies of papers that will comprise a record on appeal (CPLR 2105); (4) require the moving party to attach a copy of a proposed amended pleading (CPLR 3025(b)); (5) adopt the Uniform Interstate Depositions and Discovery Act of 2007, to authorize disclosure in New York State in an action pending in another jurisdiction ((CPLR 3119)(new) & CPLR 3102(e)) and (6) clarify the uncertainty in the context of an appeal of either an *ex parte* temporary restraining order or an uncontested application to the court (CPLR 5701(a) and 5704(a)).

Part III sets forth and summarizes the modified measure proposed for 2008. This measure would permit an injured party in a tort claim to bring a direct declaratory judgment against an insurer (CPLR 3001).

Part IV summarizes the previously endorsed measures not enacted into law in 2007, but once again recommended by the Committee in substantially the same form. These measures address: (1) clarifying that there is no right to subrogation for collateral source payments made in the context of a settlement of a lawsuit governed by CPLR 4545 (CPLR 4545(a), (b), ©, (e)); (2) equalizing the treatment of collateral sources in tort actions (CPLR 4111, 4213, 4545); (3) amending the rate of interest (CPLR 5004); modify the contents of a bill of particulars to expand the categories of information that may be required (CPLR 3043(a)); (5) permitting the use of an unsworn affirmation of truth in lieu of an affidavit under penalty of perjury, as in the federal courts (CPLR 2106); (6) extending the time in which a voluntary discontinuance may be obtained without court order or stipulation and repeal the requirement that the defendant file the notice of discontinuance (CPLR 3217(a)(1), (d)(repealed)); (7) clarifying the procedure for

mistake of fact applications to Supreme Court (CPLR 5241(e)); (8) setting the time for motions to dismiss for failure to state a cause of action and for summary judgment (CPLR 3211(e), 3212(a)); (9) clarifying when a claim against a public authority accrues (Public Authorities Law §2881); (10) providing for pre-judgment interest after offers to compromise in personal injury actions (CPLR 3221, 5001(a)(b)); (11) dealing with the time of service problem when a court order extending the time for filing is granted pursuant to CPLR 304 (CPLR 306-b); (12) amending CPLR 3122, governing the use of subpoenas duces tecum, to make it clear that a court may order the production of medical records without the patient's consent (CPLR 3122(a)) and (13) creating a "Learned Treatise" exception to the hearsay rule (CPLR 4549 (new)).

Six legislative proposals recommended by the Committee were enacted in 2007, as follows: (1) improving the practice in relation to the timing and service of cross-motions (CPLR 2214, 22215) (c.185, L. 2007); (2) allowing service of a trial subpoena by delivery to an attorney (CPLR 2303-a)(c.192, L. 2007); (3) giving the court discretion to correct or ignore harmless errors in the commencement of an action (CPLR 2001)(c.529, L. 2007); (4) increasing the maximum penalty for failure to obey a judicial subpoena from $50 to $150 (CPLR 2308(a)) (c.205, L. 2007); (5) permitting a New York City Civil Court Judge presiding over a CPLR 325(d) case to issue a subpoena to compel the attendance of an incarcerated person (CPLR 2302(b))©. 136, L. 2007); and (6) excluding certain releases from the scope of the General Obligations Law, particularly voluntary discontinuances for which no monetary consideration was paid (GOL 15-108(d))©. 70, L. 2007).

Part V sets forth the Committee's principal regulatory proposals. The Committee seeks approval of one regulatory measure in 2008. The Committee recommends an amendment of 22 NYCRR 202.48(b) giving the court discretion to accept an untimely submission for good cause shown or in the interest of justice.

A regulatory proposal recommended by the Committee was adopted in 2006, adding subdivision (f) to Part 202.7 of the Uniform Civil Rules for the Supreme and County Courts to ensure that a party seeking a TRO must either notify the other party of the application or explain to the judge why notice would be impracticable or would defeat the purpose of the order. In 2007 the Committee proposed a measure clarifying the application of the requirement of notice of application for temporary injunctive relief under Rule 202.7(f). This proposal was adopted.

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

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

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

Several other matters were brought to the Committee's attention during the course of 2007 which required considerable study and activity by the Committee. For example, the Committee, in its entirety and through its Subcommittee on Technology, continues to work closely with the Technology Division of the Office of Court Administration, court personnel, leaders of the bench and bar, and the federal judiciary to improve and expand recent legislation and regulations permitting the Chief Administrative Judge to conduct a pilot program providing for the filing of court papers by fax or electronic means in selected locations throughout the state. Also, theCommittee continues to work closely with the legal community regarding the problem of clarifying the commencement of an action against a body or officer, particularly as to the statute of limitations under CPLR 217(1).

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

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

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

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

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

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

II. New Measures

1. Providing Courts Greater Opportunity for Oversight of Applications for Approval of Transfer of a Structured Settlement (G.O.L. §5-1705).

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

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

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

The structured settlement recipient (referred to in GOL Title 17 as the "payee") is typically charged a high discount rate by the factoring company in exchange for the present cash payment.

In order to assist the Court in determining whether the transfer is "in the best interests of the payee," [GOL §5-1706(b)] the following amendments to Section 5-1705 are recommended:

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

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

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

This information is obviously useful to the Court, but hopefully will also have the effect of deterring the practice of filing a petition seeking a transfer in one venue after it has already been denied in a different venue. (See, e.g., In re: Angel L. Claudio, Jr., Index #7063/2006, Supreme Court, Dutchess County, Order of Hon. Christine A. Sproat, J.S.C. 01/18/07.)

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

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

Proposal

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

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

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

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

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

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

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

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

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

(I) a copy of the transfer agreement;

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

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

and

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

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

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

2. Increasing the Time in Which a Defect in Form Must be Raised (CPLR 2102(f)).

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

Proposal

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

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

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

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

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

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

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

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

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

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

This proposal does not address the issue of the fees of a notary public. The fees to which a notary public is entitled for performing his or her statutorily-authorized functions are set forth in Executive Law § 136. An amendment to this statute prescribing the fee to which a notary is entitled for comparing and certifying a copy of a paper may be appropriate, but is beyond the jurisdictional purview of the Committee.

Proposal

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

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

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

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

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

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

§ 135. Powers and duties; in general; of notaries public who are attorneys at law. Every notary public duly qualified is hereby authorized and empowered within and throughout the state to administer oaths and affirmations, to take affidavits and depositions, to receive and certify acknowledgments or proof of deeds, mortgages and powers of attorney and other instruments in writing; to compare and certify copies of papers pursuant to CPLR 2105(b); to demand

acceptance or payment of foreign and inland bills of exchange, promissory notes and obligations in writing, and to protest the same for non-acceptance or non-payment, as the case may require, and, for use in another jurisdiction, to exercise such other powers and duties as by the laws of nations and according to commercial usage, or by the laws of any other government or country may be exercised and performed by notaries public, provided that when exercising such powers he shall set forth the name of such other jurisdiction.

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

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

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

4. Requiring the moving party to attach a copy of a proposed amended pleading (CPLR 3025(b))

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

Proposal

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

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

Section 1. Subdivision (b) of rule 3025 of the civil practice law and rules, as amended by chapter 308 of the laws of 1962, is amended to read as follows:

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

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

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

The Committee recommends amending the Civil Practice Law and Rules to adopt the Uniform Interstate Depositions and Discovery Act as promulgated by the National Conference of Commissioners of Uniform State Laws in 2007 (a complete copy of the Act is included in this Report as Appendix "A"). The Act sets forth an efficient and inexpensive procedure for litigants to depose out-of-state individuals and for the production of discoverable materials that may be located outside the trial state.

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

Discovery authorized by the subpoena must comply with the rules of state in which it occurs. Furthermore, motions to quash, enforce, or modify a subpoena issued pursuant to the Act shall be brought in and governed by the rules in the discovery state. The county clerk in the discovery state acts in a purely ministerial role, but in a manner that is sufficient to invoke jurisdiction of the discovery state over the deponent. The Act recognizes that the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in another jurisdiction from unreasonable or burdensome discovery requests.

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

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

Proposal

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

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

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

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

(a) Definitions. In this section:

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

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

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

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

i. attend and give testimony at a deposition;

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

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

(b) Issuance of subpoena.

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

(2) When a party submits an out-of-state subpoena to the county clerk, the clerk, in accordance with that court's procedure and subject to the provisions of subdivision (b) of section 2302 and section 2307 of this chapter, shall promptly issue a subpoena for service upon the person to which the out-of-state subpoena is directed.

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

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

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

(c) Service of subpoena. A subpoena issued by the county clerk under subdivision (b) of this section must be served in compliance with sections 2302 and 2303 of this chapter.

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

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

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

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

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

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

6. Clarifying the Uncertainty in the Context of an Appeal of Either an *Ex Parte* Temporary Restraining Order and an Uncontested Application to the Court (CPLR 5701(a) & 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 section 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 Divisions 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. Presently, 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 section 5704(a) and (b) 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 N.Y.C.R.R. § 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. Subdivision (a) of section 5701 of the civil practice law and rules is amended by adding a new paragraph 4 to read as follows:

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.

III. Modified Measures

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

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

Often, the party most interested in an early determination of the extent of insurance coverage is the injured plaintiff. A defendant tortfeasor who has limited resources may lack the means or the incentive to seek a declaratory judgment of coverage from an insurer. The plaintiff has an interest in determining before final determination of liability in a tort action, whether the defendant has sufficient insurance coverage to make such litigation worthwhile.

Until fairly recently, a split of authority existed as to whether the injured party could commence a declaratory judgment action concerning a coverage disclaimer. The First Department had ruled that personal injury plaintiffs could not initiate such suits. Clarendon Place Corp. v. Landmark Ins. Co., 182 A.D.2d 6 (1st Dep't 1992). However, the Second Department ruled in Watson v. Aetna, 246 A.D.2d 57 (2nd Dep't 1998) that the injured party had standing to bring a declaratory judgment action against an insurance carrier, reasoning that Insurance Law § 3420 merely prohibited a direct cause of action to recover money damages. This holding was consistent with the Second Department's earlier holding in Abate v. All-City Ins. Co., 214 A.D.2d 627 (2nd Dep't 1995) and it expressly overruled the contrary ruling in Latoni v. Mount Vernon Fire Ins. Co., 219 A.D.2d 698 (2nd Dep't 1995).

The Court of Appeals ultimately ruled, in Lang v. Hanover Ins. Co., 3 N.Y.3d 350 (2004), that a plaintiff lacked standing to bring a declaratory judgment action against a defendant's insurer. The Court ruled that Insurance Law § 3420, which grants an injured plaintiff the right to sue a tortfeasor's insurance company to satisfy a judgment obtained against the tortfeasor, does not authorize an action for declaratory relief before the plaintiffs obtains such a judgment. The purpose of this amendment is to specifically remedy that gap in the law.

Notably, for six years, from at least 1998 until the Court of Appeals' 2004 ruling in Lang, the rule in New York's busiest department, the Second Department, permitted such suits. There is no evidence to suggest that a flood of litigation occurred in the Second Department as a result. Further, there is no merit to the suggestion that, in instances in which coverage issues overlap with the underlying merits of the case, a plaintiff would seek to litigate the issue in both venues, i.e., the question of whether the insured had acted intentionally, creating both a coverage dispute and issues of liability in the underlying litigation. Courts are expressly authorized to and do *decline to entertain* declaratory judgment actions that tread too closely on the issues in the underlying action. The proposed amendment *would not alter* this. Indeed, this is the very problem this measure seeks to remedy: currently, these issues are litigated after the substantive case, resulting in considerable waste of time and resources.

CPLR § 3001 starts with the words, "the Supreme Court *may* render a declaratory judgment having the effect ..." This language, which would remain unchanged by the amendment, has long meant that the Supreme Court can *decline* to entertain a declaratory judgment action where, for any of a variety of reasons, it deems such procedure inefficient or unwarranted.

Within this framework, the longstanding rule is that jurisdiction should be declined where the matter at issue in the declaratory judgment proceeding would ultimately be determined in the underlying action. The proposed amendment does not alter that courts "may" render declaratory judgment. Nor does the proposed amendment in any way seek to alter the settled case law establishing when *the issues are sufficiently close to an underlying action* that the court should, in the exercise of discretion, *decline* jurisdiction. Rather, the amendment would merely allow the injured party to initiate a declaratory judgment, effectively meaning that the injured party could do so in the same circumstances that the *insured* or the *insurer* would have been permitted to do so.

The history on a national level of insurer/injured party disputes regarding coverage issues dates back to Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270 (1941), in which the Court held that, under the applicable Ohio law, the insurer could bring a declaratory judgment action concerning the coverage not only against its own insured, but also against the party suing its insured in an underlying action. Yet, while holding that it was "plain" that a controversy existed between the insurer and the injured party, Maryland Casualty did not address whether the *injured party* could commence the action.

Courts in Indiana, Maryland, West Virginia, Georgia, Virginia, Illinois, and New Mexico have permitted such suits. Community Action of Greater Indianapolis, Inc. v. Indiana Farmers Mutual Ins. Co., 708 N.E.2d 882 (Ind. App. 1999); Benning v. Allstate Ins. Co., 602 A.2d 233 (Md. App. 1992); Christian v. Sizemore, 383 SE2d 810 (Supreme Court of App. of West Virginia 1989); Atkinson v. Atkinson, 326 S.E.2d 206 (Sup. Ct. of Georgia 1985); Riesen v. Aetna Life and Casualty Co., 302 SE2d 529 (Supreme Court of Virginia 1983); Reagor v. Travelers Ins. Co., 415 N.E.2d 512 (Ill. App. 1980); Baca v. New Mexico State Highway Dep't., 486 P.E.2d 625 (New Mex. App. 1971).

Finally, the Committee has considered and rejected as too narrow the concept of an amendment that would permit the plaintiff to initiate a declaratory judgment action only where the disclaimer is premised upon the insured's failure to timely notify the insurer of the claim. It is well recognized that there are a host of other kinds of disclaimers that are equally removed from the merits (e.g., disclaimers premised on exclusions in the policy, alleged non-payment of premiums, non-cooperation of the insured, alleged inapplicability to the vehicle or property involved in the suit). The disclaimer can revolve around many other issues. (See, Guishard v. General Security Ins. Co., 2007 wl 2592414, aff'g, 27 ad3d 256 (1st Dept., 2006)).

Proposal

AN ACT to amend the civil practice law and rules, in relation to allowing a direct declaratory judgment action against an insurer

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

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

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

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

IV. Previously Endorsed Measures

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

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

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

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

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

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

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

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

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

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

Apart from raising concerns as to whether tort defendants may be denied a benefit that the Legislature intended they have, the "subrogation gap" has led to an array of procedural complications that threaten to increase litigation expense (both for plaintiffs and defendants), inhibit settlements, and delay disposition of personal injury and wrongful death actions. Reflective of the underlying uncertainty as to whether the plaintiff's subrogee may now have greater rights than the plaintiff himself or herself, there is also uncertainty as to whether such subrogees can formally intervene into ongoing personal injury and wrongful death actions, and, effectively veto any settlement that does not include full repayment of whatever sums were previously paid to the plaintiff. Some years ago, the Third Department held that subrogees could not inject themselves into the litigation or "veto any result that was not favorable to their interest." Berry v. St. Peter's Hosp., 250 A.D.2d 63, 68 (3d Dep't 1998). More recently, however, the Fourth Department twice ruled, each time by a 3 to 2 vote, to the contrary. Kaczmarski v. Suddaby, 9 A.D.3d 847 (4th Dep't 2004); Omiatek v. Marine Midland Bank, N.A., 9 A.D.3d 831 (4th Dep't 2004). Additionally, the Court of Appeals suggested in 2004 (only in dictum) that intervention is possible (Allstate v. Stein, 1 N.Y.3d at 423).

If the statute provided or was construed as providing that subrogees could intervene in

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

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

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

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

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

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

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

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

Under the bill, however, the specified examples would continue to be treated as collateral sources subject to offset except to the extent any of them were subject to statutory reimbursement to the payor.

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

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

Proposal

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

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

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

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

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

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

1. In any action against a public employer or a public employee who is subject to indemnification by a public employer with respect to such action or both for personal injury or wrongful death arising out of an injury sustained by a public employee while acting within the scope of his public employment or duties, where the plaintiff seeks to recover for the cost of medical care, custodial care or rehabilitation services, loss of earnings or other economic loss,

evidence shall be admissible for consideration by the court to establish that any such cost or expense was replaced or indemnified, in whole or in part, from a collateral source provided or paid for, in whole or in part, by the public employer except for those payments as to which there is a statutory right of reimbursement[, including but not limited to paid sick leave, medical benefits, death benefits, dependent benefits, a disability retirement allowance and social security (except those benefits provided under title XVIII of the social security act) but shall not include those collateral sources entitled by law to liens against any recovery of the plaintiff]. If the court finds that any such cost or expense was replaced or indemnified from any such collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the contributions of the injured public employee for such benefit. Any collateral source deduction required by this subdivision shall be made by the trial court after the rendering of the jury's verdict. The plaintiff may prove his or her losses and expenses at the trial irrespective of whether such sums will later have to be deducted from the plaintiff 's recovery.

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

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

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

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

(e) No right of reimbursement for certain collateral source payments. A collateral source payor which has made payment to a person who had a claim founded on personal injury or wrongful death shall have no right to seek reimbursement from either the plaintiff or the tortfeasor unless the right to seek said reimbursement is set forth by statute. When an action within the scope of this section settles, it shall be conclusively presumed that the settlement does not include any compensation for those losses or expenses that would have been deducted,

pursuant to this section, from any verdict that the plaintiff might have obtained. By entering into a settlement agreement, a plaintiff shall not be deemed to have taken an action in derogation of the non-statutory right of any person who supplied the collateral source payments; nor shall a plaintiff 's entry into such agreement constitute a violation of any contract between the plaintiff and the person who supplied the collateral payments. Except where there is a statutory lien or statutory subrogation right, no defendant entering into such a settlement shall be subject to a claim for reimbursement by any person who supplied the collateral source payments.

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

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

The Committee recommended this proposal in its 2005 Report. Solely due to interest from several entities during the 2006 legislative session in combining this proposal with the Committee's proposal on subrogation for collateral source payments (see above), the Committee decided to restate its interest in this measure.

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

This proposal would standardize the treatment of collateral sources not only by requiring that they be set off as to past and future awards regardless of the identity of the defendant, but in certain other respects as well. Currently, personal injury awards in actions against public defendants are offset under subdivision (b) only by collateral sources "provided or paid for, in whole or in part, by the public employer." The offset for collateral sources is reduced in such actions by the amount of any contributions made by the public employee for the collateral source benefit. This treatment would be replaced by the approach taken as to all other defendants under the current subdivision (c), which requires an offset for the most common sources of collateral sources, whether or not funded by the employer, and reduces the offset by the amount paid by the plaintiff for premiums for the two-year period immediately prior to the accrual of the action. The proposal would make clear that section 4545 applies in wrongful death actions alleging medical malpractice (as it does in all other wrongful death actions). Upon the repeal of subdivisions (a) and (b), the reference to subdivision (c) will be eliminated since it will be the sole remaining provision of section 4545.

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

all personal injury actions, including actions against public employers and medical malpractice actions.

Proposal

AN ACT to amend the civil practice law and rules, in relation to equalizing the treatment of collateral sources in tort actions

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 4545 of the civil practice law and rules are REPEALED.

§2. Subdivisions (d) and (e) of rule 4111 of the civil practice law and rules are REPEALED and subdivision (f) of rule 4111 of the civil practice law and rules, as amended by chapter 100 of the laws of 1994, is amended to read as follows:

(f) Itemized verdict in certain actions. In an action brought to recover damages for personal injury, injury to property or wrongful death [which is not subject to subdivisions (d) and (e) of the rule], the court shall instruct the jury that if the jury finds a verdict awarding damages, it shall in its verdict specify the applicable elements of special and general damages upon which the award is based and the amount assigned to each element including, but not limited to, medical expenses, dental expenses, loss of earnings, impairment of earning ability, and pain and suffering. Each element shall be further itemized into amounts intended to compensate for damages that have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the jury shall set forth the period of years over which such amounts are intended to provide compensation. In actions in which article fifty-A or fifty-B of

this chapter applies, in computing said damages, the jury shall be instructed to award the full amount of future damages, as calculated, without reduction to present value.

§3. Subdivision (b) of section 4213 of the civil practice law and rules, as separately amended by chapters 485 and 682 of the laws of 1986, is amended to read as follows:

(b) Forms of decision. The decision of the court may be oral or in writing and shall state the facts it deems essential. In [a medical, dental or podiatric malpractice action or in an action against a public employer or a public employee who is subject to indemnification by a public employer with respect to such action or both, as such terms are defined in subdivision (b) of section forty-five hundred forty-five, for personal injury or wrongful death arising out of an injury sustained by a public employee while acting within the scope of his public employment or duties, and in] any [other] action brought to recover damages for personal injury, injury to property, or wrongful death, a decision awarding damages shall specify the applicable element of special and general damages upon which the award is based and the amount assigned to each element, including but not limited to medical expenses, dental expenses, podiatric expenses, loss of earnings, impairment of earning ability, and pain and suffering. In [a medical, dental or podiatric malpractice action, and in] any [other] such action [brought to recover damages for personal injury, injury to property, or wrongful death], each element shall be further itemized into amounts intended to compensate for damages which have been incurred prior to the decision and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the court shall set forth the period of years over which such amounts are intended to provide compensation. In computing said damages, the court shall award the full amount of future damages, as calculated, without reduction to present value.

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

3. Amending the Rate of Interest (CPLR 5004)

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

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

Reasons For The Amendment

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

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

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

Reasons For The Specific Variable Rate That Is Proposed

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

The reason for the 3% addition is that the federal rate is very low as compared to 1) the real cost of money (including, most notably, the prime rate that a bank would charge a "blue chip" corporate borrower); 2) the interest rates (both fixed or variable) in all or virtually every

other state; and 3) our current, statutorily fixed rate of 9%. The other states that already use the federal rate as a base include an addition that ranges from a low of 2% to a high of 6%.

The federal rate started out at 4.37% at the beginning of 2006, went up to 5.27% over the summer of 2006, and then dropped below 5% again. The rate has dropped below 2% at various times this decade. With the added 3%, the rate would currently (October 2006) be a bit lower than 8%, and would thus be lower than the current 9% fixed rate. However, the new rate would not constitute a significant departure at this time.

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

Pre-Verdict Interest

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

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

Proposal

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

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

Section 1. Section 5004 of the civil practice law and rules is amended to read as follows:

§5004. Rate of Interest. [Interest shall be at the rate of nine per centum per annum,

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

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

4. Modifying the Contents of a Bill of Particulars to Expand the Categories of Information that May be Required (CPLR 3043(a))

This proposal seeks to amend CPLR 3043(a) to further and improve the statute's intended purposes: amplifying the pleadings; limiting the proof and scope of inquiry at trial; and preventing surprise, all while avoiding undue burdens upon any party. The proposed amendments would not alter or limit the court's discretion to deny any one or more of the particulars of CPLR 3043 or to grant other, further or different particulars in a proper case. The amendments will serve judicial economy by curtailing motion practice regarding the nature and scope of claims and will expedite discovery by requiring parties to more clearly set forth theories of liability.

Rule 3043 governing bills of particulars in personal injury actions has remained largely unchanged since its effective date of September 1, 1964. Under the CPLR interrogatories generally are not permitted in personal injury actions (CPLR 3130(1)). Unless a party waives the right to depose the adversary, a bill of particulars provides the only means for obtaining written responses from the opposing party. Ten years after its enactment the Rule was amended by adding the provisions relating to an action brought pursuant to Insurance Law § 673(1) for personal injuries arising out of negligence in the use or operation of a motor vehicle in the state (L. 1974, c. 575). In 1979, the Legislature added CPLR 3042(b), which allows for service of a supplemental bill of particulars, without leave of the court and at least 30 days prior to trial, subject to specific limitations (L. 1979, c. 590).

In particular, the Committee recommends modification of three (3) existing statutes to clarify the specificity required.

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

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

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

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

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

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

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

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

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

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to the categories of information that may be required in a bill of particulars in personal injury actions

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

Section 1. Subdivision (a) of rule 3043 of the civil practice law and rules, as amended by chapter 805 of the laws of 1984, is amended to read as follows:

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

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

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

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

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

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

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

insurance law;

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

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

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

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

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

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

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

(14) The principal address of the plaintiff.

§2. This act shall take effect immediately and apply to a bill of particulars where the demand for the bill of particulars was served on or after the date on which it shall become law.

5. Unsworn Affirmation of Truth Under Penalty of Perjury

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

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

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

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

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

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

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

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

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

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

Proposal

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

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

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

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

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

(Signature)"

§2. Paragraph (1) of Section 210.00 of the penal law is amended to read as follows:

1. "Oath" includes an affirmation, including but not limited to an affirmation under rule twenty one hundred six of the civil practice law and rules, and every other mode authorized by law of attesting to the truth of that which is stated.

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

6. Extending the Time in Which a Voluntary Discontinuance May be Obtained Without Court Order or Stipulation (CPLR 3217(a)(1) and Repealing the Requirement that the Defendant File the Notice of Discontinuance (CPLR 3217(d))

The Committee recommends that CPLR 3217(a)(1) be amended to extend the time period in which a voluntary discontinuance may be obtained without the need for a court order or a stipulation of settlement. This change would give maximum flexibility to parties who may want to settle claims very early in the litigation process, or even before a law suit is actually served. In addition, the Committee recommends the repeal of subdivision (d) of the rule, which was added by the Legislature in 2003.

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

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

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

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

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

discontinuance of a cross-claim.

Finally, the Committee recommends the repeal of CPLR 3217(d). CPLR 3217(d), requiring the defendant to file the stipulation of discontinuance, was added by the Legislature (L. 2003, ch.62, Part J, § 29, eff. July 14, 2003) when fees were added to motions. (See CPLR 8020(2)(d)). No corresponding amendment was made to the other provisions of the section. The simple addition of subparagraph (d) created an inconsistency in the law and has been interpreted differently by judges and lawyers alike. The plaintiff has little incentive to file the discontinuance and the fee is so objectionable to the defendant that it discourages filing. The result is that large numbers of cases are being left "open" in the clerk's office, despite actual discontinuance. While apparently this fee has not resulted in a positive revenue stream, it actually results in an increase in costs to the system when reconciliation of dockets takes place at a later date. The Committee recommends the repeal to assist the mission of the court system to have discontinuances filed promptly and as a matter of course.

Proposal

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

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

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

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

§2. Subdivision (d) of rule 3217 of the civil practice law and rules, such rule as added by Chapter 62 of the laws of 2003, is REPEALED.

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

7. Clarifying the Procedure for Mistake of Fact Applications to Supreme Court (CPLR5241(e))

The Committee recommends the amendment of CPLR 5241(e) to require in actions to enforce a money judgment that applications to assert a mistake of fact in Supreme Court be made by order to show cause or motion on notice to the creditor in the same action in which the order or judgment sought to be enforced was entered.

Currently, the law requires that where an income execution is served on a debtor, the debtor has 15 days to reply and, where the income execution contains an error as defined in CPLR 5241(a)(8), bring a petition under CPLR Article 4 for mistake of fact. This petition is in aid of a court order, i.e., either a Supreme Court order in a matrimonial proceeding or a Family Court order in a support proceeding. The Committee believes that it should not be necessary that a new proceeding be brought to challenge an error in an income execution and seeks to remove the burden of commencing a new, separate, enforcement proceeding, together with the new index fee and fee for a request for judicial intervention, solely to correct the error.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the application made to supreme court to determine a mistake of fact in an income execution for support enforcement

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

Section 1. Subdivision (e) of section 5241 of the civil practice law and rules, as amended by chapter 815 of the laws of 1987, is amended to read as follows:

(e) Determination of mistake of fact. Where the execution has been issued by the support collection unit, the debtor may assert a mistake of fact and shall have an opportunity to make a submission in support of the objection within fifteen days from service of a copy thereof. Thereafter, the agency shall determine the merits of the objection, and shall notify the debtor of its determination within forty-five days after notice to the debtor as provided in the subdivision(d) of this section. If the objection is disallowed, the debtor shall be notified that the

income execution will be served on the employer or income payor, and of the time that deductions will begin. Where the income execution has been issued by an attorney as officer of the court, or by the sheriff, or by the clerk of the court, the debtor may assert a mistake of fact within fifteen days from service of a copy thereof by application to the supreme court or to the family court having jurisdiction in accordance with section four hundred sixty-one of the family court act. If application is made to the family court, such application shall be by petition on notice to the creditor and it shall be heard and determined in accordance with the provisions of section four hundred thirty-nine of the family court act, and a determination thereof shall be made, and the debtor notified thereof within forty-five days of the application. If application is made to the supreme court such application shall be by [petition] order to show cause or motion on notice to the creditor [and, it shall be heard and determined in accordance with the provisions of article four of the civil practice law and rules,] in the action in which the order or judgment sought to be enforced was entered and a determination thereof shall be made, and the debtor notified thereof within forty-five days of the application.

§ 2. This act shall take effect immediately.

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

By Chapter 492 of the Laws of 1996, the Legislature amended Rule 3212(a) to provide that a motion for summary judgment shall be made within the time set by the court or, if no such time is set, "no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." The purpose of that amendment was to prevent the late filing of motions for summary judgment, often made on the eve of trial and resulting in a delay of the scheduled trial. The Committee approves of that amendment; indeed, it was the Committee's recommendation that spurred the legislative change.

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

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

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

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

The majority opted to require a trial, while the dissent would have chosen to permit the motion to be heard.

As the Court recognized, neither result is satisfactory. The Committee has, therefore, attempted to develop a procedure that would continue to discourage late summary judgement motions, bu not necessarily require a trial where there are no disputed factual issues. This proposal is the result.

The Committee has modeled its proposal after CPLR 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 th authority given to the trial court is completely discretionary, a party will have no right to have the motion heard if it is made late.

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

Proposal

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

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

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

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in paragraphs two [, seven] or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted[; an]. A motion based upon a ground specified in paragraph seven of subdivision (a) shall be made by a date set by the court, or, if no such date is set, no later than one hundred twenty days after the filing of the note of issue; provided, however, that the court, for good cause shown or in the interests of justice

may extend the time for making such motion. An objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waved if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship. The foregoing sentence shall not apply in any proceeding under subdivision one or two of section seven hundred eleven of the real property actions and proceedings law. The papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed. An objection based upon a ground specified in paragraphs eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading.

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

(a) Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue[, except with leave of court on]; provided, however, that the court, for good cause shown or in the interests of justice, may extend the time for making such motion.

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

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

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

Proposal

AN ACT to amend the public authorities law, in relation to defining the dates of accrual of contract claims

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

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

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

Notwithstanding any contrary provision of law, in the case of an action or special proceeding against a public authority for monies due or arising out of a contract, accrual of such a claim shall be deemed to have occurred as of the date payment for the amount claimed was denied.

§2. This act shall take effect immediately.

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

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

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

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

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

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

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

Proposal

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

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

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

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

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

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

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

discretion.

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

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

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

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

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

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

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

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

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

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

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

Proposal

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

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

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

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

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

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

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

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

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

The proposed amendment also involves a possible uncertainty caused by the federal privacy law, the Health Insurance Portability and Accountability Act ("HIPAA"). The HIPAA "Privacy Rule" was designed to provide national standards for the protection of certain health information. 45 C.F.R. Parts 160 and 164. The basic principle of the Privacy Rule was that "covered entities" – health insurance plans, health care clearinghouses, and medical providers who transmit health information in electronic form governed by federal standards, as defined in 45 C.F.R. §164.104 - - may not use or disclose "protected health information" ("PHI") without an authorization from the patient, unless the request for the information falls within a specific exception articulated by the rule. 45 C.F.R. §§164.502(d)(2), 164.514(a)(b). PHI is essentially

information received or created by a covered entity which relates to health status of an individual whose identity can be deciphered by the reader of the information. 45 C.F.R. §160.103.

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

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

Thus, in a situation where the person whose medical information is being sought refuses to authorize its release, or the provider itself is afraid that it has not received sufficient authorization to release the records, and the court needs the records to adjudicate a claim, there is some question whether a court order will suffice, given the terms of CPLR 3122 and the ruling in Campos v. Payne. Additionally, the recent Court of Appeals decision in Arons v. Jutkowitz, 2007 N. Y. Slip Op. 09309 (Nov. 27, 2007) has no impact on this problem, other than to once again call attention to the uncertainty. The proposed amendment to CPLR 3122(a) resolves that uncertainty by providing that a medical provider served with a subpoena duces tecum must respond if served with a demand and either an accompanying authorization for the release of the medical record or a court order.

Proposal

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

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

Section 1. Subdivision (a) of rule 3122 of the civil practice law and rules, as

amended by Chapter 575 of the laws of 2002, is amended to read as follows:

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

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

§2. This act shall take effect immediately.

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

This proposal seeks to have New York State adopt a "learned treatise" rule, an evidentiary rule long followed in the federal courts. While last recommended in its 2004 Report, the Committee takes special note of the Court of Appeals decision in Hinlicky v. Dreyfuss, 6 N.Y.3d 636 (2006), and once again recommends this timely measure.

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

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

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

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

Finally, it should be noted that this provision is not intended to overturn the result in Spensieri v. Lasky, 94 N.Y.2d 231, 701 N.Y.S.2d 689 (1999). In Spensieri, which some attorneys have construed as possibly constituting a first step towards judicial adoption of a

learned treatise rule, the Court ruled that the PDR (Physician's Desk Reference) was inadmissible, not because it was hearsay, but instead because it was not deemed sufficiently reliable or authoritative for the purposes for which it was offered. Because proposed section 4549 would make admission contingent on the court's acceptance of the "treatise" as a "reliable authority," treatises and similar materials would still be excluded where they were not deemed "reliable." Under the new provision, those maderials would now be admitted, albeit in oral form only, where the materials are deemed reliable.

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to admissibility of authoritative treatises and like materials

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 Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, pamphlets, or in other form on a subject of history, medicine, or other science or art are admissible into evidence as proof of the matters stated therein, provided that the publication is established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

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

V. Recommendations for Amendments to Certain Regulations

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

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

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

The Committee recommends that the Uniform Rules for the Supreme Court and the County Court (22 NYCRR 202.48) be amended to answer questions raised by recent case law examining the excuse of law office failure. In May, 2007, the Supreme Court, Appellate Division, First Department, held that the failure to submit judgment to the court for signature within 60 days did not meet the requirement of a showing of good cause. Farkas v. Farkas, 40 A.D.3d 207, 835 N.Y.S.2d 118, 2007 N.Y. Slip Op. 03762 (2007). 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's failure to submit judgment was not justified by lack of prejudice to the ex-husband from the late submission, merit, lack of opportunity or law office failure.

Inclusion of the alternative "interest of justice" basis for an extension will give the court greater flexibility. 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 a significant risk exists that some courts may follow the Farkas decision before an opportunity for further appellate review of the issue of good cause and law office failure, and, therefore, makes this recommendation.

Proposal

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

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

VI. Summary of Other Previously Endorsed Recommendations

A. Legislative Proposals

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

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

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

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

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

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

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

This benefits the non-settlor in two ways. First, in those instances in which the settling tortfeasor's payment turns out to exceed what the trier of fact later determines to be the settlor's equitable share of the damages, the non-settler benefits by the difference between those two

sums. The second benefit accorded to the non-settlor is that the risk of settlor's insolvency, formerly borne by the non-settlor, is now eliminated. The non-settlor is able to deduct the settlor's equitable share whether or not settlor actually could have paid such sums. By virtue of these features, the non-settlor often obtains windfall reductions of liability, usually, but not invariably, at the plaintiff's expense.

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

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

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

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

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

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

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

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

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

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

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

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

The proposal would add a new section 39-c to the Judiciary Law to provide that ADR neutrals would be protected by immunity from civil suit to the same extent as a Justice of the Supreme Court. The proposal would also amend section 17 of the Public Officers Law to ensure that neutrals serving in ADR programs would be represented by the Attorney General in lawsuits brought against them relating to their service and that they would be indemnified by the State

where necessary. It is not anticipated that any significant number of such lawsuits would be commenced. However, the Committee is of the view that these safeguards are necessary to encourage qualified persons to serve as neutrals in court-annexed ADR programs and thus expand the benefit to the public from such programs.

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

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

6. Neglect to Proceed (CPLR 3216, 3404)

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

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

This measure would revise rules 3216 and 3404 to make them more flexible, practical, and effective. As revised, Rule 3216 would provide that if a party unreasonably neglects to proceed in an action in which no note of issue has been filed, the court may take any of several steps to address the problem - - striking the offending party's pleadings in whole or in part, dismissing the action in whole or in part, issuing a default judgment, or directing an inquest - - rather than the sole step of dismissal available under the current statute. Second, revised rule

3216 would permit the 90-day demand to be served by regular mail, a change that should make it practical for courts to initiate the process rather than having to depend upon the parties to do so.

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

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

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

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

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

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

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

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

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

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

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

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

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

of service on the first respondent served.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The first case, Klinger v. Dudley, 41 N.Y.2d 362 (1977), barred a recovery by a plaintiff against a third-party defendant found liable for a portion of the damages owed plaintiff by the

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

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

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

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

This proposal, last included in the Committee's 2004 report, recommends that CPLR 3101(d)(1) be amended to provide a minimal deadline for expert disclosure (i.e., sixty days before trial), a time frame which could be expanded to give earlier expert disclosure in certain commercial cases or as the need arises in other cases, if directed by the court.

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

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

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

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

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

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

This proposal is a companion recommendation to Item 12 set forth above. The Committee feels that even if the wholesale amendment treatment of CPLR 3101(d)(1) is difficult to achieve, given political realities, it would still recommend that the Legislation make possible more extensive expert discovery under certain circumstances in commercial cases. The availability of such disclosure would promote fairer and more efficient preparation and processing of these cases. This proposal was last recommended in the Committee's 2004 report.

CPLR 3101(d)(1)(i) provides for the furnishing, upon request of a party, of a statement regarding an expert whom the adversary intends to call at trial. Subdivision (d)(1)(iii) authorizes further disclosure concerning the expected testimony of an expert only by court order "upon a showing of special circumstances." The courts have interpreted "special circumstances" narrowly, confining it to instances in which the critical physical evidence in a case has been destroyed after its inspection by an expert for one side but before its inspection by the expert for the other, and certain other, similarly limited situations. E.g., The Hartford v. Black & Decker,

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

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

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

Under the Committee's proposal, subdivision (d)(1)(iii) would be divided into two subparts. The first subpart (A), would retain the existing provisions of (d)(1)(iii), which would apply to most cases, including smaller commercial cases. These commercial cases are usually less complex than those involving larger sums, and more extensive disclosure of experts would be disproportionately costly. However, in commercial cases in which $250,000 or more is found by the court to be in controversy, the amendment, in the form of a new subpart (B), would authorize the court to allow further disclosure of experts expected to testify at trial.

Under this proposal, the applicant would be obliged to show that the need for that disclosure outweighs the concomitant expense and delay to any party. The applicant would be required to demonstrate that traditional expert discovery as provided for by subdivision (d)(1)(i) would not suffice. However, the applicant would not have to demonstrate "special circumstances" as currently construed by the case law, which would remain the standard for all cases other than this group of commercial cases. Since the proposal would require the court to weigh the risk that the proposed disclosure might be unduly expensive or cause unreasonable delay, the court should normally inquire, if further disclosure is found necessary, whether a particular form of disclosure would be more appropriate, including less expensive and time-consuming, than another.

"Commercial action" is defined so as to include the most common forms of such disputes, and a measure of flexibility is provided for. The definition expressly excludes personal injury, wrongful death, matrimonial and certain other matters, so that there will be no uncertainty about the reach of the statute.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Finally, the Committee also proposes amending CPLR 3117(a)(4) to conform to CPLR

3101(d)(1)(iii) by allowing the deposition of a person practicing "medicine, dentistry or podiatry" to be used for any purpose.

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

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

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

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

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

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

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

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

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

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

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

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

admissions made to them by the boy.

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

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

Other courts have followed Matter of A and M in recognizing a parent-child privilege under similar circumstances (i.e., where a minor child under arrest or investigation for a serious crime seeks the guidance and advice of a parent). See, People v. Edwards, 135 A.D.2d 556; People v. Harrell, 87 A.D.2d 21, 26, aff'd 59 N.Y.2d 620, People v. Tesh, 124 A.D.2d 843, lv. denied 69 N.Y.2d 750; But see, People v. Gloskey, 105 A.D.2d 871; and Matter of Mark G., 65 A.D.2d 917.

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

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

The measure does not provide, as in the case of the spousal privilege under CPLR section 4502, that one of the participants in the confidential communication can prevent the disclosure by the other. Rather, the proposed language merely restricts compelled disclosure for qualified communications. Either party to the confidential communication may reveal it if they choose. Thus, in sensitive matters such as matrimonial cases, support proceedings, and proceedings under Article 81 of the Mental Hygiene Law for the appointment of a guardian, either parent or child could decide to testify, even if the other party chooses to invoke his or her privilege.

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

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

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

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

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

Thus, CPLR 3215(d) would seem to indicate that where at least one defendant has answered, and one or more have failed to appear, plead, or proceed to trial, the plaintiff must apply to the court within one year after the default, and the court may issue an order permitting

the plaintiff to take one of several steps (entering judgment, making an assessment, taking of an account, directing a reference), but only following the conclusion of the trial or other disposition of the action against the defendant who has answered.

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

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

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

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

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

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

Where a person is found to have engaged in conduct constituting contempt under

proposed section 750, the court, under proposed sections 751 and 752, may "punish" or "remedy" the contempt, through the imposition of a fine or imprisonment, or both, in accordance with the applicable provisions of those sections.

Thus, for example, under proposed section 751 ("Punitive contempt; sanctions"), where the court makes a finding of contempt and seeks to *punish* the contemnor, it may do so by imposing a fine or a jail sanction of up to six months, or both. Where the contempt involves willful conduct that disrupts or threatens to disrupt court proceedings, or that "undermines or tends to undermine the dignity and authority of the court," the fine imposed under that section may not exceed $5000 "for each such contempt." In fixing the amount of the fine or period of imprisonment, the court, under proposed section 751(2), must consider "all the facts and circumstances directly related to the contempt," including the nature and extent of the contempt, the amount of gain or loss caused thereby, the financial resources of the contemnor and the effect of the contempt "upon the court, the public, litigants or others." The measure also directs that, where a punitive sanction of a fine or imprisonment is imposed, the underlying contempt finding must be based "upon proof beyond a reasonable doubt" (section 753(5)).

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

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

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

> committed in the immediate view and presence of the court [it] may be punished summarily where the conduct disrupts proceedings in progress, or undermines or threatens to undermine the dignity and authority of the court in a manner

> and to the extent that it reasonably appears that the court will be unable to continue to conduct its normal business in an appropriate way.

Proposed section 753(1).

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

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

Proposed section 753 includes an additional provision not found in existing Article 19 that would allow for the appointment by an Administrative Judge (or the appellate court on an appeal of a contempt adjudication) of a "disinterested member of the bar" to prosecute a contempt charge or respond to a contempt appeal (section 753(4)). This provision is intended to address the situation in which, due to the nature of the alleged contempt or the circumstances of its commission, there is no advocate to pursue the contempt charge in the trial court, or to argue in favor of upholding the contempt finding on appeal. Where, for example, a contempt is committed by a non-party to a civil or criminal case (e.g., a reporter violates a Trial Judge's order prohibiting the taking of photographs in court), or involves misconduct by a party that does not affect the opposing party's rights or remedies, the court may be forced to either pursue the contempt charge itself, or forgo prosecution altogether. By allowing for the appointment in these situations of a disinterested attorney to pursue the contempt charge, and to argue in support of any resulting contempt ruling on appeal, this provision fills a critical gap in existing Article 19 and insures that the fundamental nature of the adversarial process remains intact.

The measure provides that where a person charged with contempt is financially unable to obtain counsel, and the court determines that it may, upon a finding of contempt, impose a sanction of imprisonment, it must, unless it punishes the contempt summarily under proposed section 753(1), assign counsel pursuant to Article 18-B of the County Law (section 753(6)). The requirement that the court, before assigning counsel, make a preliminary determination that it may impose jail as a sanction if a contempt is found, is intended to eliminate the need to assign

counsel in every single contempt case involving an indigent contemnor (see, existing Judiciary Law section 770 [providing, in pertinent part, that where it appears that a contemnor is financially unable to obtain counsel, "the court *may in its discretion* assign counsel to represent him or her"], emphasis added). Notably, the measure requires that counsel be assigned *regardless* of whether the indigent contemnor is facing a "punitive" jail sanction under proposed section 751, or a "remedial" jail sanction under proposed section 752 (see, generally, People ex rel Lobenthal v. Koehler (129 AD2d 28, 29 [(1st Dept. 1987)] [holding that, under U.S. Supreme Court precedent, an indigent alleged contemnor facing possible jail as a sanction has the right to assigned counsel, regardless of whether the charged contempt is "civil" or "criminal" in nature]; see also, Hickland v. Hickland, 56 AD2d 978, 980 [3d Dept. 1977]).

Similarly, the measure requires that, where an adjudicated contemnor who is financially unable to obtain counsel appeals a contempt ruling that includes a sanction of imprisonment, the appellate court must assign counsel pursuant to Article 18-B (section 755(2)). Because existing Article 18-B of the County Law contains no express reference to the assignment of counsel to indigent persons charged with contempt under the Judiciary Law, the measure makes conforming changes to County Law section 722-a to include these Judiciary Law contempt proceedings (other than summary proceedings) and appeals within the scope of proceedings to which Article 18-B applies (see, section 5 of the measure).

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

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

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

CPLR Article 65 authorizes the filing of a written notice of the pendency of any action in which a judgment demanded would affect real property. Once filed, such a notice of pendency constitutes constructive notice of the action to any prospective transferee of the real property, and has the practical effect of making that property unmarketable. If an action relates to the protection or enforcement of an existing recorded interest in the real property — such as a mortgage in a foreclosure action — a notice of pendency does not impose a significant additional burden on the property owner, whose ability to transfer or encumber the property already is restricted by the pre-existing recorded interest. But a notice of pendency also can be filed where a plaintiff claims a new interest in property — for example, in an action to impose a constructive trust on the property — in which case the notice of pendency has the same effect on the property owner as a grant of a preliminary injunction or order of attachment would have. Unlike these

other provisional remedies, however, the notice of pendency is obtained without any judicial review of the merits of plaintiff's claim to the property, and, in most cases, without plaintiff having to provide an undertaking with respect to, or compensation for, damages suffered by the property owner in the event that his or her claim to the property ultimately is determined to have been without merit.

Although it is relatively easy for a plaintiff to obtain and maintain the benefits of this potentially powerful restraining device, it also is easy for the plaintiff to lose these benefits. The courts have sought to provide compensatory protection for property owners by insisting that plaintiffs strictly comply with the statutory requirements for filing and maintaining notices of pendency. As a general matter, there are no second chances for plaintiffs who fail to seek timely extension of a notice of pendency prior to expiration of its three-year term. This prohibition against filing a second notice of pendency recently was reaffirmed in Matter of Sakow, 97 N.Y. 2d 438 (2002), where the Court of Appeals rejected an attempt to file a second notice of pendency after an initial notice was vacated and no stay of the order vacating it was obtained pending the outcome of what ultimately was a successful appeal.

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

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

The proposal adjusts current practice as to posting of bonds by expressly prohibiting any requirement of a bond from defendant as part of an order vacating the notice after a preliminary hearing (proposed CPLR 6514(f)), in that such an order will issue only after a finding that neither the merits nor the equities of plaintiff's situation can justify a notice of pendency under any circumstances. The proposal would amend CPLR 6515 to permit a defendant to seek an

order vacating the notice upon posting a bond without regard to the merits of plaintiff's claim, enabling the court to vacate a notice even if there is some merit to plaintiff's claim, but only if plaintiff's interests can be adequately protected with a bond.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Regulatory Proposals

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

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

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

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

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

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

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

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

not order parties in a given case into mediation or neutral evaluation and they may not consent to go on their own.

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

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

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

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

VII. Pending and Future Matters

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

1. The Committee, through its Subcommittee on Statutes of Limitations, is working with relevant committees of the New York State Bar Association to create a statutory solution which will clarify the commencement of an action against a body or officer –particularly as to the statute of limitations (CPLR 217(1))

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

3. 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.

4. The Committee, in its entirety and through its Subcommittee on Technology, continues to monitor, and when necessary recommend improvements in, the framework established by the Chief Administrative Judge implementing the filing of court papers by fax or electronic means in selected locations throughout the state.

5. The Committee, through its Ad Hoc Subcommittee on CPLR 3101(d)(1)(iii), is continuing the analysis of expert witness disclosure in medical malpractice cases considering, especially, the impact of new search technologies on the current limitation of the CPLR. There exists a conflict between the practice in the 2nd and 4th Departments as to expert witness identification in a medical malpractice case and the subcommittee is resolved to arrive at an effective proposal to eliminate the discrepancy without creating a burden on any party.

6. The Committee, through its Subcommittee on Alternative Dispute Resolution is renewing its anlysis of court-annexed alternative dispute resolution in conjunction with its examination of the National Conference of Commissioners on Uniform State Laws proposed Uniform Arbitration Act and Uniform Mediation Act.

VIII. Subcommittees

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

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

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

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

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

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

- Subcommittee on Contribution and Apportionment of Damages
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X. Appendix

Uniform Interstate Depositions and Discovery Act

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SIXTEENTH YEAR
PASADENA, CALIFORNIA

July 27 – August 3, 2007

WITH PREFATORY NOTE AND COMMENTS

November 7, 2007

ABOUT NCCUSL

The **National Conference of Commissioners on Uniform State Laws** (NCCUSL), also known as Uniform Law Commission (ULC), now in its 116th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

ULC members must be lawyers, qualified to practice law. They are practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical.

- ULC strengthens the federal system by providing rules and procedures that are consistent from state to state but that also reflect the diverse experience of the states.
- ULC statutes are representative of state experience, because the organization is made up of representatives from each state, appointed by state government.
- ULC keeps state law up-to-date by addressing important and timely legal issues.
- ULC's efforts reduce the need for individuals and businesses to deal with different laws as they move and do business in different states.
- ULC's work facilitates economic development and provides a legal platform for foreign entities to deal with U.S. citizens and businesses.
- Uniform Law Commissioners donate thousands of hours of their time and legal and drafting expertise every year as a public service, and receive no salary or compensation for their work.
- ULC's deliberative and uniquely open drafting process draws on the expertise of commissioners, but also utilizes input from legal experts, and advisors and observers representing the views of other legal organizations or interests that will be subject to the proposed laws.
- ULC is a state-supported organization that represents true value for the states, providing services that most states could not otherwise afford or duplicate.

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UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

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Prefatory Note

1. History of Uniform Acts

The National Conference of Commissioners on Uniform State Laws has twice promulgated acts dealing with interstate discovery procedures.

In 1920, the Uniform Foreign Depositions Act was adopted by NCCUSL. The pertinent section of that act provides:

> *Whenever any mandate, writ or commission is issued from any court of record in any foreign jurisdiction, or whenever upon notice or agreement it is required to take the testimony of a witness in this state, the witness may be compelled to appear and testify in the same manner and by the same process as employed for taking testimony in matters pending in the courts of this state.*

The UFDA was originally adopted in 13 states. The states and territories which currently have the act include Florida, Georgia, Louisiana, Maryland, Nevada, New Hampshire, Ohio, Oklahoma, South Dakota, Tennessee, Virginia, Wyoming, and the Virgin Islands.

In 1962, the Uniform Interstate and International Procedure Act was adopted by NCCUSL. The act was designed to supercede any previous interstate jurisdiction acts, including the UFDA, and was more extensive than the UFDA, having provisions on personal jurisdiction, service methods, deposition methods, and other topics. Section 3.02(a) of the act provides:

> *[A court] [The _____ court] of this state may order a person who is domiciled or is found within this state to give his testimony or statement or to produce documents or other things for use in a proceeding in a tribunal outside this state. The order may be made upon the application of any interested person or in response to a letter rogatory and may prescribe the practice and procedure, which may be wholly or in part the practice and procedure of the tribunal outside this state, for taking the testimony or statement or producing the documents or other things. To the extent that the order does not prescribe otherwise, the practice and procedure shall be in accordance with that of the court of this state issuing the order. The order may direct that the testimony or statement be given, or document or other thing produced, before a person appointed by the court. The person appointed shall have power to administer any necessary oath.*

The UIIPA was originally adopted by 6 states. The states, districts, and territories which currently have the act include Arkansas, District of Columbia, Louisiana, Massachusetts, Pennsylvania, and the Virgin Islands.

In 1977 the National Conference of Commissioners on Uniform State Laws withdrew the UIIPA from recommendation "due to its being obsolete." Until now, no other uniform act for interstate depositions has been proposed.

2. Common issues

While every state has a rule governing foreign depositions, those rules are hardly uniform. These differences are extensively detailed in *Interstate Deposition Statutes: Survey and Analysis*, 11 U. Balt. L. Rev 1, 1981. Some of the more important differences among the various states are the following:

a. In what kind of proceeding may depositions be taken?

Many states restrict depositions to those that will be used in the "courts" or "judicial proceedings" of the other state. Some states allow depositions for any "proceeding." The UFDA and UIIPA take a similar approach.

b. Who may seek depositions?

A few states limit discovery to only the parties in the action or proceeding. Other states simply use the term "party" without any further qualifier, which may be interpreted broadly to include any interested party. Still other states expressly allow any person who would have the power to take a deposition in the trial state to take a deposition in the discovery state. The UIIPA allows any "interested party" to seek discovery. The UFDA does not state who may seek discovery.

c. What matters can be covered in a subpoena?

The UFDA expressly applies only to the "testimony" of witnesses. The UIIPA expressly applies to "testimony or documents or other things." Several states follow the UIIPA approach, while others seem to limit production to documents but not physical things, and still others are silent on the subject, although some of those states recognize that the power to produce documents is implicit. Rule 45 of the FRCP is more explicit, and provides that a subpoena may be issued to a witness "to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises..."

d. What is the procedure for obtaining a deposition subpoena?

Under the UFDA, a party must file the same notice of deposition that would be used in the trial state and then serve the witness with a subpoena under the law of the trial state. If a motion to compel is necessary, it must be filed in the discovery state (the deponent's home court). Other states require that a notice of deposition be shown to a clerk or judge in the

discovery state, after which a subpoena will automatically issue. Still other states require a letter rogatory requesting the trial state to issue a subpoena. Under the UIIPA, either an application or letter rogatory is required. About 20 states require an attorney in the discovery state to file a miscellaneous action to establish jurisdiction over the witness so that the witness can then be subpoenaed.

e. What is the procedure for serving a deposition subpoena?

The UFDA provides that the witness "may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this state." The UIIPA provides that methods of service includes service "in the manner prescribed by the law of the place in which the service is made for service in that place in an action in any of its courts of general jurisdiction." State rules usually follow the procedure of the UFDA and UIIPA.

f. Which jurisdiction has power to enforce or quash a subpoena?

Most states give the discovery state power to issue, refuse to issue, or quash a subpoena.

g. Where can the deponent be deposed?

Some states limit the place where a deposition can be taken to the discovery state, and some limit it to the deponent's home county. The UFDA and UIIPA are silent on this issue.

h. What witness fees are required?

A few states require the payment of witness fees. While most states are silent on the issue, it is probably assumed that the witness fee rules generally existing in the discovery state apply. These usually include fees and mileage, and are usually required to be paid at the time the witness testifies.

i. Which jurisdiction's discovery procedure applies?

A significant issue is whether the trial state's or discovery state's discovery procedure controls, and on what issues. The general Restatement rule is that the forum state's (the discovery state's) procedure applies. The UIIPA, as well as many states, provides that the discovery state can use the procedure of either the trial or discovery state, with a presumption for the procedure of the discovery state. Some states reverse this presumption, while others are unclear, and still others are silent on the issue.

Another significant issue is whether the trial state's or discovery state's courts can issue protective orders. Both states have interests: the trial state's courts have an interest in protecting witnesses and litigants from improper practices, and the discovery state's courts have an obvious

interest in protecting its residents from unreasonable and overly burdensome discovery requests. Most states expressly or implicitly allow the discovery state's courts to issue protective orders.

j. Which jurisdiction's evidence law applies?

Evidentiary disputes usually center on relevance and privilege issues. Most states indicate that the discovery state should rule on all relevance issues. Other states indicate that relevance issues should be resolved before a subpoena issues, which would necessarily mean that such issues be decided by the trial state. If the discovery state makes such determinations, it is unclear which state's evidence law should apply (if there is a difference).

Perhaps the most difficult issues are whether the trial state or discovery state should determine issues of privilege, and which state's privilege law will apply. Here both jurisdictions have important interests: the trial state has an interest in obtaining all information relevant to the lawsuit consistent with its laws, while the discovery state has an interest in protecting its residents from intrusive foreign laws. The Restatement (Second) Conflict of Laws provides that the state which has the "most significant relationship" to the communication at issue applies its laws. The issue is further compounded by the general rule that once the privilege is waived, it is generally waived. If the deponent does not object at the deposition and testifies about privileged communications, the privilege will usually be waived.

3. This act

A uniform act needs to set forth a procedure that can be easily and efficiently followed, that has a minimum of judicial oversight and intervention, that is cost-effective for the litigants, and is fair to the deponents. And it should be patterned after Rule 45 of the FRCP, which appears to be universally admired by civil litigators for its simplicity and efficiency.

The Drafting Committee believes that the proposed uniform act meets these requirements, should be supported by the various constituencies that have an interest in how interstate discovery is conducted in state courts, and should be adopted by most of the states. The act is simple and efficient: it establishes a simple clerical procedure under which a trial state subpoena can be used to issue a discovery state subpoena. The act has minimal judicial oversight: it eliminates the need for obtaining a commission, letters rogatory, filing a miscellaneous action, or other preliminary steps before obtaining a subpoena in the discovery state. The act is cost effective: it eliminates the need to obtain local counsel in the discovery state to obtain an enforceable subpoena. And the act is fair to deponents: it provides that motions brought to enforce, quash, or modify a subpoena, or for protective orders, shall be brought in the discovery state and will be governed by the discovery state's laws.

UNIFORM INTERSTATE DEPOSITIONS AND DISCOVERY ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Interstate Depositions and Discovery Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

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

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, [a federally recognized Indian tribe], or any territory or insular possession subject to the jurisdiction of the United States.

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

(A) attend and give testimony at a deposition;

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

(C) permit inspection of premises under the control of the person.

Comment

This Act is limited to discovery in state courts, the District of Columbia, Puerto Rico, the United States Virgin Islands, and the territories of the United States. The committee decided not to extend this Act to include foreign countries including the Canadian provinces. The committee felt that international litigation is sufficiently different and is governed by different principles, so that discovery issues in that arena should be governed by a separate act.

The term "Subpoena" includes a subpoena duces tecum. The description of a subpoena in the Act is based on the language of Rule 45 of the FRCP.

The term "Subpoena" does not include a subpoena for the inspection of a person (subsection (3)(C) is limited to inspection of premises). Medical examinations in a personal injury case, for example, are separately controlled by state discovery rules (the corresponding federal rule is Rule 35 of the FRCP). Since the plaintiff is already subject to the jurisdiction of the trial state, a subpoena is never necessary.

SECTION 3. ISSUANCE OF SUBPOENA.

(a) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a court of court in the [county, district, circuit, or parish] in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this act does not constitute an appearance in the courts of this state.

(b) When a party submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure, shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(c) A subpoena under subsection (b) must:

(A) incorporate the terms used in the foreign subpoena; and

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

Comment

The term "Court of Record" was chosen to exclude non-court of record proceedings from the ambit of the Act. The committee concluded that extending the Act to such proceedings as arbitrations would be a significant expansion that might generate resistence to the Act. A "Court of Record" includes anyone who is authorized to issue a subpoena under the laws of that state, which usually includes an attorney of record for a party in the proceeding.

The term "Presented" to a clerk of court includes delivering to or filing. Presenting a subpoena to the clerk of court in the discovery state, so that a subpoena is then issued in the name of the discovery state, is the necessary act that invokes the jurisdiction of the discovery state, which in turn makes the newly issued subpoena both enforceable and challengeable in the discovery state.

The committee envisions the standard procedure under this section will become as follows, using as an example a case filed in Kansas (the trial state) where the witness to be deposed lives in Florida (the discovery state): A lawyer of record for a party in the action pending in Kansas will issue a subpoena in Kansas (the same way lawyers in Kansas routinely issue subpoenas in pending actions). That lawyer will then check with the clerk's office, in the Florida county or district in which the witness to be deposed lives, to obtain a copy of its subpoena form (the clerk's office will usually have a Web page explaining its forms and procedures). The lawyer will then prepare a Florida subpoena so that it has the same terms as the Kansas subpoena. The lawyer will then hire a process server (or local counsel) in Florida, who will take the completed and executed Kansas subpoena and the completed but not yet executed Florida subpoena to the clerk's office in Florida. In addition, the lawyer might prepare a short transmittal letter to accompany the Kansas subpoena, advising the clerk that the Florida subpoena is being sought pursuant to Florida statute ___ (citing the appropriate statute or rule and quoting Sec. 3). The clerk of court, upon being given the Kansas subpoena, will then issue the identical Florida subpoena ("issue" includes signing, stamping, and assigning a case or docket number). The process server (or other agent of the party) will pay any necessary filing fees, and then serve the Florida subpoena on the deponent in accordance with Florida law (which includes any applicable local rules).

The advantages of this process are readily apparent. The act of the clerk of court is ministerial, yet is sufficient to invoke the jurisdiction of the discovery state over the deponent. The only documents that need to be presented to the clerk of court in the discovery state are the subpoena issued in the trial state and the draft subpoena of the discovery state. There is no need to hire local counsel to have the subpoena issued in the discovery state, and there is no need to present the matter to a judge in the discovery state before the subpoena can be issued. In effect, the clerk of court in the discovery state simply reissues the subpoena of the trial state, and the new subpoena is then served on the deponent in accordance with the laws of the discovery state. The process is simple and efficient, costs are kept to a minimum, and local counsel and judicial participation are unnecessary to have the subpoena issued and served in the discovery state.

This Act will not change or repeal the law in those states that still require a commission or letters rogatory to take a deposition in a foreign jurisdiction. The Act does, however, repeal the law in those discovery states that still require a commission or letter rogatory from a trial state before a deposition can be taken in those states. It is the hope of the Conference that this Act will encourage states that still require the use of commissions or letters rogatory to repeal those laws.

The Act requires that, when the subpoena is served, it contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel. The committee believes that this requirement imposes no significant burden on the lawyer issuing the subpoena, given that the lawyer already has the obligation to send a notice of deposition to every counsel of record and any unrepresented parties. The benefits in the discovery state, by contrast, are significant. This requirement makes it easy for the deponent (or, as will frequently be the case, the deponent's lawyer) to learn the names of and contact the other lawyers in the case. This requirement can easily be met, since the subpoena will contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record and of any party not represented by counsel (which is the same information that will ordinarily be contained on a notice of deposition and proof of service).

SECTION 4. SERVICE OF SUBPOENA. A subpoena issued by a clerk of court under Section 3 must be served in compliance with [cite applicable rules or statutes of this state for service of subpoena].

SECTION 5. DEPOSITION, PRODUCTION, AND INSPECTION. [Cite rules or statutes of this state applicable to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises] apply to subpoenas issued under Section 3.

Comment

The Act requires that the discovery permitted by this section must comply with the laws of the discovery state. The discovery state has a significant interest in these cases in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery request. Therefore, the committee believes that the discovery procedure must be the same as it would be if the case had originally been filed in the discovery state.

The committee believes that the fee, if any, for issuing a subpoena should be sufficient to cover only the actual transaction costs, or should be the same as the fee for local deposition subpoenas.

SECTION 6. APPLICATION TO COURT. An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Section 3 must comply with the rules or statutes of this state and be submitted to the court in the [county, district, circuit, or parish] in which discovery is to be conducted.

Comment

The act requires that any application to the court for a protective order, or to enforce, quash, or modify a subpoena, or for any other dispute relating to discovery under this Act, must comply with the law of the discovery state. Those laws include the discovery state's procedural, evidentiary, and conflict of laws rules. Again, the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from any unreasonable or unduly burdensome discovery requests, and this is easily accomplished by requiring that any discovery motions must be decided under the laws of the discovery state. This protects the deponent by requiring that all applications to the court that directly affect the deponent must be made in the discovery state.

The term "modify" a subpoena means to alter the terms of a subpoena, such as the date, time, or location of a deposition.

Evidentiary issues that may arise, such as objections based on grounds such as relevance or privilege, are best decided in the discovery state under the laws of the discovery state (including its conflict of laws principles).

Nothing in this act limits any party from applying for appropriate relief in the trial state. Applications to the court that affect only the parties to the action can be made in the trial state. For example, any party can apply for an order in the trial state to bar the deposition of the out-of-state deponent on grounds of relevance, and that motion would be made and ruled on before the deposition subpoena is ever presented to the clerk of court in the discovery state.

If a party makes or responds to an application to enforce, quash, or modify a subpoena in the discovery state, the lawyer making or responding to the application must comply with the discovery state's rules governing lawyers appearing in its courts. This act does not change existing state rules governing out-of-state lawyers appearing in its courts. (See Model Rule 5.5 and state rules governing the unauthorized practice of law.)

SECTION 7. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it

SECTION 8. APPLICATION TO PENDING ACTIONS. This [act] applies to requests for discovery in cases pending on [the effective date of this [act]].

SECTION 9. EFFECTIVE DATE. This [act] takes effect ___.