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

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

January 2024

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I. Introduction

The Advisory Committee on Civil Practice, one of the standing advisory committees established by the Chief Administrative Judge 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 Judiciary'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 various bar associations, as well as legislative committees. In addition to recommending measures for inclusion in the Judiciary's legislative program, the Committee reviews and comments on other pending legislative measures concerning civil procedure.

In this 2024 Report, the Advisory Committee recommends a total of fifty-six measures for enactment by the 2024 Legislature. Of these, fifty-two previously have been endorsed in substantially the same form, four are new measures.

Part II sets forth and summarizes the five new and amended measures proposed for 2024. They are designed to: (1) requiring additional service by mail when utilizing electronic service upon the Secretary of State (BCL 306(b); BCL 408(e); LLC 303(a); NPC 306(b)); (2) amending the motion for poor persons relief to motion for fee waiver (CPLR 1101); (3) preclude the requirement that deposition testimony be the subject of pre-trial motions or pre-trial designations to be used during trial (CPLR 3117); (4) updating future payment interest rates for structured settlements (CPLR 5031); (5) permit Appellate Review of non-final Judgment or Order in Certain Circumstances (CPLR 5501(e)).

Part III summarizes the fifty-one previously endorsed measures not enacted through 2024, but once again recommended by the Committee in substantially the same form. These measures: (1) reinforce the viability of consent as a basis of general personal jurisdiction over foreign corporations authorized to do business in New York State (CPLR 301(a); BCL 1301(e) (new); Gen. Assoc. Law 18(5) (new); Ltd. Liability Co. Law 802(c) (new); Not-for-Profit Corp. Law 1301(e) (new); Partnership Law 121-902(e) (new) and Partnership Law 121-1502(r) (new)); (2) remedy filing irregularities in personal injury and wrongful death actions, as related to the *ad damnum* clause (CPLR 305(b)); (3) address procedures for relief and substitution of counsel and limited scope appearances (CPLR 321); (4) clarify procedures for a class action (CPLR 901, 902, 908 & 909); (5) permit attorney's fees for class representatives or persons in class actions (CPLR 909); (6) require in an action brought by or against a public official that the public official be named by his or her official title rather than naming the person in their individual capacity (CPLR 1019; 1023); (7) provide that defendants are entitled to seek apportionment of the State's fault in Supreme Court actions where the State is a joint tortfeasor (CPLR 1601): (8) address certain CPLR Article 16 issues in relation to apportionment of liability for non-economic loss in personal injury actions (CPLR 1601, 1603, 3018); (9) amend and clarify the procedures for electronic stipulations among parties or counsel (CPLR 2104); (10) clarify that parties may agree if interest will accrue from the date of a stipulation conceding liability (CPLR 2104); (11) clarify requirements for filing copies of prior pleadings with certain motion papers (CPLR 2221(d), (e), 3211(e)); (12) address documents subpoenaed for trial (CPLR 2305); (13) repeal the requirement for an out-of-state affidavit (CPLR 2106(b) & CPLR 2309(c)); (14) require the pleading of an affirmative defense and a motion to dismiss for objections regarding certain notices of claim (CPLR 3018(b), 3211; Gen. Mun. L. 50-i); (15) set a time frame for expert witness disclosure

(CPLR 3101(d)(1)); (16) expand expert disclosure in commercial cases (CPLR 3101(d)(1)); (17) clarify the physician-patient privilege waiver as to prior injuries (CPLR 3101(j)); (18) codify the manner in which parties provide notice to hold depositions conducted remotely by telephone or other electronic means (CPLR 3113(d)); (19) improve judicial economy by clarifying the procedure for consideration of a motion to dismiss a cause of action (CPLR 3211(a)(7)); (20) simplify the conduct of an inquest in default judgments (CPLR 3215(b)); (21) address the procedure for vacating a default judgment where the party in default was not provided with notice (CPLR 3215(g)(1)); (22) address the time within which a party may discontinue a claim without prejudice (CPLR 3217(a)(1)); (23) clarify when to make a motion to dismiss during foreclosure settlement conferences (CPLR 3408(n)); (24) address the seating of alternate jurors (CPLR 4106); (25) create a statutory Parent-Child Privilege (CPLR 4502(a); Family Court Act §1046(vii)); (26) enact a waiver of privileged confidential information for exclusive use in a civil action (CPLR 4504(a)); (27) harmonize prima facie proof of damages by increasing the threshold of damages suffered in non-small claims matters (CPLR 4533-a; UCCA 1804); (28) address authentication of materials obtained during discovery (CPLR 4540-a) (new);) (29) amend an exception to the rule against hearsay to address business records relied upon by experts in civil trials (CPLR 4549 (new)); (30) harmonize the law of evidence regarding inadvertent waiver of the attorney-client privilege (CPLR 4550); (31) clarify that any party on an appeal from an order granting or denying a post-trial motion may raise any issue that was preserved for appellate review during the trial (CPLR 5501(c)); (32) permit appellate review of a non-final judgment or order in certain circumstances (CPLR 5501(e) (new)); (33) conform the statutes on the timing of a motion seeking leave to appeal, the automatic stay and the 5-day rule (CPLR 5519); (34) permit service of a levy upon any branch of a financial institution to be effective as to any

account as to which the institution is a garnishee ((CPLR 5222(a), 5225(b), 5227, 5232(a), 6214(a)); (35) clarify the meaning of property of a judgment debtor (CPLR 5225(a) & (b)); (36) allowing an appeal from a decision or ruling by the court when no order has been executed (CPLR 5512); (37) eliminate the uncertainty in the context of an appeal of either an *ex parte* temporary restraining order or an uncontested application to the court (CPLR 5701(a) and 5704(a)); (38) give discretion to courts in such circumstances to extend the time for summons service and modify the procedure for post-attachment hearings when serving ex parte attachment papers in foreign countries within the time limits imposed by those statutes (CPLR 6211(c) (new), CPLR 6213); (39) to address confidentiality and privileges in mediation proceedings in New York State (CPLR Article 74 (new)); (40) remedy injustices arising out of contracts of adhesion in the context of consumer contracts (CPLR 7501, 7515 (new); Gen. Oblig. L. §5-336, §5-792(new) Exec. L. §94-a; Pub. Health L. §2801-h (new)); (41) eliminate the five percent cap on receiver commissions (CPLR 8004(a)); (42) establish a uniform procedure governing applications for attorney's fees (CPLR 8405); (43) allow a claimant to amend a timely served notice of intention in the Court of Claims (Court of Claims Act §11(d) (new)); (44) clarify the manner in which the acknowledgment of a written agreement made before or during marriage may be proven in an action or proceeding (D. R. L. §236(B)(3)); (45) permitting a delay for filing a notice of petition in a wrongful death action by tolling the 90-day window to service the claim until the appointment of a representative of the decedent's estate (General Municipal Law 50-e(1)(a)); (46) amend the law regarding service of notices of claim upon a municipal entity to deem compliance in limited instances (Gen. Mun. L. §50-e(1)(b) & (3)(c)); (47) amend the General Obligations Law in relation to the limitation of non-statutory reimbursement and subrogation (Gen. Ob. L. § 5-335); (48) amend the General Obligations Law governing

structured settlement transfers (Gen. Obligations Law §§ 5-1703, 5-1705 & 5-1708); (49) amend the General Obligations Law to facilitate flexible tolling agreements (Gen. Ob. L. §17-103; CPLR 201); (50) clarify the effect of res judicata in small claims court (New York City Civil Court Act §1808, New York City Civil Court Act §1808-A; Uniform City Court Act §1808, Uniform City Court §1808-A; Uniform District Court Act §1808, Uniform District Court Act §1808-A; Uniform Justice Court Act §1808); ad (51) permit amendments to worker's compensation applications to correct certain mistakes related to non-compliance of rules (WCL § 23**).**

Part IV sets forth the Committee's regulatory proposals. The Committee continues to seek approval of seven regulatory measures in 2023: (1) removing the option for hard copy service of orders with notice of entry from the e-filing rules (22 NYCRR 202.5-b); (2) allowing a 5-day cure in e-filed cases for failure to provide hard copies of prior papers filed electronically (22 NYCRR 202.5-b(d)(4)); (3) permitting parties videotaping depositions to give notice of videotaping without naming the specific video technician (22 NYCRR 202.15(c)); (4) clarifying the remedies available to the court for failure to appear (22 NYCRR 202.26(e) & 202.27); (5) amending 22 NYCRR 202.48(b) to give the court discretion to accept an untimely submission for good cause shown or in the interest of justice; (6) requiring the provision of additional information to courts hearing petitions or applications for compromise orders approving settlements in cases where such court approval is required (22NYCRR 202.38; 22 NYCRR 202.67); and (7) providing greater flexibility for the court to address confidentiality in the submission of court papers in the Commercial Division of the Supreme Court (22 NYCRR 202.70(g), Rule 9 (new).

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

Part VI of the Report highlights important pending and future projects under Committee consideration.

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

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

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II. New and Amended Measures

A. New Measures

1. Requiring Additional Service by Mail When Utilizing Electronic Service Upon the Secretary of State
   (BCL 306(b); BCL 408(e); LLC 303(a); NPC 306(b))

This is one in a series of measures being upon the recommendation of the Advisory Committee on Civil Practice. The Advisory Committee proposes significant changes in Business Corporation Law which provides for service of process on domestic and authorized foreign corporations on limited liability companies, and on not-for-profit corporations by service of process on the Secretary of State. The present statutory scheme, coupled with special service provisions in the CPLR where a party using Secretary of State service seeks a default judgment against a domestic or authorized foreign corporation, has resulted in unnecessary motion practice, has delayed the progress of litigation and rapid resolution of disputes, and on occasion has resulted in the improper entry of default judgments and consequent improper interference with the business and finances of defendant corporations.

THE CURRENT SYSTEM

The service of process on a domestic or foreign corporation is the subject of CPLR Section 311.[1] There are two approaches: a party seeking to serve process on a corporation may do so by in hand service on "an officer, director, managing or general agent or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service."[2] Or a party may serve a domestic or authorized foreign corporation by service on the Secretary of State under Business Corporation Law sec. 306, or may serve an unauthorized foreign corporation by service on the Secretary of State under Business Corporation Law section 307. When the service on the Secretary of State alternative is used, actual provision of process has proven to be ineffectual in several areas. Due no doubt to budgetary restraints, in recent years it has often taken several months for that office to carry out its statutory duty to "promptly send" a

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[1] "Process" are the papers to be served. In an action, they are the summons and complaint, summons with notice, or third-party summons and complaint, which have been filed with the clerk of the court in which the action is brought. In a special proceeding, they are the notice of petition and petition which have been so filed. CPLR Rule 305
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[2] Mail service on a corporation is not jurisdictionally effective, see McKinney's Consol. Laws CPLR sec. 311, Supplementary Practice Commentaries 2014.

copy of the process "by certified mail, return receipt requested, to such corporation…" (BCL section 306(b)(1)). [3] As a result, other than by happenstance, the named defendant is not aware that an action has been commenced against it.

However, because service is complete when the Secretary of State is served, defendant's time to appear in the action often has run before that defendant knows it has been sued. And since the statute does not provide to the party notice of the sending of the copy of the process to the defendant, that party may well assume that defendant is in willful default, and undertake the preparation of default papers in reliance thereon.[4] And while under CPLR 3215(g)(4) a default judgment is not to be entered against a defendant corporation served pursuant to BCL 306 unless the party using Secretary of State service has made "an additional service of the summons by first class mail … upon the defendant corporation at its last known address…"[5], there are a substantial number of decided cases in which default judgments have issued in the absence of this additional service and had to be vacated either by the trial court or on appeal. Even where the additional service is made and defendant receives it, in the absence of consent defendant is required to move to be permitted to make a late appearance and continue with the litigation.

As of January 1, 2023, an electronic alternative for service by hand on the Secretary of State came into force, by amendment to BCL 306(b). Domestic and authorized foreign corporations were permitted to file with the Secretary of State an email address to which the Secretary would be obligated to send notice if a plaintiff had electronically submitted a copy of the process commencing the action. Service would be complete, for pleading purposes, "when the Secretary of State has reviewed and accepted service of such process." Registration of an email address for electronic service of process is explicitly voluntary, BCL 304-A.[6]

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[3] The Department of State's counsel's office has informed the Committee that it has been funded to expand substantially its staff in this area and anticipates that by the fall of 2023 it will be sending copies of the process to the corporate defendant in 2-3 days of receipt from the filer.

[4] The Department of State's counsel's officed has informed the Committee that it provides notice to the process server which served the process on the Department that the process has been sent to the corporate defendant.

[5] It should be noted that it is unclear under CPLR 3215(4) whether the additional service is to be made to the last address known to the plaintiff, or to the address on file with the Secretary of State

[6] The Advisory Committee recognizes the advantages of the availability of electronic service of process and urges the legislature to contemplate making registration of an email address for receipt of process mandatory for domestic and authorized foreign corporations. Whether such a requirement might have unexamined impact on corporations which do not have electronic capacity is an inquiry beyond the purview of the Advisory Committee.

The Secretary has established a system to receive these filings from corporations. [7] Since the statutory text does not provide for any notice to the party that the Secretary has sent on the electronic notice of the proceeding to the defendant, the party is unable to ascertain when the time for the defendant to appear runs, and there is no way for any party to know when the Secretary has sent the notice. Finally on this point, since CPLR 3215(g)(4) was not amended, the party's obligation to make an additional service is not electronic, which would seem to vitiate the arguable advantages of the electronic alternative.

Service on the Secretary of State where the intended recipient is a domestic or authorized foreign not-for-profit corporation is provided in Not-for-Profit Law section 306, which is essentially identical with the relevant portions of BCL 306-b. Use of the electronic alternation is provided for, and as with BCL corporations it is voluntary. (NPC section 306-a).

Service of process on the Secretary of State where the intended recipient is a domestic or foreign limited liability company authorized to do business in the state is permitted by CPLR 311-a and is provided for in Limited Liability Corporation Law 301. There is no provision in the cited section regarding the time of completion of service, and the additional service requirement for default judgments against domestic and authorized foreign corporations served under the BCL does not apply to service under LLC 301. Whether personal delivery to the Secretary of State, as a statutory agent of the company, is the completion of service under CPLR 318 on a limited liability company does not appear to have been the subject of any reported decisions. As is presently true for corporations, registration by an LLC of an email address for electronic service is voluntary, LLC section 301-b. There does not appear to be any reason to maintain any difference between service using the Secretary of State on corporations or on LLCs.

THE PROPOSED AMENDMENTS

The Committee proposes modifications to the Business Corporation Law system for service on the Secretary of State; in the interest of uniformity identical changes are proposed to the Not-for-Profit Corporation Law and the Limited Liability Company Law. The keystone of the proposed amendments is that a party utilizing Secretary of State service must not only serve

[7] A party contemplating using electronic service can ascertain whether a potential defendant has so registered by going to the Department of State website, going to the page entitled "Search in Corporate and Business Entity Database", entering the name of the potential defendant and the type of entity (corporate, LLC, or partnership), and the clicking on the name of the entity on the "Entity Search Results" page. Under the category "Service of Process on the Secretary of State as Agent", there is a line "Electronic Service of Process of the Secretary of State as Agent", which contains the entry "Permitted" or "Not permitted'"

the Secretary of State but must also make an additional service of the process by first class mail to the defendant in order to complete service, and thus to start defendant's time to appear running. The additional service by mail must include notice that service has been or is being made pursuant to this statute. This notice is required so that a defendant receiving the mailed process realizes that statutorily compliant service is being undertaken and does not ignore the process as inadequately served under the CPLR.

Under the amendments, it is the party using Secretary of State service who files proof of such service on the Secretary and proof of the additional service by mail with the Court clerk. That filing is to be made within 20 days of the delivery to the Secretary and the additional mailing to the defendant, and service is complete ten days after such filing. And to avoid where possible the ambiguity of the present CPLR 3215(g)(4) provision, the amendments specify that the additional service by mail is to be made to the address of the corporate or LLC defendant on file with the Secretary of State, or if no such filing exists to the last address of the corporation or LLC known to the serving party.[8]

These changes ought to greatly minimize inadvertent defaults in suits against corporations. They are modeled on CPLR section 308(2), which uses an additional mail service where service on a natural person is by leaving the process with a person of suitable age and discretion, generally known as substituted service. The goal here, as in CPLR section 308(2), is to increase the likelihood that the defendant gets actual notice that it has been sued. And given the lengthy delays that have been experienced in the passing along of process from the Secretary of State to the intended defendant, the change enables a plaintiff who wishes to move the case rapidly the ability to accelerate the completion of the pleading process, or to seek a default judgment with certitude that such a judgment will not be vacated because of delay at the Department level. Since the change will require an additional mail service in every case in which a plaintiff elects to use Secretary of State service, there is no longer a need for the additional mailing provision in CPLR 3215(g)(4).[9] While at present a plaintiff in a small claims or commercial claims part of a court, a petitioner in a summary proceeding to recover real property,

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[8] The current statute contemplates that there may be corporations which have not filed a post office address with the Secretary as part of their compliance with the Business Corporations Law. The Committee is strongly of the view that such a failure should result in a substantial increase in the franchise tax owed by such corporation and deny to such a corporation the privilege of litigating in the courts of the State until the filing is made.

[9] We note again that CPLR 3215(g)(4) does not apply to entities other than those served under BCL 306.

or a plaintiff in an action affecting title to real property, need not make an additional mailing in order to obtain a default judgment, it is extremely unlikely that a person or entity commencing such a proceeding would use Secretary of State Service. Small claims and commercial claims actions are routinely started by filing a notice with a court clerk, and summary proceedings move far faster using "nail and mail" than is true using present section 3215(4)(g). And since actions affecting title to real property are not susceptible to clerical default judgments, in each such case a judge can ensure that appropriate efforts at actual notice have been taken.

With the deletion of CPLR section 3215(g)(4), BCL section 306((b)(2), which permits an additional service in default situations, should be repealed as well. This would have the effect of correcting an erroneous reference to section 3215(4)(f), which does not exist, in the current BCL.

Proposal

AN ACT to amend the business corporations law, limited liability company law and not-for-profit corporations law in relation to additional notice upon service upon the secretary of state and repeal sections of the business corporations law and civil practice law and rules

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

Section 1. Subsections (i) and (ii) of Subdivision (b) of Section 306 of the business corporation law is amended to read as follows:

(i) Personal delivery to and leaving with the secretary of state or a deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such corporation, at the post office address, on file in the department of state, specified for the purpose. If a domestic or authorized foreign corporation has no such address on file in the department of state, the secretary of state shall so mail such copy, in the case of a domestic corporation, in care of any director named in its certificate of incorporation at the director's address stated therein or, in the case of an authorized foreign corporation, to such corporation at the address of its office within this state on file in the department. An additional service of the process shall be made by first class mail to such corporation at the post office address on file in the department of state specified for service under this subsection or if such corporation has no such address on file in the department of state, at the last address of such corporation known to plaintiff, and such additional service shall be accompanied by a notice to such corporation that service is being made or has been made pursuant to this sub-subsection. Proof of service under this sub-subsection shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is affected later. Service shall be complete ten days after such filing.

(ii) Electronic submission of a copy of the process to the department of state together with the statutory fee, which fee shall be a taxable disbursement, through an electronic system operated by the department of state, provided the domestic or authorized foreign corporation has an email address on file in the department of state to which the secretary of state shall email a notice of the fact that process has been served electronically on the secretary of state The

secretary of state shall promptly send a notice of the fact that process has been served to such corporation at the email address on file in the department of state, specified for the purpose and shall make a copy of the process available to such corporation. An additional service of the process shall be made by first class mail to such corporation at the post office address on file in the department of state specified for service under this subsection or if such corporation has no such address on file in the department of state, at the last address of such corporation known to plaintiff, and such additional service shall be accompanied by a notice to such corporation that service is being made or has been made pursuant to this sub-subsection. Proof of service under this sub-subsection shall be filed with the clerk of the court designated in the summons within twenty days of the electronic submission to the department of state or the mailing to the defendant, whichever is affected later. Service shall be complete ten days after such filing.

§ 2. Section 408 of the business corporation law is amended by adding new subdivision (e) to read as follows:

1. Except as provided in paragraph eight of this section, each domestic corporation, and each foreign corporation authorized to do business in this state, shall, during the applicable filing period as determined by subdivision three of this section, file a statement setting forth:

(a) The name and business address of its chief executive officer.

(b) The street address of its principal executive office.

(c) The post office address within or without this state to which the secretary of state shall mail a copy of any process against it served upon him or her. Such address shall supersede any previous address on file with the department of state for this purpose.

(d) The number of directors constituting the board and how many directors of such board are women.

(e) The email address to which the secretary of state shall email a notice of the fact that process has been served electronically on the secretary of state

§ 3. Subdivision (a) of Section 303 of the limited liability company law is amended to read as follows:

(a) Service of process on the secretary of state as agent of a domestic limited liability company [or authorized foreign limited liability company] that has filed with the department of state articles of organization making such designation and every foreign limited liability company upon which process may be served pursuant to this chapter shall be made in the manner

provided by paragraph one or two of this subdivision. Either option of service authorized pursuant to this subdivision shall be available at no extra cost to the [consumer] party making service.

(1) Personally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. [Service of process on such limited liability company shall be complete when the secretary of state is so served.] The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such limited liability company at the post office address on file in the department of state specified for that purpose. An additional service of process shall be made by first class mail to such limited liability company at the post office address on file in the department of state specified for service under this subdivision, and such additional service shall be accompanied by a notice to such limited liability company that service is being made or has been made pursuant to this subsection. Proof of service under this subsection shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effect later. Service shall be complete ten days after filing.

(2) Electronically submitting a copy of the process to the department of state together with the statutory fee, which fee shall be a taxable disbursement, through an electronic system operated by the department of state, provided the domestic or authorized foreign limited liability company has an email address on file in the department of state to which the secretary of state shall email a notice of the fact that process has been served electronically on the secretary of state. [Service of process on such limited liability company shall be complete when the secretary of state has reviewed and accepted service of such process.] The secretary of state shall promptly send a notice of the fact that process against such limited liability company has been served [electronically on him or her] to such limited liability company at the email address on file in the department of state, specified for the purpose and shall make a copy of the process available to such limited liability company. An additional service of process shall be made by first class mail to such limited liability company at the post office address on file in the department of state specified for service under this subsection, and such additional service shall be accompanied by a notice to such limited liability company that service is being made or has been made pursuant to

this subdivision. Proof of service under this subdivision shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is affected later. Service shall be complete ten days after such filing.

§ 4. Subdivision (b) of section 306 of the not-for-profit corporation law is amended to read as follows:

(b) Service of process on the secretary of state as agent of a domestic corporation formed under article four of this chapter or an authorized foreign corporation shall be made [by] in the manner provided by subsection (1) or (2) of this subdivision. Either option of service authorized pursuant to this subdivision shall be available at no extra cost to the party making service.

(i)P[p]ersonally delivering to and leaving with the secretary of state or his or her deputy, or with any person authorized by the secretary of state to receive such service, at the office of the department of state in the city of Albany, duplicate copies of such process together with the statutory fee, which fee shall be a taxable disbursement. [Service of process on such corporation shall be complete when the secretary of state is so served.] The secretary of state shall promptly send one of such copies by certified mail, return receipt requested, to such corporation, at the post office address, on file in the department of state, specified for the purpose. If a domestic corporation formed under article four of this chapter or an authorized foreign corporation has no such address on file in the department of state, the secretary of state shall so mail such copy to such corporation at the address of its office within this state on file in the department. An additional service of process shall be made by first class mail to such limited liability company at the post office address on file in the department of state specified for service under this subdivision, and such additional service shall be accompanied by a notice to such limited liability company that service is being made or has been made pursuant to this subsection. Proof of service under this subsection shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is affected later. Service shall be complete ten days after such filing.

(ii) Electronic submission of a copy of the process to the department of state together with the statutory fee, which fee shall be a taxable disbursement, through an electronic system operated by the department of state, provided the domestic or authorized foreign corporation has an email address on file in the department of state to which the secretary of state shall email a notice of the fact that process has been served electronically on the secretary of state The

secretary of state shall promptly send a notice of the fact that process has been served to such corporation at the email address on file in the department of state, specified for the purpose and shall make a copy of the process available to such corporation. An additional service of the process shall be made by first class mail to such corporation at the post office address on file in the department of state specified for service under this subsection or if such corporation has no such address on file in the department of state, at the last address of such corporation known to plaintiff, and such additional service shall be accompanied by a notice to such corporation that service is being made or has been made pursuant to this sub-subsection. Proof of service under this sub-subsection shall be filed with the clerk of the court designated in the summons within twenty days of the electronic submission to the department of state or the mailing to the defendant, whichever is affected later. Service shall be complete ten days after such filing.

§ 5. The business corporations law section 304-a and civil practice law and rules section 3215(4) are hereby repealed.

§ 6. This act shall take effect immediately.

2. Amending the Motion for "Poor Persons Relief" to Motion for Fee Waiver (CPLR 1101)

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of the Advisory Committee on Civil Practice. This measure would amend CPLR 1101 to eliminate the title of motion for permission to proceed as a poor person and redesignate this provision as a motion for fee waiver.

The designation of individuals with insufficient means to prosecute or defend a legal action as "poor persons" is a highly outdated, pejorative, and often inaccurate legal term. This measure recommends amending the title of CPLR 1101 to clearly and accurately reflect the purpose this provision, which is making a motion to waive costs, fees and expenses. Furthermore, it is recommended that the classification property calculated in determining fee waiver status, in addition to income and assets, is clarified as real property owned by the moving party.

In addition, given recent amendments to CPLR 2106 authorizing the use of affirmations in lieu of affidavits for any person in civil action pursuant to Chapter 559 of the Laws of 2023, it is further recommended that CPLR 1101 amended to include that a party may submit affirmation to move for fee waiver. This change will help make it explicitly clear that a party is no longer required to submit a notarized affidavit when making such motion and instead, which was intended to save individuals the time, cost and burden associated with locating a notary.

Proposal

AN ACT to amend the civil practice law and rules to change the title of the motion to proceed as a poor person to a motion for fee waiver

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

Section 1. Subdivision (a) of Section 1101 of the civil practice law and rules is amended to read as follows:

§1101. Motion [for permission to proceed as a poor person] to waive costs, fees and expenses; affidavit or affirmation; certificate; notice; [waiver of fee;] when motion not required.

(a) Motion; affidavit or affirmation. Upon motion of any [person] party, the court in which an action is triable, or to which an appeal has been or will be taken, may [grant permission to proceed as a poor person] waive costs, fees and expenses if the party has insufficient means to prosecute or defend the action or appeal. Where a motion [for leave to appeal as a poor person] to waive costs, fees and expenses is brought to the court in which an appeal has been or will be taken, such court shall hear such motion on the merits and shall not remand such motion to the trial court for consideration. The moving party shall file an affidavit or affirmation setting forth the amount and sources of [his or her] the party's income and assets and listing [his or her] any real property owned with its value; that [he or she is unable] the party lacks sufficient means to pay the costs, fees and expenses necessary to prosecute or defend the action or to maintain or respond to the appeal; the nature of the action; sufficient facts so that the merit of the contentions can be ascertained; and whether any other person is beneficially interested in any recovery sought and, if so, whether every such person is unable to pay such costs, fees and expenses. An executor, administrator or other representative may move for permission for fee waiver on behalf of a deceased, infant or incompetent [poor] person.

§ 2. This act shall take effect immediately.

3. Precluding the Requirement that Deposition Testimony be the Subject of Pre-Trial Motions or Pre-Trial Designations to be Used During Trial
(CPLR 3117)

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of the Advisory Committee on Civil Practice. This measure would amend the CPLR 3117 to preclude requirements that deposition testimony be the subject of pre-trial motions or pre-trial designations in order to be used during a trial.

The purpose of this recommendation is to prevent courts from requiring that depositions be the subject of a pre-trial motion, such as a motion *in limine*, or requiring litigants to designate the portions of the deposition to be used in advance of trial. CPLR 3117 sets forth the specific circumstances and conditions for the use of deposition testimony during a trial, however, it contains no conditions or requirements that in order to use such deposition testimony during a trial, the party seeking to use the deposition or a portion thereof must identify the specific deposition testimony intended to be used or bring an application in advance of trial seeking the court's permission to do so. It has nevertheless come to the Committee's attention that some trial courts have begun imposing the requirement that in order to use deposition testimony during a trial, a litigant must bring a pre-trial motion *in limine* identifying the testimony sought to be used and obtaining the court's permission to do so.

Pre-trial motions, such as motions *in limine*, are not appropriate as a prerequisite for reading deposition testimony at trial. "Generally, the function of a motion *in limine* is to permit a party to obtain a preliminary order before or during trial excluding the introduction of anticipated inadmissible, immaterial, or prejudicial evidence or limiting its use. Its purpose is to prevent the introduction of such evidence to the trier of fact, in most instances a jury." *State v. Metz*, 241 A.D.2d 192, 198 (1st Dept. 1998); *see also Carrasquillo v. City of New York*, 22 Misc.3d 171, 173 (Sup. Ct., Kings Co. 2008) ("[t]he motion *in limine* is usually a pretrial ruling made upon application by either party for the purpose of precluding the use of a reference to prejudicial evidence at trial, whether in an opening statement or during the evidentiary process"). There may also be circumstances in which a litigant makes a motion *in limine* to admit evidence anticipated to be controversial or otherwise objected to during the trial. *See, e.g., Matter of New York City Asbestos Litigation*, 2017 WL 36374 (Sup. Ct., New York County 2017) (denying defendant's motion *in limine* seeking permission to use deposition transcripts of defendants in

other asbestos actions that had entered into settlements to point fingers at nonparty entities and reduce their own proportionate share of fault for purposes of CPLR Article 16). However, most deposition testimony is received in evidence without objection, so long as the requirements of CPLR 3117 are satisfied. It is thus unnecessary and counterproductive to require litigants to seek a ruling in advance of trial for all of the deposition testimony they may seek to use.

Furthermore, it is inappropriate to require that the portions of depositions intended to be used at trial be identified or designated in advance of trial. This is because litigants often will not know what deposition testimony they will want or need to introduce until the trial is underway. Aside from the fact that it is not always certain that a witness will appear at trial, it is virtually never certain what their testimony will be when they do appear. Trials are fluid, and circumstances often arise which can impact the need for, and admissibility of, evidence, including deposition testimony. *See, e.g., Wall Street Associates v. Brodsky*, 295 A.D.2d 262 (1st Dept. 2002) ("[w]e note that the procedural posture here involves a motion *in limine*, and "'[i]t is always possible that the incompetency will be waived at the trial, or the door opened, by design, or by inadvertence'").

The Advisory Committee on Civil Practice therefore recommends amending CPLR 3117 to prevent courts from requiring that deposition testimony be the subject of pre-trial motions or pre-trial designations in order for such testimony to be used during a trial. However, the Committee is cognizant of the fact that the Commercial Division has adopted rules that require pre-trial designation of deposition testimony in such actions. Therefore, the proposed amendment to CPLR 3117 excludes actions filed in the Commercial Division.

Proposal

AN ACT to amend the civil practice law and rules to preclude requirements that deposition testimony be the subject of pre-trial motions or pre-trial designations to be used during a trial.

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

Section 1. Section 3117 of the civil practice law and rules is amended by adding a new subdivision (e) to read as follows:

(e) A litigant's right to use deposition testimony in accordance with this section shall not be subject to any requirement by the court that such deposition testimony must first be the subject of a pretrial motion.

§ 2. This act shall take effect immediately.

4. Updating Future Payment Interest Rates for Structured Settlements
(CPLR 5031(e))

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of the Advisory Committee on Civil Practice. This measure would amend CPLR 5031 in relation to future payments on structured settlements to reflect current economic realities.

Revisions to CPLR 5031 in its current form was part of a 2003 rewrite of CPLR Article 50-A, which altered the structured settlement scheme applicable to actions involving medical, dental and podiatric malpractice. Generally, a structured settlement is a method of dispensing compensation to an injured plaintiff in fixed payments over time rather than one lump sum. The present value of a structured settlement is determined by the present cash value of the remaining future payments due minus the discount rate, which is a calculation of the time value of the money. The higher the discount rate, the lower the present value of a structured settlement. The previous amendments to CPLR 5031 sought to eliminate litigation over the value of the discount rate of structured settlements by putting forth a fixed measure. Under current law, the current calculation for the discount rate is 1) for future payments up to twenty years, the discount rate is the ten-year Treasury bond on the date of the verdict, and 2) for all payments exceed twenty years, the discount rate is the ten-year Treasury bond for the first twenty years and two points above the ten-year treasure bond for the years after twenty years.

The reason for this previously proposed value for calculating the discount rate was because at the time there was no long bond, which refers to the longest maturity bond offering from the United States Treasury, as they were eliminated for several years. Currently, the longest maturity offering from the United States treasury is the thirty-year long bond, which follows the ten year-bond. This measure proposes that any payments exceeding twenty-years should be based on the existing 30-year Treasury bond, which now exists as the longest maturity offering and reflects current economic realities.

Proposal

AN ACT to amend the civil practice law and rules to change the discount rate for future payment interests rates for structured settlements

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

Section 1. Subdivision (e) of Section 5031 of the civil practice law and rules is amended to read as follows:

(e) The discount rate to be used in determining the present value of all streams of payments for periods of up to twenty years shall be the rate in effect for the ten-year United States Treasury Bond on the date of the verdict. As to any streams of payments for which the period of years exceeds twenty years, the discount rate to be used in determining the present value shall be calculated by averaging, on an annual basis, the rate in effect for the ten-year United States Treasury Bond on the date of the verdict for the first twenty years and [two percentage points above] the rate in effect for the [ten] thirty-year United States Treasury Bond on the date of the verdict for the years after twenty years.

B. Amended Measures

1. Permitting Appellate Review of a Non-final Judgment or Order in Certain Circumstances (CPLR 5501(e))

This is one in a series of measures being upon the recommendation of the Advisory Committee on Civil Practice. This measure is intended to ameliorate two related but conceptually distinct problems that arise under current law when a party against whom a final judgment has been entered seeks to challenge one or more prior rulings in the case.

One problem, which has been a concern for many years but has recently become even more problematic, relates to the "necessarily affects" standard now embedded in CPLR § 5501(a)(1). To illustrate the issue: suppose that the plaintiff or defendant — this equally affects both sides of the caption — moves for summary judgment, or for some other relief, and the motion is denied. Now, further suppose that the party does not appeal the adverse interlocutory ruling, or alternatively that the party does appeal the ruling but the appeal is not reached or resolved by the time the case goes to trial. Last, suppose that the party who lost that interlocutory ruling loses as trial as well, and final judgment is then entered in the adversary's favor. Can the party who lost the prior motion argue on appeal from the final judgment, "My earlier motion should have been granted, and had it been granted, I'd now have a judgment in my favor instead of a judgment entered against me"?

The current statute specifies that the unhappy litigant can, in appealing from the final judgment, obtain review of the prior ruling … but only if that prior ruling "necessarily affect[ed] the final judgment." That is a problem for one simple reason. Although the "necessarily affects" standard has been with us for years, no one really knows what does or does not "necessarily affect" the final judgment. The Court of Appeals has itself said that there is no "generally applicable definition" of the term, and, even worse, that its rulings "may not all be consistent."[10]

[10] *Oakes v. Patel*, 20 NY3d 633, 644 [2013] ("Our opinions have rarely discussed the meaning of the expression 'necessarily affects' in CPLR 5501(a)(1) [citations omitted]. We have never attempted, and we do not now attempt, a generally applicable definition. Various tests have been proposed, but how to apply them to particular cases is not self-evident, and our decisions in this area may not all be consistent"); *Siegmund Strauss, Inc.* v *E. 149th Realty Corp.,* 20 NY3d 37, 41-42 [2012] ("it is difficult to distill a rule of general applicability regarding the 'necessarily affects' requirement"); Arthur Karger, Powers of the NY Court of Appeals § 9:5 ("the

This uncertainty concerning the circumstances in which a prior ruling can be challenged on appeal from a final judgment is deleterious in at least two respects. First and most obviously, it can result in dispositions at odds with the underlying merits of the case if the party who actually deserved to win ends up on the wrong side of the "necessarily affects" divide. Second, because the absence of a clear and predictable standard encourages the filing of interlocutory appeals (out of concern that the matter will not be deemed reviewable on appeal from the final judgment), this leads to filing of wasteful appeals, at added expense to the courts and the parties.

Although this problem has essentially existed as long as the "necessarily affects" has existed, it became even more critical with the Court of Appeals' recent ruling in *Bonczar v. Am. Multi-Cinema, Inc.*, 38 NY3d 1023 [2022]. While there has always been uncertainty about what does and does not "necessarily affect[]" the final judgment, one particular application of the standard seemed relatively clear. If the party who ultimately lost had moved for and had been denied summary judgment, the prior denial of the motion was a ruling which "necessarily affect[ed]" the final judgment since the party would not have ended up with judgment against him or her had the motion been granted. At least, that is what most commentators who had addressed the issue felt.[11]

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decisions do not appear to have been entirely consistent as respects the strictness with which the term 'necessarily affects' is to be interpreted"); David D. Siegel & Patrick M. Connors, New York Practice § 530 (6th ed.) ("While the liberal standards for review of interlocutory orders in *Siegmund Strauss* and *Oakes* are helpful, there is, in fact, no airtight way to determine whether an order 'necessarily affects' the final judgment so as to assure review").

[11] *E.g.*, Richard C. Reilly, McKinney's Practice Commentaries, C5501:4, Order that "Necessarily Affects" Final Judgment ("What does it take to be able to say that the disposition "necessarily affects" the final judgment? One test, which has been described as "not perfect but helpful" [citation omitted], is to ask whether assuming that the non-final order or judgment is erroneous, its reversal would also require a reversal of the judgment. If it would, it is reviewable; if not, and the judgment order can stand despite it, it is not reviewable"); David D. Siegel & Patrick M. Connors, New York Practice § 530 [2021] ("[CPLR 5501] introduces the sometimes difficult and pesky inquiry of whether an intermediate order or interlocutory judgment 'necessary affects' the final judgment. One test, not perfect but seemingly helpful, is to ask this question: assuming that the non-final order or judgment is erroneous, would its reversal overturn the judgment? If it would, it's a reviewable item; if it would not, and the judgment can stand despite it, it is not reviewable").

That is also what those courts that spoke to the issue believed.[12] And, while the rulings were very old, the Court of Appeals had said that as well.[13]

However, *Bonczar* injected a caveat which, as a practical matter, swallows the rule. The caveat was that the interlocutory denial of the party's prior motion for summary judgment would be reviewable only if the party had no "further opportunity" to litigate the subject issue at trial. With *Bonczar* now the law of the land, the Appellate Division has followed suit and has ruled, in case after case, that the prior denial of a motion for dismissal or for summary judgment did not "necessarily affect" the final judgment adverse to the movant and was therefore not reviewable on appeal from the final judgment.[14]

There are, in the Committee's view, several reasons why that caveat, fully assuming it to be a sensible and faithful construction of the "necessarily affects" verbiage,[15] is undesirable from a policy perspective. For one thing, while it is almost always the case that the party who lost a prior motion for summary judgment can *ask* the trial judge to rule differently, the trial judge is not likely to *grant* an application that another judge of that court previously denied. The long-settled doctrine of law of the case, while not absolutely preventing the second judge from rendering a contrary

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[12] *Shaw v. City of Rochester*, 200 AD3d 1551, 1552 [4th Dept 2021]; *Crapsi v S. Shore Golf Club Holding Co., Inc.,* 19 AD3d 1024,1026 [4th Dept 2005]; 4 N.Y. Jur.2d Appellate Review § 525 ("An appeal from final judgment brings up for review an intermediate order granting or denying summary judgment to the appellee because such an intermediate order is a nonfinal order that necessarily affects the final judgment").

[13] *Buffalo Elec. Co. v. State*, 14 NY2d 453, 460 [1974] ("Concisely, the attitude is that an intermediate order is within section 580 if the result of reversing that order would be, inevitably and mechanically, to require a reversal or modification of the final determination"'); *Fox* V *Matthiessen,* 155 NY 177, 178 [1898] (the interlocutory orders "necessarily affected the final judgment; for, if the motion had been granted, a judgment could not have been entered").

[14] *Selig v. Town of Hempstead*, 213 AD3d 878, 880 [2d Dept 2023]; *Fernandez v. Taping Expert, Inc.*, 210 AD3d 651, 652-653 [1st Dept 2022]; *Dyszkiewicz v. City of New York*, 218 AD3d 546, 547-548 [2d Dept 2023].

[15] Significantly, the *Bonczar* Court did not give any policy-related reason for its ruling. That is, it did not suggest that it was *good* (or bad, for that matter) that a prior denial of summary judgment should not be reviewable on appeal from a final judgment. The Court was merely construing a statutory standard, the "necessarily affects" standard.

ruling, dictates that such should occur only in exceptional cases, and thus inhibits the second judge from "reversing" the prior ruling.

Second, it does not, we believe, constitute good policy to deny the unhappy litigant *appellate* review by virtue of that party's alleged opportunity to obtain *trial-level* review, especially if the later opportunity exists more in theory than fact.[16]

Third, the very real concern that the appellate court may decline to hear the merits of the subject issue in the appeal from the final judgment will encourage the taking and perfection of unnecessary appeals.

Regarding the last consideration, the point is that many orders that deny a party's motion for summary judgment are ultimately rendered moot either because the parties settle at or near trial or because the party denied summary judgment prevails by virtue of a jury verdict. For this reason, it often makes sense, even when the party believes he or she should have been granted summary judgment, for the party to soldier on and seek appellate review at the end of the case if the issue has not become moot by then. A party in those circumstances may well reason, "If I appeal now, it will cost me $X in additional legal expenses, plus Y months of delay, to litigate an interlocutory appeal that may not end the case. If I wait, the case may settle or I may win on other grounds, rendering the denial of summary judgment irrelevant. And if the issue doesn't go away, I can raise it post-judgment, and also avoid having successive appeals."

If, however, the right of appellate review is essentially "use it or lose it," the entire analysis changes. The party who otherwise would have opted to hold all of his or her arguments for a single, post-judgment appeal may now be constrained to appeal. This results in additional appeals that

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[16] It should be noted that, in *Bonczar* itself, the issue was not whether the plaintiff whose summary judgment motion had been denied was entitled to Appellate Division review of the ruling. The Appellate Division had reviewed the ruling. Rather, the issue was whether the "opportunity" to seek a directed verdict during the trial precluded post-judgment review by the Court of Appeals, this in a case in which the 3 to 2 split in the Appellate Division would have otherwise permitted an appeal as of right to the Court of Appeals. This distinction may well have figured in the result in *Bonczar*, but it remains that *Bonczar's* main impact has been and will continue to be in the far more numerous cases in which there was no prior Appellate Division review of the subject order and the issue thus becomes whether the losing litigant can obtain *any* appellate review of the prior ruling.

would not otherwise occur, at additional costs to all parties, including those on the other side of the appeal, and also including the courts.

Last, all of this assumes that the party denied summary judgment *actually can* obtain appellate review of the interlocutory ruling in advance of the trial if he or she wishes to do so. This is sometimes not the case, especially in the Second Department, where the delay between the party's perfection of the appeal and the court's hearing of the appeal is usually measured in years. In such cases in which it is not feasible to obtain appellate review in advance of the trial, a rule denying post-judgment review of the interlocutory order serves to insulate a possibly erroneous disposition from any meaningful appellate review.

For all of these reasons, the Committee recommends that CPLR 5519(a)(1) be amended so as to, 1) eliminate the never adequately defined "necessarily affects" standard, and 2) clearly provide that a party appealing from an adverse final judgment can obtain appellate review of an earlier denial of his or her motion for dismissal or summary judgment.

The second problem the proposal is intended to ameliorate relates to the circumstance in which an interlocutory appeal was taken but not yet resolved by the time the final judgment was entered. In that setting, the Court of Appeals' ruling in *Matter of Aho*, 39 NY2d 241 [1976] requires that the interlocutory appeal be dismissed, even if it has already been fully briefed.[17] The proposal would instead include a new subdivision (e), stating that "entry of a final judgment shall not terminate the prosecution of any timely appeal from a non-final judgment or order."[18]

As with the proposed amendment of subdivision (a), new subdivision (e) is intended to better facilitate dispositions on the merits and to minimize the litigants' costs.

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[17] *Matter of Aho* has been cited in more than 3,600 decisions to date, including more than 3,300 times by the Appellate Division for the Second Department.

[18] While it would, of course, be the Appellate Divisions' prerogative as to how to effect the procedural change, one presumes that the courts would consolidate the appeals in those instances they deemed it expedient to do so.

Proposal

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

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

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

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

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

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

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

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

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

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

subparagraph (ii) of paragraph two of subdivision (b) of section fifty-six hundred two, only the non-final determination of the appellate division shall be reviewed.

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

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

<u>(e) Non-final judgments and orders. The entry of a final judgment shall not terminate the prosecution of any timely appeal from a non-final judgment or order</u>.

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

III. Previously Endorsed Measures

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

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

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

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

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

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

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

From 1916 until the decision in *Daimler,* New York courts — State and Federal — held that a foreign corporation's registration to do business in New York constitutes consent by the corporation to general personal jurisdiction in the New York courts. Judge Benjamin N. Cardozo wrote in *Bagdon v. Philadelphia & Reading Coal & Iron Co.,* 217 N.Y. 432

(1916), that such consent flows from the foreign corporation's statutorily required designation of a New York agent for service of process:

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

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

The applicable New York statutes, both in 1916 and now, do not explicitly state that registration to do business or designation of a local agent to accept service of process constitutes consent to general jurisdiction. Until recently, this omission was not viewed as a constitutional impediment to litigation against a registered foreign corporation The United States Supreme Court twice recognized that a corporation's statutorily required designation of a local agent to accept process rationally may be interpreted as consent to general jurisdiction: "[W]hen a power is actually conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act." *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.,* 243 U.S. 93, 96 (1917.) The critical facts that the corporation had agreed to subject itself to the regulation of the state of New York and thereby had consented to general personal jurisdiction. This is "part of the bargain by which [the foreign corporation] enjoys the business freedom of the State of New York." *Neirbo Co. v. Bethlehem Shipbuilding Corp.,* 308 U.S. 165, 174 (1939). For at least 98 years, foreign corporations have been on notice that becoming licensed to do business in New York is a consent to general personal jurisdiction.

In the years since the Daimler decision, a number of courts have considered whether

the absence of explicit statutory notice that registration constitutes consent to general jurisdiction eliminates consent to such jurisdiction by the mere act of registration. The United States Court of Appeals for the Second Circuit, in dismissing an action brought in a Connecticut state court and removed to the Federal District Court, wrote that the Connecticut registration of foreign corporations statute “was neither explicit about the scope of jurisdiction conferred, nor had there issued an authoritative state judicial decision construing the statute.” *Brown v. Lockheed*, 814 F3d 619, 637 (2nd Cir. 2016) That decision was relied on by the Appellate Division in dismissing a case in New York relying on general jurisdiction solely by virtue of registration under the current BCL, *Aybar v Aybar*, 169 A.D.3d 137 (2nd Dept.2019), leave dismissed 33 NY3d 1004). *Aybar* has been followed by Appellate Division decisions in other departments, *Best v.. Guthrie Med. Group*, 175 A.D.3d 1048 (4th Dept 2019), and *Fekah v. Baken Hughes Inc.*, 2019 N.Y.App.Div> LEXIS 7463 (1st Dept. 2019),

However, other courts have held that under statutes similar to the current BCL registration statute, consent jurisdiction is preserved, see, e.g. *In re Sealed Case*, 932 F.3d 915 (Fed. Cir. 2019),[19] The question has attracted substantial academic analysis, compare, for example, *Consent to Judicial Jurisdiction: the Foundatjon of “Registration”* Statutes, 73 N.Y.U. Ann. Surv. Am. L. 159 (Professor Oscar Chase 2018), supporting such jurisdiction with *Registration Statutes, General Jurisdiction, and the Fallacy of Consent,* 36 Cardozo L. Rev. 1343 (Professor Tanya Monestier 2015) rejecting such jurisdiction. For an exhaustive analysis of the issue from the pen of a Federal appellate judge, dealing with general jurisdiction over foreign corporations registering under the Delaware statute analogous to New York’s BCL, see *Acorda Therapeutics, Inc. v. Mycal Pharms., Inc*, 817 F.3d 755 (Fed. Cir. 2016, O’Malley, C.J., concurring).

The addition of the proposed new subdivision (e) to BCL §1301 would avoid the recent Appellate Division case law restricting general jurisdiction, by providing an explicit and forceful legislative declaration as to the effect of a foreign corporation's registration to do business in New York. Consent to general jurisdiction is a fair requirement to impose on

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[19] The same position has been adopted in Minnesota, Missouri, Nebraska, Arkansas, and New Jersey. See *Am. Dairy Queen Corp. v. W.B. Mason Co*, 2019 U.S.Dist.LEXIS 3314, *9-12 (Jan 8, 2019 D.C.Minn.), collecting cases., and most recently in New Mexico *Schmidt v. Navistar, Inc.*, 2019 U.S.Dist.LEXIS 35064 (March 4, 2019 D.C.N.M.),

corporations that benefit from conducting business in New York. Such consent provides the certainty of a forum with open doors for the enforcement of obligations of New York-licensed corporations without the expense and burden of proving jurisdiction on a case-by-case basis. In *Daimler,* the Supreme Court recognized the value of having an "easily ascertainable" and "clear and certain forum in which a corporate defendant may be sued on any and all claims." 134 S.Ct. at 760.

There is substantial judicial support for the proposition that the proposed addition to BCL sec. 1301 would pass constitutional muster. The Pennsylvania registration statute has for years provided that "qualification" of a foreign corporation "shall constitute a sufficient basis of jurisdiction to enable the tribunals of this Commonwealth to exercise general personal jurisdiction", and that explicit notice has insulated general jurisdiction claimants from dismissal in a plethora of cases. See, e.g., *Healthcase Servs. Grp. V. Moreta*, 2019 U.S.Dist. LEXIS 198954 (E.D.Pa.), and *Gronch Co., Inc. v Simon Prop. Group, Inc.,* 2019 N.Y.Misc. LEXIS 1821, *7 (Sup.Ct.N.Y.Co) rejecting general jurisdiction because section 1304, as currently written, "does not expressly require a corporation to consent to jurisdiction to do business within the state."

Enactment of the proposed addition to BCL sec. 1304 will not burden the New York courts with cases which ought not to be litigated here when corporate defendants are registered in New York, courts retain the discretionary power to decline the exercise of jurisdiction over them in the interests of justice and convenience pursuant to the doctrine *of forum non conveniens.* CPLR 327; *see, e.g., Bewers v. American Home Products Corp.,* 99 A.D.2d 949 (1st Dep't), *aff'd,* 64 N.Y.2d 630 (1984).

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

BCL §1312(a) applies to corporations engaged in "regular, systematic and

continuous" business in New York. *See, e.g., Highfill, Inc. v. Bruce and Iris, Inc.,* 50 A.D.3d 742, 743 (2d Dep't 2008). This standard encompasses corporations that maintain offices or other facilities in New York for the purpose of engaging in a mix of local and interstate business and provides sufficient flexibility for the inclusion of corporations that do business in New York without a fixed location, as was the case in *Highfill.* It has been noted that the "regular, systematic and continuous business" standard helps to ensure compliance with constitutional limits on state regulation of purely interstate business. *See Airtran New York, LLC v. Air Group, Inc.,* 46 A.D.3d 208, 214 (1st Dep't 2007). Consistent with the history, policy and caselaw relating to foreign business corporations, this measure also codifies the principle that other types of foreign business organizations consent to general jurisdiction when they do business in New York and, pursuant to statute, expressly appoint the Secretary of State as their agent upon whom process may be served. This measure thus includes foreign joint stock associations and business trusts *(see* Gen. Assoc. Law §§18; 2(4) (these are the only "associations" that must designate the Secretary of State as agent)); foreign limited liability companies *(see* Ltd. Liability Co. Law §§301(a); 802(a)); foreign not-for-profit corporations *(see* Not-for-Profit Corp. Law §§304, 1301, 1304(a)(6)); foreign limited partnerships *(see* Partnership Law §§121-104; 121-902); and foreign limited liability partnerships *(see* Partnership Law §121-1502).

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

With respect to not-for-profit corporations, the amendment of the Not-for-Profit Corporation Law (§1301(e)) recognizes that some not-for-profits, such as religious corporations, are exempt from the requirement that they designate the Secretary of State as

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

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

Proposal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Remedying Filing Irregularities in Personal Injury and Wrongful Death Actions (the *Ad damnum* Clause) (CPLR 305(b))

The Committee recommends that CPLR rule 305(b) be amended to provide that where the plaintiff in an action for personal injury or wrongful death commences suit with a summons with notice rather than with a summons and complaint, the summons with notice need not specify "the sum of money" the plaintiff seeks, popularly known as the *ad damnum*. This would eliminate an inconsistency that arises from the 2003 amendment of CPLR § 3017(b).

Prior to 2003, the plaintiffs in all personal injury and wrongful death actions were, with two exceptions, required to specify in the complaint the amount of money sought in the action. The two exceptions were actions against municipalities and medical malpractice actions. In those two kinds of cases, defendant could serve a supplemental demand for that information, but the information would not appear in the complaint.

In 2003, CPLR § 3017(b) was amended to extend to all personal injury and wrongful death actions the rule then followed only in medical malpractice actions and actions with municipal defendants. Complaints in personal injury and wrongful death actions would no longer contain *ad damnum* clauses specifying the damages the plaintiff sought, but the defendant would be entitled to obtain that information on demand.

There were several reasons for the amendment. One concern was that the prior practice encouraged inflated demands since (a) plaintiffs were incentivized to make their *ad damnum* large enough to encompass any potential recovery and (b) the severity of the injury was not always known at the time of commencement of the suit. Additionally, the prior practice led to undue focus, especially in the media, upon *ad damnum* demands that were essentially meaningless and often misleading. Finally, the defendant naturally wanted to know and was entitled to know far more than the gross figure plaintiff would claim as his or her total damages, and the more sensible course was to require the plaintiff to provide such information as the defendant demanded during discovery.

CPLR rule 305(b) specifies the information that must appear in the summons in those instances in which "the complaint is not served with the summons." Unfortunately, when CPLR § 3017(b) was amended to effectively remove the *ad damnum* clause from the complaints served in personal injury and wrongful death actions, CPLR rule 305(b) was not amended. It still

requires the plaintiff to specify "the sum of money" sought except in actions for medical malpractice.

As is noted in Professor Patrick M. Connors' McKinney's commentary, this inconsistency, which is of course an historical anomaly that serves no purpose, is a trap for the unwary that could potentially result in the dismissal of an action. McKinney's Practice Commentary, C3017:10A. This could occur if an attorney who is familiar with the rules governing content of the complaint reflexively assumes that the *ad damnum* should also be omitted from a summons served without complaint.

The proposed bill would amend CPLR rule 305(b) to exempt personal injury and wrongful death actions from the requirement that the pleader specify "the sum of money" sought, thus eliminating the inconsistency with CPLR § 3017(b). As in those personal injury and wrongful death actions that are commenced with service of a complaint (the vast majority of such actions), the plaintiff will be required to provide that information (and more) on demand.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the content of a summons with notice in certain actions.

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

Section 1. Subdivision (b) of rule 305 of the civil practice law and rules is amended to read as follows:

(b) Summons and notice. If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and, except in an action for [medical malpractice] personal injury or wrongful death, the sum of money for which judgment may be taken in case of default.

§ 2. Subdivision (c) of section 3017 of the civil practice law and rules, as amended by chapter 694 of the laws of 2003, is amended to read as follows:

(c) Personal injury or wrongful death actions. In an action to recover damages for personal injuries or wrongful death, the complaint, summons with notice, counterclaim, cross-claim, interpleader complaint, and third-party complaint shall contain a prayer for general relief but shall not state the amount of damages to which the pleader deems himself or herself entitled. If the action is brought in the supreme court, the pleading shall also state whether or not the amount of damages sought exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction. Provided, however, that a party against whom an action to recover damages for personal injuries or wrongful death is brought, may at any time request a supplemental demand setting forth the total damages to which the pleader deems himself or herself entitled. A supplemental demand shall be provided by the party bringing the action within fifteen days of the request. In the event the supplemental demand is not served within fifteen

days, the court, on motion, may order that it be served. A supplemental demand served pursuant to this subdivision shall be treated in all respects as a demand made pursuant to subdivision (a) of this section.

§3. This act shall take effect on the thirtieth day after it shall have become a law and shall apply to actions commenced on or after such date.

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

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

321§(b)

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

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

representation if a consent is not filed. It includes a new requirement that the incoming attorney or firm also sign the consent to substitution form. The new attorney's signature and endorsement would operate as the appearance of the new attorney of record, thereby serving as notice of the substitution and promptly notifying the court and opposing counsel of the identity of the new attorney.

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

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

To assist the court in managing the proceedings and to prevent overreaching by opposing counsel, the subdivision would include an automatic thirty-day stay of proceedings, except as

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

321§(c)

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

321§(d)

This new subdivision would address those situations in which a party is represented by a firm and the firm itself dissolves. *See* RPC 1.0(h) (definition of "firm" or "law firm"). Under the ethics rules, an attorney is obligated to take reasonable steps to avoid prejudice to the client. *See* RPC 1.16(e) ("[e]ven when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client"); *see also id.* 1.16(d) ("When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."). In applying these precepts to dissolution, courts have held that, although basic principles of partnership law normally would absolve the members of a firm from the obligation to conduct any post dissolution business, the attorney ethics rules impose a continuing post dissolution responsibility. The duty to avoid prejudice to the client of a dissolved firm required the members of the dissolved firm to take steps such as precluding the adverse consequences of a statute of limitation expiring after the dissolution, *Vollgraff v Block*, 117 Misc 2d 489 (Sup. Ct. Suffolk County 1982) and opposing a motion to dismiss and a motion to require a defendant to post a bond. *RLS Assocs. v United Bank of Kuwait*, 417 F Supp 2d 417 (S.D.N.Y. 2006).

But where a firm is attorney of record, dissolution of the firm ordinarily means no individual attorney affiliated with the firm has the authority to represent the party. Current

CPLR §321 provides no express guidance when a firm dissolves about how to withdraw from the action and facilitate the appearance of successor counsel.

New subdivision (d) would address this problem by formally requiring a partner, shareholder or member of the dissolved firm to protect the client's interests by filing a motion to withdraw (see, 22 NYCRR § 1200[Rules of Professional Conduct]; Rule 1.0 (May, 2013) (definition of partner)). Courts have supported this approach in the past given the responsibility of the members to wind up the firm's business. *See Vollgraff*, 117 Misc 2d 489; *RLS Assocs., LLC*, 417 F Supp 2d 417 (citing *Vollgraff*); *see also* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Jud. Ethics Op. 1988-4 (collecting cases). The former members would be allowed to appoint one from among them with the responsibility for performing this responsibility. If no motion is required because the client has retained new counsel, such counsel can appear as attorney of record by serving a notice of appearance stating that the firm that previously was attorney of record dissolved; in such situation no action is required by a member of the dissolved firm to complete the substitution under subdivision (b)(1).

Proposal

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

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

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

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

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

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

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

(c) Death, removal or disability of attorney. If an attorney of record who is a sole

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

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

§ 2. This act shall take effect immediately.

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

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

This proposal would result in the amendments described below.

§ 901(b)

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

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

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

§ 902

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

Current law requires that a party move for class certification within sixty days of the last responsive pleading. In some actions, whether certification of one or more classes is appropriate under § 901(a) cannot be determined until after limited discovery. The proposal would replace

the current fixed sixty-day deadline, which sometimes results in pro forma certification motions, with a requirement that a party move at a practicable time. The amendment would improve the ability of the parties to craft and a court, where appropriate, to certify class definitions. This new subdivision matches the language of Rule 23(c)(1).

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

§ 908

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

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

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

§ 909

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

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

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

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

Proposal

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

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

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

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

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

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

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

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

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

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

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

§ 902. Order allowing class action [. Within sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action, the plaintiff shall move for an order to determine whether it is to be so maintained] and appointing class counsel. (a) At an early practicable time after a person sues or is sued as a

class representative, the court must determine by order whether to certify the action as a class action. An order under this section may be conditional and may be altered or amended before the decision on the merits on the court's own motion or on motion of the parties. The action may be maintained as a class action only if the court finds that the prerequisites under section 901 have been satisfied. Among the matters which the court shall consider in determining whether the action may proceed as a class action are:

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

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

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

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

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

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

1. shall consider:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. Authorizing Incentive Awards for Class Representatives in Class Actions (CPLR 909)

The recent decision of Saska v. Metropolitan Museum of Art, 2017 NY Slip Op 27202, (June 15, 2017) highlights what the Committee believes to be a deficiency in the scope of CPLR rule 909, which relates to the award of attorneys' fees in class actions. That statute gives the court discretion to award incentive awards to representatives of the class based upon the reasonable value of the services rendered. In Saska, the Supreme Court of New York County, citing the Court of Appeals in Flemming v. Barnwell Nursing Home and Health Facilities, Inc., 15 N.Y.3d 375, 912 N.Y.S.2d 504, 938 N.E.2d 937 (2010), determined that while CPLR rule 909 provides for representatives and objectors to recover attorneys' fees, it does not provide for a separate cash award for such representatives. The court in Saska further noted that the issue was not whether the class representatives deserved to be compensated or whether such awards are good public policy, but only whether such awards are permitted by statute.

The Committee believes that it is appropriate for the court to allow fees to be awarded to class representatives or persons in appropriate actions as deemed by the court, as class representatives or persons often advance the class action for the benefit of the entire class at great personal and economic expense.

The Committee therefore proposes an amendment to CPLR rule 909 to specifically provide that the court may award attorneys' fees to not only representatives of the class, but also to any person that the court finds has acted to the benefit of the class.

The Committee also notes that is has supported other significant changes in Article 9 through proposed legislation that appears as Item 2 in the Previously Endorsed Measures (Part IV).

Proposal

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

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

Section 1. Rule 909 of the civil practice law and rules is amended to read as follows:

Rule 909. Attorney's fees. If a judgment in an action maintained as a class action is rendered in favor of the class, the court in its discretion may award attorney's fees to the representatives of the class and/or to any other person that the court finds has acted to benefit the class based on the reasonable value of legal services rendered and if justice requires, allow recovery of the amount awarded from the opponent of the class. It may, in its discretion where appropriate, award an additional amount to such class representatives or persons.

§ 2. This act shall take effect immediately and apply to all actions commenced on or after the date on which it shall have become law and all actions pending on the date one which it shall have become law.

6. Substitution of Parties
(CPLR 1019; CPLR 1023)

The Committee recommends an amendment to CPLR 1023 that would require, in an action brought by or against a public official or entity, that an individual or entity shall be named by official title rather than by the name of any individual or individuals who hold the office. The amendment would repeal as unnecessary the option in CPLR 1019 which authorizes naming the person rather than the official title.

Currently an action may be brought by or against a public officer in two ways: either by naming the official title of the public office or body itself, or by naming the individual or individuals who hold the office. *See* CPLR 1019, 1023. When an individual named in his or her official capacity dies, resigns, or otherwise ceases to hold public office, an action by or against that individual does not abate. *See Abell v. Hunter*, 211 A.D. 467 (2d Dept. 1924), *aff'd*, 240 N.Y. 702 (1925). But when such an event occurs, the caption no longer accurately identifies the officeholder.

Although CPLR 1019 provides a procedure to update the action by permitting substitution of a new officeholder by name, it is inefficient to proceed by party name. First, the identity of an individual officeholder is irrelevant to obtain the relief sought because any individual who holds the public office will be bound by any judgment or settlement. Second, to ensure accuracy after a person ceases to hold office, multiple substitutions may be needed, e.g., once for a person with an acting or temporary appointment, pending a special election or a nomination and confirmation process; and again, for the new officeholder. Third, New York's substitution procedure was modeled on then-current federal law; but as the federal courts soon realized, the main requirements (e.g., notice to the former official or showing need to continue the action) are burdensome or unnecessary. *See* 1961 Advisory Comm. Notes to Fed. R. Civ. Proc. 25(d). Automatic substitution places unneeded burdens on court resources.

This amendment would make it mandatory to name a public officer or body only by official title, rather than by the name of an individual officeholder. This method would be more expedient and avoid the problems that arise when individuals cease to hold office. *See* Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 1023. The amendment would retain in CPLR 1023 the authority of a court to grant permission to add the names of individual officeholders. But because a person is no longer named in the first

instance, a party now would have to demonstrate why adding names of individuals to an official title is necessary for an action to proceed. In the rare cases where a court has authorized addition of a name, a court order would be necessary to substitute individual officeholders. *See generally Matter of Travel House of Buffalo v. Grzechowiak*, 31 A.D.2d 74 (4th Dep't 1968), *aff'd*, 24 N.Y.2d 1034 (1969).

The amendment would not affect actions where the official has been sued in his or her individual or personal capacity, i.e., actions in which the official would be personally liable for any relief independent of his or her official position. Instead, the other substitution provisions of the CPLR would continue to apply in such cases.

Proposal

AN ACT to amend the civil practice law and rules, in relation to substitution of parties

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

Section 1. Section 1019 of the civil practice law and rules is REPEALED.

§2. Section 1023 of the civil practice law and rules is amended to read as follows:

§1023. Public body or officer described by official title. When a public officer, body, board, commission or other public agency may sue or be sued in its official capacity, [it may] that person or entity shall be designated by [its] the official title, subject to the power of the court to require names to be added.

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

7. Addressing Article 16 in Relation to Seeking Apportionment of the State's fault in Supreme Court Actions Where the State is a Joint Tortfeasor (CPLR 1601)

Background

This bill would amend CPLR §1601 of the Civil Practice Law and Rules (CPLR) to provide that defendants are entitled to seek apportionment of the State's fault in Supreme Court actions where the State is a joint tortfeasor.

Reasons for Support

This legislation would further the purpose of Article 16, which is to ensure that low-fault, deep-pocket defendants are not forced to pay more than their equitable share of non-economic damages. It would also rectify a current unfairness in the law affording the State greater Article 16 protections than all other defendants enjoy.

Under Article 16, where the relative fault of a joint tortfeasor is 50% or less of "the total liability assigned to all persons liable," that tortfeasor shoulders responsibility only for its proportionate share of the non-economic damages. The Legislature enacted Article 16 to ameliorate the harshness of the common-law rule of joint and several liability as to non-economic pain and suffering damages, whereby a tortfeasor found even 1% liable could be held responsible for an entire judgment.

In its current incarnation, Article 16 expressly permits the State to seek apportionment of the fault of joint tortfeasors in actions against it, even though those tortfeasors could not be sued in the Court of Claims. No corollary provision expressly allows other tortfeasors to seek apportionment of the State's fault in a Supreme Court action (where the State cannot be sued). See CPLR §1601 (1).

However, the language in §1601 that a defendant can seek apportionment of any nonparty's culpability, "unless the claimant proves that with due diligence he or she was unable to obtain jurisdiction over such person," had, prior to the decision of the Court of Appeals in *Artibee v. Home Place Corporation*, 28 N.Y.3d 379, 2017 NY Slip Op 01145 (2017), been interpreted by some courts to permit a defendant to seek apportionment of the State's fault in Supreme Court. The logic underlying this conclusion was that the phrase *due diligence* could only be read to mean personal jurisdiction, because no amount of diligence could overcome the subject matter jurisdiction bar to suing the State in the Supreme Court. In other words, a diligent claimant could of course easily obtain personal jurisdiction over the State in the Supreme Court

but could never proceed with the suit. See McKinney's Practice Commentary C1601:3 (noting that it can be argued that a plaintiff's inability to sue the State in Supreme Court is not an inability to obtain jurisdiction, but rather is the result of a rule of substantive law based on the doctrine of sovereign immunity); *see also Duffy v. Chautauqua County*, 225 A.D.2d 261, 267 (4th Dept. 1996) (noting Professor David Siegel's suggestion that the feature precluding consideration of a non-party's culpability under CPLR 1601 is the lack of personal, rather than subject matter, jurisdiction). This sensible construction of the statute avoided an inequity in the law whereby the State could seek apportionment of the fault of a non-party defendant, but that same defendant would have no parallel right to apportion the State's fault in a Supreme Court action. If this were the purpose of Article 16 in this context, then surely it would have been made explicit.

Yet, that is precisely the result reached by the Court of Appeals in its recent decision in *Artibee*. There, the Court held that the fault of the State cannot be apportioned in an action in Supreme Court because Article 16, by its terms, does not permit it. The Court noted that the term jurisdiction is "elastic" and was not cabined to instances where a plaintiff cannot obtain personal jurisdiction. *Id*. at 747. The constitutional prohibition on suing the State in Supreme Court is a limitation on the Supreme Court's jurisdiction. Because a plaintiff cannot obtain jurisdiction over the State in the Supreme Court, the Court concluded that Article 16 precludes apportionment of the State's fault in that Court. The Court, though, acknowledged that the argument that jurisdiction meant personal jurisdiction found support in various commentaries and cases. *Id*. at 747.

As the dissenting Judges in *Artibee* cogently observed, this decision undermines the legislative goal of Article 16 by prohibiting non-State defendants from seeking to apportion the fault of the State in the Supreme Court, while according to the State a preferred status in the Article 16 paradigm, and elevating the rights of plaintiffs in Supreme Court over those in the Court of Claims. Simply put, this decision erodes the salutary purpose of Article 16 and promotes inequity in the law by favoring the State.

This legislation makes explicit what was already implicit in Article 16: that non-State defendants enjoy a parallel right to seek apportionment of the State's fault in Supreme Court. It also promotes fairness and consistency in the law by affording all defendants the same Article 16

rights and treating plaintiffs in the Court of Claims the same as plaintiffs in the Supreme Court. At the same time, this bill furthers the overall legislative goals embodied in Article 16.

Although there are strong arguments supporting such an interpretation, this legislation stops short of providing that the word "jurisdiction" in CPLR §1601 (1) means "personal jurisdiction," thereby leaving for judicial interpretation the issue of whether a defendant could seek an apportionment of fault in other scenarios, as for example where a non-party tortfeasor was bankrupt, and an automatic bankruptcy stay was in effect. *See In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 846 (2nd Cir. 1992).

Finally, the *Artibee* majority's conclusion that the concerns underlying Article 16 are not implicated where the State is a tortfeasor because the State is solvent and a defendant could seek contribution in the Court of Claims, while technically correct, involves practical concerns. To realize any Article 16 benefit, the defendant would be required not only to subject itself to complete liability for any judgment, but also to assume that it would be successful in seeking contribution in the Court of Claims. Most defendants will not commit to such a risky course, especially in cases involving the State, where exposure is often significant due to traumatic injuries stemming from claimed highway-design malfeasance or medical malpractice. Instead, defendants likely will settle these cases, foreclosing any right to contribution under General Obligations Law § 15-108. The upshot is that the protections of Article 16 will prove illusory in any Supreme Court action where the State is a tortfeasor.

The Legislature should enact this bill to further the legislative goals of Article 16, and to restore fairness and consistency to the law in this area.

The Committee also notes that is has supported other significant changes in Article 16 through proposed legislation that appears as Item 16 in the Previously Endorsed Measures (Part IV).

Proposal

AN ACT to amend the civil practice law and rules, in relation to limited liability of persons jointly liable

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

Section 1. Subdivision 1 of section 1601 of the civil practice law and rules is amended to read as follows:

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

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

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

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

CPLR Article 16

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

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

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

Correction of the Anomaly Concerning the Plaintiff's Own Culpability

The proposed amendment of CPLR § 1601 would correct an anomaly that may occur when the plaintiff is found partially at fault for the subject injuries. As Justice Mark C. Dillon recently noted in the Albany Law Review (73 Alb.L.Rev. 79 [2009]), there is an instance in

which a defendant assigned 50% or less of the total culpability can nonetheless derive no benefit under CPLR § 1601.

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

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

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

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

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

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

The proposed amendments of CPLR §§ 1603 and 3018(b) would not alter the defendant's current rights to limit liability under CPLR Article 16 but would resolve whether the plaintiff is entitled to notice and discovery concerning the claims that the defendant intends to

advance at trial. The issue has been the subject of conflicting rulings by the Second and Fourth Departments of the Appellate Division.

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

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

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

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

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

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

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

Proposal

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

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

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

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

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

§1603. Burdens of proof. In any action or claim for damages for personal injury a party asserting that the limitations on liability set forth in this article do not apply shall allege and prove by a preponderance of the evidence that one or more of the exemptions set forth in subdivision one of section sixteen hundred one or section sixteen hundred two applies. A party seeking limited liability pursuant to this article shall have the burden of alleging and proving by a preponderance of the evidence that its equitable share of the total [liability] culpability is fifty percent or less of the total culpability.

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

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

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

9. Amending and Clarifying the Procedure for Stipulations Among Parties or Counsel (CPLR 2104)

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of this Advisory Committee on Civil Practice. CPLR rule 2104 currently provides the procedures for entering binding stipulations relating to any matter in an action. Generally, binding stipulations must be made in open court, reduced to an order and entered, or made in a writing subscribed by a party or counsel. There are several ambiguities under rule 2104, however, and this measure is proposed to resolve them.

First, the requirement of a writing "subscribed" by a party or counsel has resulted in controversies in cases where parties sought to confirm and make stipulations binding through an email. For example, in *Teixeira v. Woodhaven Ctr. of Care*, 173 A.D.3d 1108, 103 N.Y.S.3d 120 (2d Dept. 2019), the Second Department addressed the meaning of "a writing subscribed" and held that to "subscribe" a settlement transmitted by email, the attorney sender must type their name to indicate the act of signing. An automatically added signature block at the foot of an email would not suffice as a signing act, thus rendering a possibly intended stipulation unenforceable.

The First Department interpreted CPLR rule 2104 differently in *Philadelphia Insurance Indemnity Company v. Kendall* (197 A.D.3d 75 [1st Dept. 2020]) holding that "…if an attorney hits 'send' with the intent of relaying a settlement offer or acceptance, and their email account is identified in some way as their own, then it is unnecessary for them to type their own signature." In *Philadelphia Insurance* counsel transmitting the stipulation did have their name included on a "prepopulated block containing his contact information at the end of the email," but the court below had held, as in *Teixeira*, that this was not sufficient to meet the CPLR 2104 "subscribed" requirement.

In reversing, the First Department reasoned that the act of transmitting the email constitutes an electronic signing under CPLR 2104, and the typing of an additional signature is unnecessary to meet the subscription requirement, because the "distinction between prepopulated and retyped signatures in emails reflects a needless formality." The Court relied on section 302[a] of the State Technology Law which provides a very broad definition of a binding electronic signature: any "electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign

the record." The Committee finds the reasoning of the First Department persuasive, and that the Second Departments appropriate concern to follow the statutory subscription requirement could be met by the proposed amendment.

The Committee is mindful, as was the First Department, of the concern expressed by some courts that emails are ubiquitous and very easy to send, which in some instances may undercut intentionality. However, the proposed amendment is not intended to preclude parties from an attack on a purported stipulation unintentionally sent or sent without actual or implied authority. The rule is not intended to preclude attacks on the intent or authenticity of an email settlement communication.

The Court in *Philadelphia Insurance* expressly addressed the possibility that lawyers may send a settlement email inadvertently, just as they may inadvertently produce discovery materials. The Court found it unnecessary to determine the showing necessary to "claw back" a settlement email sent in error, because there was no such concern in this case. However, the First Department did note that a part of such a showing would be the sender's prompt action to rectify the error.

This measure also seeks to render this rule gender neutral, and to address directly the requirements of a binding stipulation, rather than express the requirements indirectly, as the current rule does by its "not binding upon a party unless…" language. Also, the measure recognizes the revenue generating intent of the current rule requirement of filing the "terms of such stipulation", with the more practical requirement of a settlement stipulation of discontinuance. This measure would take effect immediately.

Proposal

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

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

Section 1. Rule 2104 of the civil practice law and rules, as amended by chapter 62 of the laws of 2003, is amended to read as follows:

Rule 2104. Stipulations. An agreement between parties or their attorneys relating to any matter in an action[, other than one made between counsel in open court,] is [not] binding upon a party [unless it is in a writing subscribed by him or his attorney or] if reduced to [the form of] an order and entered, made on the record in open court, or made in a writing transmitted by the party to be charged for their attorney on paper or electronically with the intent to be bound. With respect to stipulations of settlement [and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant], the defendant shall file a stipulation of discontinuance with the county clerk.

§2. This act shall take effect immediately.

10. Clarifying Interest Accruing from the Date of Stipulation (CPLR 2104)

The Committee recommends that rule 2104 of the civil practice law and rules be amended so as to provide that a stipulation conceding liability as to one or more claims for damages may specify the rate, method of calculation, or date from which prejudgment interest will be computed.

The purpose of the amendment is partly to clarify that the parties may agree if and how prejudgment interest will run. The amendment is also intended to encourage that parties do so, particularly in personal injury actions in which the parties' failure to expressly agree on the matter may mean that the plaintiff will receive no interest at all until the jury returns a damages verdict, possibly years later. The amendment is prompted by the Appellate Division's ruling in *Mahoney v Brockbank*, 142 AD3d 200 [2d Dept 2016].

By way of background, long settled law holds that interest in an action for breach of contract runs from the breach itself. *Siegel v Laric Entertainment Corp.*, 307 AD2d 861, 862–863 [1st Dept 2003]. By contrast, in a personal injury action interest does not start to run until the jury returns a liability verdict. *Trimboli v Scarpaci Funeral Home, Inc.*, 30 NY2d 687 [1972], *affg on opn. below* 37 AD2d 386 [2d Dept 1971]. Where liability in a personal injury action is instead established by an order granting the plaintiff summary judgment, interest runs from the date of the order imposing liability. *Love v State*, 78 NY2d 540 [1991].

Until the ruling in *Mahoney*, there was no appellate authority that addressed the issue of when interest starts to run in a personal injury action in which the defendant concedes liability. The Court in *Mahoney* ruled that, in contrast to the situation in which liability is imposed by order of the court, interest does not run from the date defendant concedes liability and, indeed, does not run at all until the damages are assessed by a jury. This could be years later, as in fact occurred in *Mahoney*.

Mahoney may or may not be followed if and when the issue in that case ever reaches the Court of Appeals. The Committee takes no position as to whether the ruling in *Mahoney* constitutes good or bad policy. The proposed amendment neither codifies nor rejects the ruling in *Mahoney*. The amendment will thus have no effect on a stipulation conceding liability which does not address interest

However, the Committee believes that some parties who enter into concessions of liability in personal injury actions will do so on the (currently mistaken) assumption that interest will automatically run from that date, that others will assume the opposite, and still others will not consider the matter at all. The Committee also feels that irrespective of whether the Court of Appeals ultimately approves the reasoning and result in *Mahoney*, it is preferable that the parties expressly decide for themselves if and how interest will run in the particular circumstances of the case.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the running of interest after a concession of liability.

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

Section 1. Rule 2104 of the civil practice law and rules is amended to read as follows:

§2104. Stipulations. An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by [him or his] the party or the party's attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk. A stipulation acknowledging or declining to contest liability on a claim may specify the rate, method of calculation or date from which prejudgment interest will be computed.

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

11. <u>Clarifying Requirements for Filing Copies of Prior Pleadings with Certain Motion Papers</u>
(CPLR 2221(d)(e), CPLR 3211(c))

The Committee recommends amendments to CPLR 2221 and 3211 to clarify the requirements for filing copies of prior pleadings with certain motion papers. The first proposal, an amendment to CPLR 2221, would codify case law requirements that a party seeking reargument, renewal or both must submit with its CPLR 2221 motion a copy of the papers submitted on the prior motion as well as a copy of the order determining it. The second proposal, an amendment to CPLR 3211(c), would codify the case law requirement that a party seeking relief under CPLR 3211(a) or (b) must submit with its motion a copy of the pleading.

CPLR 2221

Currently, CPLR 2221 does not indicate whether a party seeking reargument or renewal must submit the underlying motion papers. However, many courts, including the Appellate Division, have concluded that a CPLR 2221 movant's failure to submit the underlying motion papers is cause to deny the CPLR 2221 motion. In fairness to the bar, the Committee believes that the requirement that the underlying motion papers accompany a motion for reargument or renewal ought to be clear and ought to come from the CPLR. The Committee recommends that CPLR 2221 is the statute where a practitioner seeking reargument or renewal, or both, is likely to find it.

The Committee recommends that where the party is seeking reargument or renewal, or both, in a paper-filed action, the burden of complying with this requirement should be - in most circumstances - modest. The party must submit a hard copy reproduction of the underlying motion papers; indeed, many practitioners do this already. In an e-filed action, the movant could upload the underlying motion papers as an exhibit to the CPLR 2221 motion or simply reference the e-filing system docket number(s) of the previously filed papers (see CPLR 2214[c] ["Except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system."]). This measure would add a reference to CPLR 2214(c), to make plain the intent under CPLR 2214[c] that a CPLR 2221 movant in an e-filed case can discharge his or her

burden to include a copy of the underlying motion papers by making reference to the e-filing system docket numbers of the previously e-filed submissions.

CPLR 3211

It is incontrovertible that the court must have a copy of the pleading to adjudicate a motion to dismiss that pleading. So, a party seeking relief under CPLR 3211(a) or (b) should be required to support its motion with a copy of the pleading. Also, CPLR 3211 and 3212 are kindred statutes that are often invoked together. The proposed amendment would provide greater symmetry between those two statutes.

In addition, there are a number of decisions that have already imposed a submit-the-pleading requirement (e.g. *Alizio v Perpignano*, 225 AD2d 723 [1996]; *1501 Corp v Leilenok Realty Corp*, 2015 WL 2344489 [Sup Ct, Queens County 2015]; *Gibbs v Kings Auto Show Inc*., 2015 WL 1442374 [Sup Ct, Kings County 2015]; *Lawlor v Torchmark Corp*., 2015 WL 7291050 [Sup Ct, Kings County 2015]; see also *Sternstein v Metropolitan Ave. Dev*., LLC, 2011 WL 2610520 [Sup Ct, Kings County 2011] ["Plaintiffs are correct that failure to annex the complaint is a procedural defect, but defendants have sufficiently cured the defect by supplying the complaint in the reply."])). The Committee believes that practicing attorneys would be better served if a rule requiring the submission of a pleading on a CPLR 3211 motion was clearly set forth in the CPLR instead of the annotations to it. CPLR 2214(c), which provides that "[t]he moving party shall furnish all other papers not already in the possession of the court necessary to the consideration of the questions involved.," seemingly requires a party moving under CPLR 3211(a) or (b) to submit the pleading. But much of the procedure governing motions under CPLR 3211(a) and (b) is provided by CPLR 3211 itself (see subdivisions [c] and [e]). Any procedural requirements relating specifically to CPLR 3211 should be contained in that statute.

The burden on the CPLR 3211 movant is minimal: submit the pleading. In a paper filed action, the movant would submit a hard copy of the pleading as an exhibit; in an e-filed action, the movant could upload the pleading as an exhibit to the motion or simply reference the e-filing system docket number of the previously filed pleading (see CPLR 2214[c] ["Except when the rules of the court provide otherwise, in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system."]). This measure adds a reference to CPLR 2214(c) to make plain that statute's intent that a CPLR

3211 movant in an e-filed case can discharge his or her burden to include a copy of the pleading by making reference to the e-filing system docket number of the previously e-filed pleading.

The clarity and predictability that this measure will provide outweigh significantly any modest burden imposed by the amendment. The Committee recognizes that there may be situations where submission of all of the underlying motion papers may not be warranted or necessary. However, it rejects the alternative approach of limiting the rule to require submission of solely those prior papers that are necessary to decide the motion (undeniably, there may be no benefit to requiring submission of papers (potentially voluminous ones) that are unrelated to the issues raised) because the court is free to direct otherwise. The Committee takes note firmly that (1) the Court has discretion to dispense with the requirement that a CPLR 2221 movant submit all underlying motion papers or to overlook a movant's failure to failure to file some or all of the underlying motion papers and (2) the authority under CPLR 3212(b) for a court to overlook a movant's failure to submit a pleading in support of a motion for summary judgment applies with equal force under CPLR 3211.

Regulatory Reform

It is of great concern to the Committee that there exists a practice in some courts to deny motions in e-filed cases on the ground that the movants did not provide the court with "working copies" (see 22 NYCRR 202.5-b(d)(4)). The term “working copies” has no statutory basis in the CPLR, yet at this time it is recognized widely in practice and exists in court rules. Therefore, the Committee recommends, as a companion to this statutory measure, an amendment of the Uniform Rules of the Supreme and County Courts to provide for a "safe harbor" provision, requiring a court, prior to denying a motion on the basis that the movant did not provide a working copy, to provide the movant with a brief 5-day cure period. (See V. Recommendation to Certain Regulations, Measure No.1).

Proposal

AN ACT to amend the civil practice law and rules, in relation to motion papers

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

Section 1. Paragraphs (d) and (e) of rule 2221of the civil practice law and rules are amended to read as follows:

(d) A motion for leave to reargue:

1. shall be identified specifically as such, and be accompanied by the motion papers submitted on the prior motion and the order from which reargument is sought, except as provided in subdivision (c) of rule 2214 or otherwise directed by the court;

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and

3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(e) A motion for leave to renew:

1. shall be identified specifically as such, and be accompanied by the motion papers submitted on the prior motion and the order from which renewal is sought, except as provided in subdivision (c) of rule 2214 or otherwise directed by the court;

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion.

§ 2. Subdivision (c) of rule 3211 of the civil practice law and rules is amended to read as follows:

(c) [Evidence]Supporting proof; evidence permitted; immediate trial; motion treated as one for summary judgment. A motion made under subdivision (a) or (b) shall be supported by a copy of the pleadings and by other available proof, except as provided in subdivision (c) of rule

2214 or otherwise directed by the court. Upon the hearing of a motion made under subdivision (a) or (b), either party may submit any evidence that could properly be considered on a motion for summary judgment. Whether or not issue has been joined, the court, after adequate notice to the parties, may treat the motion as a motion for summary judgment. The court may, when appropriate for the expeditious disposition of the controversy, order immediate trial of the issues raised on the motion.

§ 3. This act shall take effect immediately and shall apply to motions filed on or after such effective date.

12. Addressing Subpoenaed Documents for Trial
(CPLR 2305)

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

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

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

Proposal

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

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

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

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

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

13. Regarding Certificates of Conformity
(CPLR 2106(b); CPLR 2309(c))

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of the Advisory Committee on Civil Practice. This measure would amend sections 2106(b) and 2309(c) of the Civil Practice Law and Rules to eliminate the requirement for an out-of-state affidavit.

The Advisory Committee recommends repeal of the CPLR 2309(c) requirement for an out-of-state affidavit. The certificate required by CPLR 2309(c), commonly referred to as a "certificate of conformity," must contain language attesting that the oath administered in the foreign state was taken in accordance with the laws of that jurisdiction or the law of New York. The purpose of this recommendation is to eliminate this unnecessary step that creates a potential defect, by permitting the affiant to affirm under penalty of perjury pursuant to CPLR 2106. Under current law, foreign affiants outside of the United States are not required to submit certificates of conformity. Only affiants within the United States, but outside the State of New York, are required to do so. In addition, this measure amends CPLR 2106 to permit any person located outside the state of New York to submit an affirmation of truth a statement, not just foreign persons located outside the geographic boundaries of the United States.

This act would take effect immediately upon being signed into law.

Proposal

AN ACT to amend the civil practice law and rules, in relation to certificates of conformity

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

Section 1. Subdivision (c) of section 2309 of the civil practice law and rules is amended to read as follows:

(c) Oaths and affirmations taken without the state. [An]Subject to the provisions of rule 2106, an oath or affirmation taken without the state shall be treated as if taken within the state if it is [accompanied by such certificate or certificates as would be required to entitle a deed acknowledged without the state to be recorded within the state if such deed had been acknowledged before the officer who administered the oath or affirmation] subscribed and affirmed by the affiant to be true under penalties of perjury and contains an acknowledgement that the document may be filed in an action or proceeding in a court of law.

§ 2. Subdivision (b) of rule 2106 of the civil practice law and rules is amended as follows:

(b) The statement of any person, when that person is physically located outside the [geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States of the] state of New York, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ___ day of ______, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the [geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States] state of New York, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law. (Signature)

§ 3. This act shall take effect immediately.

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

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

Motions To Dismiss On Notice Of Claim Grounds

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

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

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

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

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

Yet, the purpose of the notice of claim provisions is to provide municipalities with the opportunity to timely investigate claims, not to provide them with the means to tactically obtain dismissals. If the time to correct the error has not passed, there is no reason why the plaintiff should not be given the opportunity to correct the error. Nor is there any reason why a municipality should be allowed to sit silently through years of litigation — including conferences

attended by judges or their staff, motions read and resolved by judges and their staffs, appeals consuming court time and resources, and even trials — before raising a dispositive objection that could have been raised years earlier.

The *Margerum* Anomaly

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

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

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

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

Filling An Ostensibly Unintended Gap

CPLR 3211(a) specifies the grounds on which a party may move to dismiss a claim. CPLR 3211(e) specifies the time in which each such motion should be made. However, for no discernable reason, CPLR 3211(e) addresses only ten of the eleven paragraphs in CPLR 3211(a). It says nothing at all about paragraph eleven. That paragraph authorizes a motion to dismiss on the ground that "the party is immune from liability pursuant to section seven hundred twenty-a of the not-for-profit corporation law."

The proposed bill would amend CPLR 3211(e) so as to expressly address motions

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

Proposal

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

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

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

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

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

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

1. a defense is founded upon documentary evidence; or

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) Standards for motions to dismiss in certain cases involving public petition and

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

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

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

§ 50-i. Presentation of tort claims; commencement of actions. 1. No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for [personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of] damage, injury or death, or for invasion of personal or property rights, of every name and nature, and whether casual or continuing trespass or nuisance and any other claim for damages arising at law or in equity, alleged to have been caused or sustained in whole or in part by or because of any misfeasance, omission of duty, negligence or wrongful act on the part of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer [firemen] firefighters of any such city, county, town, village, fire district or school district or any

volunteer [fireman] firefighter whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this article, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice, or if service of the notice of claim is made by service upon the secretary of state pursuant to section fifty-three of this article, that at least forty days have elapsed since the service of such notice, and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the death.

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

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

4. (a) Notwithstanding any other provision of law to the contrary, including any other subdivision of this section, section fifty-e of this article, section thirty-eight hundred thirteen of the education law, and the provisions of any general, special or local law or charter requiring as a condition precedent to commencement of an action or special proceeding that a notice of claim be filed or presented, any cause of action against a public corporation for personal injuries suffered by a participant in World Trade Center rescue, recovery or cleanup operations as a result of such participation which is barred as of the effective date of this subdivision because the applicable period of limitation has expired is hereby revived, and a claim thereon may be filed and served and prosecuted provided such claim is filed and served within one year of the effective date of this subdivision.

(b) For the purposes of this subdivision:

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

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

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

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

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

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

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

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

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

Current Law

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

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

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

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

incurring the costs of retaining an expert.

The Proposal

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

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

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

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

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

What The Proposal Would Not Change

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

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

900 (4th Dep't 1998); *Rosati v. Brigham Park Co-Op. Apartments*, 37 Misc.3d 1206(A), Slip Op 2012 WL 4748396.

Proposal

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

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

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

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

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

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

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

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

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

The Committee believes that, on balance, the current rules governing expert disclosure work reasonably well in cases other than commercial cases. The issue of expert disclosure, generally, raises diverse opinions in the bar. Therefore, the Committee recommends that CPLR 3101(d)(1)(i) should be modified to permit additional expert disclosure in substantial commercial cases only. The issues addressed by experts in commercial cases are often complex, touching on nuanced economic, financial and corporate principles, such as how stock or other securities should be valued; how a business should be valued; or whether the financial analysis of a board of directors was sound under the circumstances. In addition to presenting difficult legal and

factual issues, commercial cases often involve substantial sums of money or impact corporate governance. Generous expert disclosure is available in virtually all other forums, including all other state courts and the federal courts, *see* Federal Rules Civil Procedure 26. A modern forum for the resolution of commercial disputes is essential for New York to maintain its prominence as an international financial center; unless meaningful expert disclosure is routinely available in commercial actions, New York's efforts to maintain its financial dominance may be seriously compromised. Accordingly, we believe that additional expert disclosure in commercial cases should be permitted to provide the world class forum for the resolution of commercial disputes the State needs.

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

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

commercial cases. To be sure, the proposed amendment expressly states that it is inapplicable to "personal injury, wrongful death, matrimonial, or foreclosure actions."

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

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

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

Proposal

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

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

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

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

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

§ 2. This act shall take effect immediately.

17. Regarding Physician-Patient Privilege Waiver as to Prior Injuries (CPLR 3101(j) (new))

The Committee recommends the addition of a new subdivision (j) to CPLR § 3101 to specify what medical records are "material and necessary" to the defense of a personal injury action, so as to effectively bridge the polar extremes that now exist in the First and Second Departments of the Appellate Division.

One issue that arises in virtually every personal injury action is the extent to which the defendant may obtain disclosure of the plaintiff's medical or psychiatric history. Common law holds that a person who commences a personal injury action waives the physician-patient privilege that would otherwise exist with respect to those medical records that are material and necessary to the defendant's defense against the claim. *Koump v. Smith*, 25 NY2d 287, 294 [1969]. By comparison, the defendant does not waive his or her doctor-patient privilege simply by being sued and can successfully resist disclosure of even the most pertinent of his or her medical records. For example, a personal injury defendant who is claimed to have driven while impaired by alcohol can successfully resist disclosure of medical records that would reveal his or her blood alcohol level at the time of the subject accident. *Dillenbeck v. Hess*, 73 NY2d 276 [1989].

The problem, which the proposed amendment is intended to correct, is that the scope of discovery that a personal injury defendant is afforded with respect to the plaintiff's medical history now varies greatly with the venue of the action, and within a given venue can vary significantly from judge to judge. In the Second Department, the Appellate Division has repeatedly ruled that any claim for emotional injury or for loss of enjoyment of life, which are sequelae to at least some extent of virtually every serious or permanent physical injury, effectively renders the plaintiff's entire life's history an open book.[20] In such cases, the

[20] *Greco v. Wellington Leasing Limited Partnership*, 144 AD3d 981, 982 [2d Dept 2016] ("because the plaintiff affirmatively placed her entire medical condition in controversy through broad allegations of physical injuries and claimed loss of enjoyment of life due to those injuries, which included impairment of her nervous system and requirement of neurological care, the nature and severity of her previously psychiatric conditions and her history of treatment for substance abuse are matters material and necessary to the issue of damages"); *Bravo v. Vargas*, 113 AD3d 577, 578 [2d Dept 2014] (similar); *Graziano v. Cagan*, 105 AD3d 701, 702 [2d Dept 2013] (similar).

defendant is often afforded discovery of the plaintiff's entire life history, even including embarrassing and ostensibly irrelevant treatment many years removed from the case.

In contrast to the rule in the Second Department, the First Department has generally limited the disclosure the defendant can obtain to those records that relate to diagnosis or treatment concerning the same body parts or conditions that are in issue in the subject suit.[21] The First Department's recently reversed ruling in *Brito v. Gomez*, 168 AD3d 1 [1st Dept 2018], *rev'd* 33 NY3d 1126 [2019] nicely illustrates where that standard has led.

There is, thus, an enormous difference between the scope of disclosure afforded the defendant in the First Department and the scope of disclosure afforded the defendant in the Second Department.[22] What is more, it does not appear that the gulf will be bridged any time soon in the absence of a statutory amendment. While the Court of Appeals had the opportunity in *Brito* to set forth a single rule or standard to govern the scope of medical discovery allowed a personal injury defendant, it instead limited its ruling to "the particular circumstances of this case," stating on abbreviated section 500.11 review that "[u]nder the particular circumstances of this case, plaintiff therefore waived the physician-patient privilege with respect to the prior treatment of her knees." Further, the Court of Appeals ruling in *Brito* seems not to have effected any change in the First Department, for that Court recently invoked the same "body parts" limitation that it applied in *Brito*, albeit without citing *Brito*.[23]

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[21] *Pellot v. Tivat Realty LLC*, 173 AD3d 498, 499 [1st Dept 2019] ("By suing to recover for injuries to her back, plaintiff 'did not place in issue her entire medical condition'"); *Spencer v. Willard J. Price Associates, LLC*, 155 AD3d 592, 592 [1st Dept 2017] (similar).

[22] The Appellate Division for the Fourth Department has, it seems, charted a course between the extremes. *Almalahi v. NFT Metro Sys. Inc.*, 175 AD3d 1043, 1044-1045 [4th Dept 2019]; *Reading v. Fabiano*, 126 AD3d 1523, 1524 [4th Dept 2015]; *Schlau v. City of Buffalo*, 125 AD3d 1546, 1547-1548 [4th Dept 2015].

[23] *Lafata v. Verizon Communications Inc.*, 180 AD3d 575, 575-576 [1st Dept 2020]; *Abrew v. Triple C Properties, LLC*, 178 AD2d 526, 526-527 [1st Dept 2019] ("discovery of preexisting conditions is permitted where it is relevant to the injuries to the parts of the body that were placed in controversy ... defendants argue that they are entitled to discovery of plaintiff's general medical condition both before and after the 2015 accident, based on plaintiff's claim that his injuries are permanent, caused mental anguish, prevented him from enjoying life, and interfered with his ability to perform his daily activities. However, this Court has repeatedly rejected such broad requests for discovery of prior injuries").

The Committee believes, a) the scope of disclosure should be relatively consistent from one department to another, and b) there should be a reasonable balance between the two polar extremes currently employed by the First and Second Departments.

On the one hand, the defendant should be permitted to obtain the plaintiff's medical records where, as in *Brito* itself, there is reason to believe that the records sought may enable the defendant to prove that there is an alternative cause for the plaintiff's claimed limitations. On the other hand, while there will no doubt be cases where a court could reasonably conclude that a plaintiff's prior medical or psychiatric records reasonably relate to an emotional injury alleged by the plaintiff, the mere fact that the plaintiff claims an emotional injury or a loss of enjoyment of life should not make the plaintiff's life history an open book. The proposed standard set forth in subdivision (j)(1) reflects an effort to achieve that balance, which is consistent with existing Court of Appeals' precedent.

Nothing in paragraph 2, is intended to require that a motion for such disclosure be made when one is not otherwise required.

Proposal

AN ACT to amend the civil practice law and rules, in relation to discovery of the plaintiff's medical history in a personal injury action

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

Section 1. Section 3101 of the civil practice law and rules is amended by adding a new subdivision (j) to read as follows:

(j) Scope of disclosure of medical records in personal injury actions.

1. Medical records are material and necessary to the defense of a personal injury action if they reasonably relate to the injuries or limitations claimed by the plaintiff in the action. A person who commences a personal injury action waives his or her privilege under sections 4504, 4507, and 4508 regarding medical records, but only with respect to those medical records shown to be material and necessary to the defense of the action. A claim by the plaintiff of loss of enjoyment of life or emotional injury shall not of itself render the plaintiff's entire medical history material and necessary to the defense of the action, but such claims shall be considered in assessing whether or to what extent the records sought for the defense of a personal injury action reasonably relate to the injuries and limitations claimed by the plaintiff.

2. A party seeking disclosure of another party's medical records bears the burden of establishing prima facie that the records sought are material and necessary for the defense of plaintiff's claims. If the party seeking disclosure thus establishes a prima facie entitlement to the records sought, the party seeking to withhold medical records subject to disclosure may seek a protective order pursuant to subdivision (a) of section 3103 and bears the burden of establishing why the records should not be disclosed.

3. For the purposes of this subdivision, the term medical records shall mean records of a licensed, registered or authorized professional, or of that professional's employee, under sections 4504, 4507, 4508, or 4510.

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

18. Permitting Parties to Notice Depositions to be Conducted Remotely by Telephone or Electronic Means
(CPLR 3113(d))

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of the CPLR Advisory Committee on Civil Practice. This is a proposal would amend CPLR 3113(d) to permit parties to notice depositions to be conducted remotely by telephone or other electronic means. The statute currently requires the stipulation of all parties in order for a deposition to be conducted remotely or for a party to participate remotely in an in-person deposition. The proliferation of remotely conducted depositions via platforms such as Zoom, Skype and Microsoft Teams during the COVID-19 pandemic has demonstrated to litigators the potential benefits of remote depositions in terms of convenience and savings in time and expense. Although the pandemic is a passing phenomenon, which is, or hopefully soon will be, coming to an end, the Committee is of the view that the experience with remote depositions warrants a change that would permit them to be conducted without the requiring all parties to stipulate thereto.

Accordingly, the Committee proposes this measure, which would permit a party to serve a notice of deposition to be conducted via remote means. Like the requirement of the stipulation under the current rule, the notice would have to designate reasonable provisions to ensure that an accurate record is generated and would have to specify reasonable provisions for the use of exhibits during the deposition.

In addition, the amendment answers various practical questions raised by the circumstances of a remote deposition, during which the witness and the parties may be in different locations. It provides that the place of a remote deposition is deemed to be the location where the deponent answers the questions. It provides that the person administering the oath need not be physically present at the location and may administer the oath electronically, provided that this person can see and hear the deponent and that the person administering the oath is authorized to do so in the place where the deponent answers the questions, or that the deponent acknowledges that he or she understands that the testimony is true under penalties of perjury of the laws of New York. This measure further provides that the parties and the deponent may stipulate to alternative procedures, including alternatives for administering the oath.

Under this measure, rule 3113 continues to provide that any additional costs are to be borne by the party seeking to have the deposition conducted remotely. However, because

attorneys participating in depositions may, for any number of reasons, not want to participate remotely and may prefer to be in the room with the witness, the amendment provides that "[a]ny party may, at their own expense attend and participate in a remote deposition in person at the same location as the deponent." Similarly, because there are many instances in which parties may determine that they do not need to attend in-person a deposition that is not being conducted remotely -- such as distance, time or travel costs -- the amendment provides that "[i]n any deposition that is not being taken remotely, any party, other than the deponent, may participate remotely, provided that the remote participant bears any additional cost or expense associated with such participation." It is the view of the Committee that the provisions in the proposed amendment permitting any party to attend remote depositions in-person and permitting any party to attend in-person depositions remotely, each at their own expense, strike a balance that is fair and reasonable to all litigants under any applicable circumstances.

It should further be noted that nothing in this measure would in any way alter or impair a party's right to object to a deposition which is noticed to be in-person. This measure would take effect immediately.

Proposal

AN ACT to amend the civil practice law and rules, in relation to remote depositions

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

Section 1. Subdivision (d) of Rule 3113 of the civil practice law and rules is amended to read as follows:

(d) [The parties may stipulate that a] A deposition may be taken remotely by telephone or other [remote] electronic means [and that a party may participate electronically]. The [stipulation] notice under Rule 3107 shall designate reasonable provisions to ensure that an accurate record of the deposition is generated, and shall specify [, if appropriate,] reasonable provisions for the use of exhibits at the deposition [; shall specify who must and who may physically be present at the deposition; and shall provide for any other provisions appropriate under the circumstances]. The place of a remote deposition is deemed to be the location where the deponent answers the questions. [Unless otherwise stipulated to by the parties, the officer] The person administering the oath [shall] need not be physically present with the deponent at the place of the deposition and may administer the oath remotely, provided that the person administering the oath can see and hear the person taking the oath; and, if the oath is taken outside of this state, either (i) the person administering the oath is authorized to administer oaths in the place where the deponent answers the questions, or (ii) the deponent acknowledges that deponent understands that the testimony or statement being made is true under penalties of perjury of the laws of the State of New York. Any the additional costs of conducting the deposition remotely [by telephonic or other remote electronic means, such as telephone charges,] shall be borne by the party requesting that the deposition be conducted by such means. Unless the court orders otherwise, the parties and the deponent may stipulate to any alternative procedures for depositions taken remotely, including alternative procedures for administering the oath. Any party may, at their own expense, attend and participate in a remote deposition in person at the same location as the deponent. In any deposition that is not being taken remotely, any party, other than the deponent, may participate remotely, provided that the remote participant bear any additional cost or expense associated with such participation.

§2. This act shall take effect immediately.

19. Improving Judicial Economy by Clarifying the Procedure for Consideration of a Motion to Dismiss a Cause of Action
(CPLR 3211(a)(7))

This measure would ensure that when a party moves to dismiss a complaint for failure to state a cause of action, and makes arguments addressed to specific causes of action, the court would be required to decide the viability of each cause of action addressed. While most courts already do so, the proposal would overrule those decisions that hold that when the notice of motion seeks dismissal of the complaint generally, it should be denied in its entirety once the court determines that a single cause of action is viable even if particularized arguments are made in the supporting papers. By not ruling with respect to each cause of action addressed, courts following this approach fail to streamline the litigation and thereby undermine judicial economy. They also make settlement more difficulty.

In the Committee's view, the proper approach was articulated by the First Department in *Gamiel* v. *Curtis* v. *Riess-Curtis*, 16 AD3d 140 (1st Dept 2005). The court there stated that "[where] a motion to dismiss for failure to state a cause of action particularizes each of the claims in the complaint, *even though it is nominally addressed to the complaint as a whole*, the court should treat that motion as applying to each individual cause of action alleged.... " Id. (emphasis added). Inasmuch as the defendant's supporting affirmation in *Gamiel* made particularized arguments as to the various claims in the complaint, the court denied the motion as to certain claims but granted it as to three others, allowing the case to proceed only on those claims that warranted further attention by the litigants and the lower court.

Unfortunately, not all courts have followed this approach. For example, in *Great Northern Assoc*. v. *Continental Casualty Co*., 192 AD2d 976 (3rd Dept 1993), review of the record shows that while the Notice of Motion sought dismissal of the entire complaint, the supporting affirmation made detailed arguments as to each cause of action. Nonetheless, the Third Department found "[no] error in Supreme Court's wholesale denial of [the] motion to dismiss upon the conclusion that two of the 13 claims stated viable causes of action." The Court said the result was dictated by "clear and well established" precedent in the Third Department. This case demonstrates the need to codify *Gamiel*.

The Second Department had held that if particularized arguments are made in an affirmation in support of a motion nominally addressed to the complaint as a whole, courts

should address each cause of action. *Martirano Construction Corp*. v. *Briar Construction Corp*., 104 AD2d 1028, 1029 (2nd Dept 1984). Where particularized arguments are made only in the lower court brief, however, even if the affirmation references the particularized reasons given in the brief, the court has denied a motion to dismiss a complaint in its entirety upon finding one cause of action to be viable. *Long Island Diagnostic Imaging* v. *Stony Brook Diagnostic Assoc*., 215 AD2d 450 (2nd Dept 1995). It did so in that case even though the movant had made detailed arguments as to each of 19 causes of action in its lower court brief.

The approach that a motion should be denied so long as one cause of action is viable appears to have its roots in older cases like *Advance Music Corp*. v. *American Tobacco*, 296 N.Y. 79, 93 (1946). That case held, under the Rules of Civil Practice, that a motion to dismiss for insufficiency seeking dismissal of an entire pleading must be denied under the rule that a "demurrer to a 'declaration' containing several counts should be overruled if any count is good." The decision did not recognize an exception even for cases in which particularized argument is made as to each cause of action. See *Griefer* v. *Newman*, 22 AD2d 696 (2nd Dept 1964) (reaching same result "early in the life of the CPLR," Prof. Siegel, McKinney's Commentaries 3211:26). Some lower courts relying on the broadly stated rule in *Advance Music* have denied motions to dismiss the complaint -- without any discussion of whether particularized argument was made as to each of several causes of action -- upon finding only one cause of action to be viable. E.g., *Plata* v. *Parkway Village Equities Corp*., 2013 N.Y. Misc. LEXIS 3478 (Sup. Ct. Queens Co., June 13, 2013).

The mere fact that a notice of motion nominally seeking dismissal of the entire Complaint does not needlessly specify by number each and every cause of action should not be grounds for denying the entire motion upon a finding that a single cause of action is viable. Such an approach exalts form over substance and results in a waste of the parties' time and resources. The critical factor should be whether the movant has set forth arguments as to each cause of action. If particularized arguments are made, either in a supporting affirmation or an accompanying memorandum of law, the litigants should be entitled to a decision that eliminates claims that are not viable. A decision addressing each cause of action properly limits future discovery, narrows the issues at trial, and enhances the likelihood of settlement, thus serving the interests of judicial economy.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the motion to dismiss a cause of action

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

Section 1. Paragraph 7 of subdivision (a) of section 3211 of the civil practice law and rules is amended to read as follows:

7. the pleading fails to state a cause of action, the court shall determine the motion with respect to each cause of action addressed in the moving party's motion papers or any memorandum of law; or

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

20. <u>Addressing the Conduct of an Inquest in Default Judgments (CPLR 3215(b))</u>

The Committee recommends adoption of this proposed amendment to CPLR §3215(b) to outline the procedure for an inquest on a default judgment.

A defendant who defaults in appearing concedes only liability. *See Rokina Opt. Co. v. Camera Kings,* 63 N.Y.2d 728, 730, 480 N.Y.S.2d 197, 198-99, 469 N.E.2d 518, 519-20 (1984) ("a defendant whose answer is stricken as a result of a default admits all traversable allegations in the complaint, including the basic allegation of liability, but does not admit the plaintiff's conclusion as to damages"); *Glenwood Mason Supply Co., Inc. v. Frantellizzi,* 138 A.D.3d 925, 31 N.Y.S.3d 107 (2d Dep't 2016). Therefore, the defaulting defendant may still contest damages at an inquest. The CPLR does not contain a detailed procedure for conducting an inquest, but there are provisions in the Uniform Rules for the Supreme and County Courts ("Uniform Rules") addressing the issue. These provisions permit the plaintiff to put in paper proof of damages at the inquest and do not require live testimony. Section 202.46 of the Uniform Rules, entitled: "Damages, inquest after default; proof" provides:

(a) In an inquest to ascertain damages upon a default, pursuant to CPLR 3215, if the defaulting party fails to appear in person or by representative, the party entitled to judgment, whether a plaintiff, third-party plaintiff, or a party who has plead a cross-claim or counterclaim, may be permitted to submit, in addition to the proof required by CPLR 3215(e) [sic; should be CPLR 3215(f)], *properly executed affidavits as proof of damages.* (emphasis added)

(b) In any action where it is necessary to take an inquest before the court, the party seeking damages may submit the proof required by oral testimony of witnesses in open court *or by written statements of the witnesses, in narrative or question-and-answer form, signed and sworn to.* (emphasis added)

See Archer v. Motor Veh. Accident Idem. Corp., 2012 NY Slip OP 33568(U), 2012 WL 10816412 (Sup. Ct., Queens County 2012)(setting down matter for inquest but noting "[i]n lieu thereof, plaintiff may submit properly executed affidavits as proof of damages (22 NYCRR 202.46)"), *aff'd on other grounds* 188 A.D3d 5 (2d Dep't 2014); *see also* Siegel, New York Practice §295 ("Papers on Default Application")("Even at an inquest on damages conducted after

the defendant has conceded liability by failing to appear, the plaintiff may put in paper proof of damages; live testimony is not indispensable.”).

There are similar Uniform Rules in other courts. *See* 22 N.Y.C.R.R. §208.32 (“Damages, inquest after default; proof”) (Uniform Civil Rule for the New York City Civil Court permitting submission of proof at inquest by affidavits); *see also* 22 N.Y.C.R.R. §202.70(g), Commercial Division Rule 32(a)(“Direct Testimony by Affidavit”)(allowing testimony by affidavit at a contested non-jury trial or evidentiary hearing, not just an inquest upon a default).

Despite the existence of these procedures in the Uniform Rules governing default judgment applications, the Committee has been informed that courts and lawyers may not be aware of their existence. Furthermore, the procedure allowed by the plain language of these rules may not sufficiently respect the due process right of a defaulting party to fully cross-examine witnesses testifying as to damages.

In *Rokina Opt. Co. v Camera King*, 63 NY2d 728, 730 (1984), the Court of Appeals held that “judgment against a defaulting party may be entered only upon application to the court along with notice to the defaulting party and ‘a full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages’.” Quoting from *Rokina* in *Conteh v. Hand*, 234 AD2d 96 (1st Dep’t 1996), the First Department ruled that Supreme Court improperly refused to permit the defendants to call a witness at an inquest on damages after the completion of plaintiff’s testimony. The court remanded the matter for a new inquest on damages. In *Ruzal v. Mohammad,* 283 A.D.2d 318, 319, 724 N.Y.S.2d 854 (1st Dep't 2001), the First Department ruled that Supreme Court “erred in holding an inquest on submissions only without defendant having first defaulted on a formal inquest proceeding (22 NYCRR § 202.46[a]).” Quoting again from *Rokina* and citing to *Conteh,* the First Department ordered “the matter restored to the trial calendar for a proper inquest on damages.”

There is also case law interpreting the Uniform Rules, which holds that the plaintiff can only proceed on documentary proof if a defaulting defendant does not contest damages at the inquest. In *Suleiman v. Miamor Transp. Corp*., 13 Misc.3d 1230(A), 2006 WL 3068963 (Sup.Ct., Bronx County 2006), for example, the trial court refused to allow plaintiffs to submit affidavits from their doctors as proof of damages in lieu of their testimony. Interpreting Uniform Rule 202.46, the court concluded that the rule does not permit the plaintiff to submit proof of damages at an inquest in documentary form if the defendant appears at the inquest. Similarly,

in *Rivera v. Serrata*, 19 Misc. 3d 379, 852 N.Y.S. 2d 830 (Sup. Ct., Bronx County 2008), where the inquest was conducted before a jury, the court held that the presentation of written statements pursuant to Uniform Rule 202.46 in lieu of live testimony "would not sufficiently assist the jurors in determining whether plaintiff suffered a 'serious injury' and in their assessment of the amount of damages." The court read the phrase "'before the court' in the rule, 22 N.YC.R.R. 202.46(b), as providing that plaintiff may present such documentary evidence only in a non-jury proceeding, since the court, as finder of fact, would be in a position to properly evaluate and weigh such evidence, along with that, if any, presented by the defendant."

The court's decision in *Suleiman* relies on language in *Rokina, Conteh*, and *Ruzal* to reach the conclusion that a plaintiff is not permitted to submit proof of damages on papers alone if the defendant appears at the inquest. The Committee believes that this interpretation of the relevant Uniform Rules is unnecessarily restrictive, as a party applying for a default judgment before the court should be permitted to submit proof in affidavit form. *See* *Rawlings v. Gillert*, 104 A.D.3d 929, 962 N.Y.S.2d 325 (2d Dep't 2013)(while noting that "the defendant is entitled to a 'full opportunity to cross-examine witnesses, give testimony and offer proof in mitigation of damages,'" the court also ruled that "plaintiff should have been permitted to submit evidence, including affidavits (see 22 NYCRR 202.46), supporting her claims for [damages]"). The defaulting party must, however, be afforded the opportunity to fully cross-examine any damages witnesses, regardless of whether they have provided oral testimony or have submitted proof in affidavit form.

Given the conflicting case law in this area, the Committee requests the following amendment to CPLR 3215(b) to ensure clarity and due process in default judgment actions.

Proposal

AN ACT to amend the civil practice law and rules, in relation to a default judgment

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

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

(b) Procedure before court. The court, with or without a jury, may make an assessment or take an account or proof, or may direct a reference. The party entitled to judgment may be permitted to submit, in addition to the proof required by subdivision (f) of this section, properly executed affidavits or affirmations as proof of damages, provided that if the defaulting party gives reasonable notice that it will appear at the inquest, the party seeking damages may submit any such proof by oral testimony of the witnesses in open court or, after giving reasonable notice that it will do so, by written sworn statements of the witnesses, but shall make all such witnesses available for cross-examination. When a reference is directed, the court may direct that the report be returned to it for further action or, except where otherwise prescribed by law, that judgment be entered by the clerk in accordance with the report without any further application. Except in a matrimonial action, no finding of fact in writing shall be necessary to the entry of a judgment on default. The judgment shall not exceed in amount or differ in type from that demanded in the complaint or stated in the notice served pursuant to subdivision (b) of rule 305.

§2. This act shall take effect immediately.

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

The Committee recommends an amendment to CPLR 3215(g)(1) to resolve questions under current law regarding the procedure for a party in default who was not provided notice. Also, the Committee believes clarification of current case law is necessary to avoid reliance upon a decision holding that failure to give notice when required “is a jurisdictional defect that deprives the court of authority to entertain a motion for leave to enter a default judgment.” *Paulus v. Christopher Vacirca*, 128 A.D. 3d 116, 126 (App. Div. 2d Dept., 2016) The Committee agrees with the decision insofar as it vacated the default, but believes it is error to rule that there was no jurisdiction. The Committee proposes an amendment to require that the party in default who was not served with notice of the default shall be entitled to have the default judgment vacated if that party acts within 60 days after learning of its entry. No proof of merit shall be required of such a party in support of the vacatur.

Following the required vacatur of the default judgment, the court will have the discretion to consider the procedural posture of the case, including, but not limited to (1) denial of the motion for default, without prejudice, permitting the motion to be made again upon prior notice; (2) considering the underlying motion for the default judgment, with an opportunity for the defaulting party to be heard on the motion; or (3) permitting the defaulting party to cure the default.

The time to make the application to vacate the default judgment should not be unlimited. Sixty days after learning of the entry of the judgment should give the defaulting party sufficient time to contact a lawyer and make the application. This bright line time limit is preferable to a more flexible standard, which may entail litigation on whether the standard is met.

This measure would add an additional sentence at the end of 3215(g)(1) to read as follows: "When such notice is required but not given and judgment is entered, an application to vacate the judgment brought by the party entitled to receive notice shall be granted, provided application is made within 60 days after having obtained knowledge of entry of the judgment."

Proposal

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

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

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

1. Except as otherwise provided with respect to specific actions, whenever application is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application, and if more than one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise. The court may dispense with the requirement of notice when a defendant who has appeared has failed to proceed to trial of an action reached and called for trial. When such notice is required but not given and judgment is entered, an application to vacate the judgment brought by the party entitled to receive notice shall be granted, provided such party acted within 60 days after having obtained knowledge of entry of the judgment.

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

22. Addressing the Time Within Which a Party May Discontinue a Claim Without Prejudice (CPLR 3217(a)(1))

The Committee believes that it is necessary to address the time within which a claim may be discontinued without prejudice. CPLR 3217(a)(1) permits such withdrawal "at any time before a responsive pleading is served." In *BDO USA, LLP* v. *Phoenix Four*, 113 A.D.3d 507 (First Dept., 2014), the First Department was faced with a discontinuance by the plaintiff after a motion to dismiss had been served but prior to the service of a responsive pleading. It held that the discontinuance was ineffective and a nullity, and said "Indeed, if a motion to dismiss is not a 'responsive pleading' within the meaning of CPLR 3217(a)(1), a plaintiff would be able to freely discontinue its action without prejudice solely to avoid a potentially adverse decision on a pending dismissal motion."

The court was correct in reaching the result. As Prof. David Siegel noted in his practice commentary in McKinney's Consolidated Laws, "(T)he defendant who has moved to dismiss under CPLR 3211 has already done as much in the litigation (and more) than if she had merely answered the complaint." The problem is that the court was not correct in finding that the motion to dismiss was a "responsive pleading" for this purpose. It is not, and there is no support for a motion to dismiss being deemed a form of responsive pleading.

Consequently, the law is now confused. Under the *BDO* decision, the time within which discontinuance is permitted should end with the service of a motion to dismiss, but other courts examining this question will not be able to find support for the conclusion that a motion to dismiss is a pleading.

This proposal is intended to support the result that was reached in the BDO case and make it clear to other courts that statutory law supports that result. It does not convert a motion to dismiss into a pleading, but, rather, amends the statute to provide that discontinuance must be prior to service of a responsive pleading or a motion to dismiss a claim. Thus, it is consistent with the result reached by the First Department and creates a sound legal basis on which other courts can reach the same result.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the notice of voluntary discontinuance

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 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 a motion to dismiss the claim is served, or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court; or

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

23. Clarifying Timing in Foreclosure Settlement Conferences
(CPLR 3408(n))

This measure seeks to amend the Civil Practice Law and Rules to clarify CPLR 3408(n) to make clear that the requirement thereunder that substantive motions such as CPLR 3211 motions to dismiss for lack of jurisdiction be held in abeyance until the mandated CPLR 3408 settlement conference process in residential foreclosure actions has concluded does not excuse the making of such motions in a timely fashion in accordance with CPLR 3211(e).

There have been instances where attorneys improperly construe CPLR 3408(n) as relieving them of the obligation to either (1) move to dismiss on that ground pre-answer; or (2) raise that affirmative defense in an answer or move to dismiss on that ground within 60 days of serving the answer (CPLR 3211(e)). While CPLR 3408(n) does not relieve parties of that obligation, and merely provides that such motions will be held in abeyance pending the conclusion of the CPLR 3408 settlement conference process, parties, given the current language of the rule, may be lulled into the false assumption that they do not need to make such substantive motions until after the CPLR 3408 settlement process has been concluded and thereby find themselves precluded by CPLR 3211(e) from making such substantive motions where the 60 day period has run. Accordingly, this measure recommends that CPLR 3408(n) be amended. This act would take effect immediately.

Proposal

AN ACT to amend the civil practice law and rules in relation to clarifying that defenses bases on alleged lack of jurisdiction need be made in a timely fashion and in accordance with CPLR 3211(e).

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

Section 1. Subdivision (n) of rule 3408 of the civil practice law and rules is amended to read as follows:

Any motions submitted by the plaintiff or defendant shall be held in abeyance while the settlement conference process is ongoing, except for motions concerning compliance with this rule and its implementing rules, provided however that nothing herein shall abrogate the time requirements of CPLR 3211 (e)

§ 2. This act shall take effect immediately.

24. <u>Relating to Seating Alternate Jurors (CPLR4106)</u>

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of the Advisory Committee on Civil Practice. Selection of one or more alternate jurors at the request of a party and with the consent of the court is authorized by CPLR 4106. This provides an invaluable mechanism for continuing a trial and avoiding declaration of a mistrial when, during the trial, a juror is unable to continue to serve because of some physical or mental disability or evinces a bias or prejudice against one of the parties.

In 2013 (effective January 1, 2014), upon recommendation of the Advisory Committee, CPLR 4106 was revised to permit the court, without first securing the permission of the parties, to seat an alternate juror after a case has been submitted to the jury and deliberations have begun, and to permit that juror to participate in deliberations if a regular juror has become unable to perform the duties of a juror. However, when an alternate is seated during deliberations, CPLR 4106 is silent as to whether jury shall then continue to deliberate from the point where the alternate is seated, or must start deliberations over, from the beginning, even reconsidering issues that had been resolved by the original jurors.

The Committee recommends that CPLR 4106 be amended to provide a direction that when an alternate juror is seated after deliberations have begun, the reconstituted jury shall begin deliberations over again on all issues that were presented to the jury when the case was submitted to them.

No appellate courts have addressed this matter in New York. In *Gallegos v. Elite Model Management Corporation*, 28 A.D.3d 50 (1st Dep't, 2005), during deliberations in the damages trial of a bifurcated case, the trial judge seated two alternate jurors with this instruction to the newly constituted jury: "You are going to start deliberations from scratch…[i]t is as if you were starting from the very beginning." On appeal, however, the damages verdict was reversed because, absent consent by defense counsel, the substitution of alternate jurors was improper.

The Committee believes that when an alternate juror has been seated during deliberations, the court should instruct the newly constituted jury that it must start over and deliberate on all of the issues that were submitted to it when the deliberations began. Even though this procedure may prolong the length of deliberations, the benefits are several: the

original jurors will now have the benefit of input from the newly substituted juror on all issues; the substituted juror will hear the positions previously advanced by those jurors. Those positions may now change. After a verdict is announced and a request is made to poll the jury, all six members of the reconstituted jury will be able to honestly state that it was, or was not, their verdict. The parties will have the assurance that all six jurors in the jury box, including the substituted juror, participated in the deliberations leading to the verdict.

The Committee recognizes that where trial has been bifurcated and a verdict has already been recorded in the liability phase, when an alternate is seated in the damages phase, the newly constituted jury should be instructed to begin again only with regard to the issues raise in the damages phase.

The Committee also recommends that the Pattern Jury Instruction Committee consider an amendment to PJI 1.13A to reflect these proposals. This act shall take effect immediately and apply to all actions pending on or after such effective date.

Proposal

AN ACT to amend the civil practice law and rules, in relation to alternate jurors

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

Section 1. Section 4106 of the civil practice law and rules is amended to read as follows:

§ 4106. Alternate Jurors. One or more additional jurors, to be known as "alternate jurors", may be drawn upon the request of a party and consent of the court. Such alternate juror or jurors shall be drawn at the same time, from the same source, in the same manner, and have the same qualifications as regular jurors, and be subject to the same examinations and challenges. They shall be seated with, take the oath with, and be treated in the same manner as the regular jurors. After final submission of the case, the court may, in its discretion, retain such alternate juror or jurors to ensure availability if needed. At any time, before or after the final submission of the case, if a regular juror dies, or becomes ill, or is unable to perform the duties of a juror, the court may order that juror discharged and draw the name of an alternate, or retained alternate, if any, who shall replace the discharged juror, and be treated as if that juror had been selected as one of the regular jurors. Once deliberations have begun, the court may allow an alternate juror to participate in such deliberations only if a regular juror becomes unable to perform the duties of a juror. After an alternate has been substituted, the jury shall deliberate anew on all of the issues that were submitted to the jury at the outset of deliberations. Where a jury has rendered the verdict on one or more issues, and an alternate juror must be seated, the jury shall deliberate anew on all issues that were not determined by the rendered verdict.

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

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

The Committee recommends the adoption of a Parent-Child communication privilege. It is intended that communications induced by the confidential parent-child relationship, made in confidence and concerning which confidentiality has not been waived, would be protected from forced disclosure. The provision does not provide, as in the case with the spousal privilege under CPLR 4502, that one of the participants in the confidential communication can prevent the disclosure by the other. Rather, the proposed language merely restricts compelled disclosure for qualified communications. Either party to the confidential communication may reveal it if they choose.

The privilege would extend to communications between a child and the person legally responsible for the care of such child. The phrase "person legally responsible for the care" is drawn from the section 1012 of the Family Court Act and is intended to refer to those persons who have the legal responsibility of parents, or who function as such, such as foster parents. The person should be "the functional equivalent of a parent" in a "familial or household setting" (see Matter of Yolanda D., 88 N.Y.2d 790 (1996)). It does not include, for example, a teacher, day care worker or other person who provides temporary care of a child, even if an institutional setting (88 N.Y. 2d 796).

It is intended that the principles of the case law limiting the spousal privilege would limit this privilege as well. For example, although both words and acts may fall within the privilege (see, e.g. People v. Dagahita, 299 N.Y. 194 (1949)), the privilege would not apply unless the communication is actually induced by the confidential parent/child relationship. It must be "… prompted by the affection, confidence and loyalty engendered by such relationship." (Poppe v. Poppe, 3 N.Y.2d 312 (1957)). It should not include "daily and ordinary exchanges" or general business communications and would encompass only those communications which "… would not have been made" but for the "absolute confidence in" the parent/child relationship (see, People v. Melski, 10 N.Y. 2d 78, 80 (1961)). There was concern on the Committee that this memorandum emphasizes that commercial or business transactions are not the type of communications that are "induced" by the "absolute confidence" in the parent-child relationship. The motivation for such business communications is distinct from the interactive communication induced by the relationship to

be protected. Although the exact parameters of the confidential communications covered by the privilege would require some case-by-case analysis, it is intended that the privilege be limited to communications of a truly confidential nature involving the counsel inherent in the special parent or parentlike-child relationship. Also, the privilege would not cover communications made in the presence of another person (see, People v. Ressler, 17 N.Y. 2d 174 (1966)) unless another parent or guardian is present. For example, the privilege would not apply if the communication were made in the presence of a sibling child.

The bill includes an exception to the privilege for proceedings under Family Court Act section 1046, involving child abuse or neglect. It is assumed that the exception for communications in pursuit of criminal activity would also apply (see, People v. Watkins, 63 A.D.2d 1033 (1978)).

The Committee recognizes that restraints on a court's fact-finding powers must be judiciously limited, but also recognizes that certain relationships present such unique and important interest in confidentiality, that a limited privilege should be recognized. The confidentiality of the parent-child relationship presents interests sufficiently compelling to allow a limited restriction on the power of the courts to compel testimony.

The Advisory Committee on Civil Practice is aware that the Advisory Committee on Criminal Practice is also considering proposing a statutory parent-child privilege, but their proposal has come sufficiently late in the development of this report that this committee has not yet been able to harmonize our bill with theirs. However, the committees intend to continue to collaborate and expect to be able to offer a unified proposal by the beginning of the legislative session.

Proposal

AN ACT to amend the civil practice law and rules and the family court act, in relation to creation of a statutory parent-child privilege in civil cases

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 4502-a to read as follows:

§4502-a. Parent-child confidential communications. A child and his or her parent, or person legally responsible for the care of such child shall not be compelled to disclose a confidential communication between them.

§2. Paragraph (vii) of subdivision (a) of section 1046 of the family court act, as amended by chapter 81 of the laws of 1979 and chapter 432 of the laws of 1993, is amended to read as follows:

(vii) neither the privilege attaching to confidential communication between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the parent-child privilege as set forth in section forty-five hundred two-a of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, nor the rape crisis counselor-client privilege, as set forth in section forty-five hundred ten of the civil practice law and rules, shall be ground for excluding evidence which otherwise would be admissible.

§3. This act shall take effect immediately.

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

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

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

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

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

Proposal

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

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

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

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

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

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

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

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

27. Harmonizing Prima Facie Proof of Damages
(CPLR 4533-a); UCCA 1804

This measure is meant to remedy differing standards of prima facie proof of damages required under CPLR §4533-a and Uniform City Court Act (UCCA) §1804. The issue is that §4533-a of the CPLR is designed to simultaneously: 1) simplify the standard of prima facie proof of damages in a non-small claims civil action; and 2) create a presumption against fraud by the provider and a litigant by adding a material certification and representation to the bill or invoice. It prevents both plaintiff and defendant from submitting bogus bills as proof of damages under $2,000.00. To be proof of reasonable value, a bill or invoice for services or repairs must (1) bear a certification by the person, firm or corporation or an authorized agent or employee rendering the services or making the repairs and charging same; (2) include a verified statement that no part or payment will be refunded to the debtor; and (3) indicate that the amounts itemized are the usual and customary rates charged for the services or repairs by the affiant or employer. Further, a true copy of the itemized bill or invoice with a notice of intention to introduce the bill or invoice at trial must be served at least 10 days before trial.

The monetary limitation for prima facie proof of damages under CPLR §4533-a ($2,000.00) is antiquated (1968) in relation to the passage of Uniform City Court Act §1804 ($5,000.00) for prima facie proof of damages in small claims actions (1991). In contrast, UCCA §1804, the Informal and Simplified Procedure for Small Claims, only requires an itemized bill or invoice, receipted and marked paid, or two itemized estimates for services and repairs. It states in pertinent part as follows: "The court shall conduct hearings upon small claims in such a manner as to do substantial justice between the parties according to the rules of substantive law and shall not be bound by statutory provisions or rules of practice, procedure, pleading or evidence…"

For obvious reasons, the intent of UCCA §1804 is to simplify the small claims procedure for its litigants without fear of the complexity associated with the usual rules of civil practice. In a non-small claims civil action involving most likely much more damages than $2,000.00, there are more often than not, two attorneys and corporate plaintiffs. There may be one or more bills or invoices that are $2,000.00 or less in the same action which may represent only a part of the Plaintiff's or Defendant's proof of prima facie damages up to the jurisdictional limit. If a bill or invoice is small, it should not require oral testimony from the provider of services. In such

instances, it is much easier to submit a certified and verified bill or invoice with the appropriate representations as proof. It saves both time and money. This more detailed standard of proof is an appropriate requirement for attorneys and those pro se litigants who choose to bring a non-small claims action in a civil part. They should be held to a higher standard of proof to avoid the fraud issue.

It is important to note that the small claims part is designed to accommodate primarily pro se litigants. Often this may be the one and only time that person participates in a court proceeding. The Committee is concerned that if the strict standards of CPLR §4533-a were applied in small claims court, were there are often pro se litigants, the required certification and verification representations needed from a provider as well as the requirement to serve a notice of intention to present an itemized bill or invoice at trial in order to meet the standards would result in dismissed matters or adjournments creating case backlog. Conversely, in a non-small claims action, there is an opportunity for discovery and exchange of proof of damages. There is no such opportunity in a small claims part because such proceedings are designed to primarily promote expedient justice.

Therefore, Committee recommends that the limitation of the amount for prima facie proof of damages under CPLR §4533-a be increased to $5,000.00 from $2,000.00 and that small claims actions should be exempt from application of the provisions of CPLR rule 4533-a.

Proposal

AN ACT to amend the civil practice law and rules, in relation to prima facie proof of damages

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

Section 1. Rule 4533-a of the civil practice law and rules as amended by chapter 249 of the laws of 1988, is amended to read as follows:

Rule 4533-a. Prima facie proof of damages. [An] Except in small claims actions as defined by section 1801 of the New York City civil court act, section 1801 of the uniform city court act, section 1801 of the uniform district court act and section 1801 of the uniform justice court act, an itemized bill or invoice, receipted or marked paid, for services or repairs of an amount not in excess of [two] five thousand dollars is admissible in evidence and is prima facie evidence of the reasonable value and necessity of such services or repairs itemized therein in any civil action provided it bears a certification by the person, firm or corporation, or an authorized agent or employee thereof, rendering such services or making such repairs and charging for the same, and contains a verified statement that no part of the payment received therefor will be refunded to the debtor, and that the amounts itemized therein are the usual and customary rates charged for such services or repairs by the affiant or his or her employer; and provided further that a true copy of such itemized bill or invoice together with a notice of intention to introduce such bill or invoice into evidence pursuant to this rule is served upon each party at least ten days before the trial. No more than one bill or invoice from the same person, firm or corporation to the same debtor shall be admissible in evidence under this rule in the same action.

§2. This act shall take effect immediately.

28. Addressing Authentication of Materials Obtained During Discovery (CPLR 4540-a)

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

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

The idea that a party's production of his or her own papers serves to authenticate them is a specific application of the general rule that the authenticity of a document may be established by circumstantial evidence. See *People v. Myers*, 87 A.D.3d 826, 828 (4th Dep't 2011), *leave to appeal denied*, 17 N.Y.3d 954 (2011). The New York Court of Appeals recognized the probative value of a party's production of its own documents in *Driscoll v. Troy Housing Auth*., 6 N.Y.2d 513 (1959), where the issue was the authenticity of an unsigned, undated "roster card" describing the status of a civil service employee. The card was produced by the civil service commission from its files, where it had been kept for eight years. The Court held that "its authenticity must be presumed, or we have presumed wrongdoing rather than honesty on the part of the public official." *Id*. at 519. The Court's ruling was bolstered by the presumption of regularity that attaches to the acts and records of public agencies, but the authentication-by-production doctrine was also recognized with respect to private documents in *Ruegg v. Fairfield*

Securities Corp., 308 N.Y. 313, 320 (1955). There, the Court observed that the authenticity of a copy of a letter "produced from defendant's own files" was "unquestioned."

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

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

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

the issue of forgery or fraud. Furthermore, the presumption recognized by the statute applies only to the issue of authenticity or genuineness of the item. A party is free to assert any and all other objections that might be pertinent in the case, such as lack of relevance or violation of the best evidence rule.

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

Proposal

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

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

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

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

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

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

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

Current Law

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

Unfortunately, that rule was greatly limited, especially in the Second Department, by the ruling in *Wagman v Wagman* which dealt with the testimony of a chiropractor who, in reaching an opinion, relied upon a report interpreting the patient's magnetic resonance imaging (MRI) films. Even though doctors and chiropractors routinely rely on such reports in their day-to-day practice of diagnosing and treating their patients, the Second Department ruled that the witness could not rely on the report "without the production and receipt in evidence of the original films thereof or properly authenticated counterparts" (292 AD3d at 87).[24]

The Second Department afterwards extended *Wagman* even further, holding that the opinion evidence cannot be based upon an MRI report or similar data from another medical provider unless the author of the report was himself or herself subject to cross-examination.[25]

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

Although the Third Department appears to have definitively rejected the *Wagman* view,[26] the rule is less than clear in the other two Judicial Departments, where there are decisions that appear to be consistent with *Wagman*[27] and decisions that appear to be inconsistent with *Wagman*.[28]

The Advisory Committee's View

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

Doctors, for example, routinely rely upon x-ray reports, laboratory tests, MRI reports, and similar data in making life and death decisions. They do so because, in the overwhelming

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

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

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

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

majority of such cases, the author of the report has more expertise than the treating doctor in interpreting the data in issue. It is, we believe, illogical to posit that such reports are sufficiently reliable to make a life or death choice of treatment, but not sufficiently reliable to serve as a predicate for expert opinion.

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

This Measure

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

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

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

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

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

Proposal

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

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

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

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

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

30. Harmonizing the Law of Evidence Regarding Inadvertent Waiver of the Attorney-Client Privilege
(CPLR 4550 (new))

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

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

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

The current proposal contains minor modifications from the original draft of the proposal. That original draft addressed disclosures made in a "proceeding." CPLR 105(b) provides that the word "action" includes a "proceeding." Therefore, the amended proposal refers to disclosures made in an "action." Additionally, the original draft of the proposed statute listed the absence of "undue prejudice" as one of the conditions for non-waiver of the privilege by inadvertent disclosure, without indicating which party has the burden on that issue. The current proposal makes it clear that the burden is on the party in possession of the inadvertently

disclosed material to demonstrate undue prejudice in the nullification of the waiver and return of the material, while retaining the burden on the disclosing party to demonstrate the other grounds for nullifying the waiver.

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

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

Proposal

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

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

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

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

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

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

31. <u>Clarifying Appeals to Orders Granting or Denying Post-Trial Motions</u>
<u>CPLR 5501(c)</u>

Statement in Support

The Committee recommends that CPLR § 5501(c) be amended to eliminate a trap for the unwary that sometimes serves to frustrate disposition on the merits. The amendment evolves from a special rule that serves no reasonable policy objective and applies in one narrow instance: when the appeal is taken from a post-trial order granting or denying a new trial.

In the more common instance in which a jury verdict is rendered in favor of a party and a judgment is then entered, the party against whom the judgment is entered may appeal from that judgment and urge that the judgment should be modified or reversed by reason of, *inter alia*, "any ruling to which the appellant objected or had no opportunity to object or which was a refusal or failure to act as requested by the appellant, and any charge to the jury, or failure or refusal to charge as requested by the appellant …" CPLR § 5501(a)(3).

While the Appellate Division will generally not consider a legal argument or objection unless it was timely preserved by an objection made during the course of the trial — a very sound prerequisite which the Committee does not seek to change — the Appellate Division does not require that an objection or argument timely raised during the course of the trial be raised anew in the post-trial motion papers in order to be considered on the appeal from the judgment.

The problem is that the rule is exactly the opposite when the trial court grants a post-trial motion for a new trial and the party who prevailed with the jury appeals that order. In that instance, because the appeal is deemed to be solely from the order itself and not from any of the rulings that preceded the order, the Appellate Division will not consider preserved arguments for setting aside the verdict unless they were raised anew in the post-trial motion papers.

Interestingly, while the Appellate Division ruled in *Rivera v. Montefiore Medical Center*, 123 AD3d 424, 427 [1st Dept 2014], *aff'd* 28 NY3d 999 [2016] that an issue that was raised during the trial could not be considered on appeal from the post-trial order unless it had raised anew in the post-trial motion papers, the same court subsequently said almost exactly the opposite in *Powell v. City of New York*, 116 AD3d 589, 589 [1st Dept 1014], albeit without acknowledging the ruling in *Rivera*. The latter decision gave rise to an entire Law Journal column in which a

commentator wrote that *Powell* “leaves the reader with furrowed brows locked in place” and “requires review by the Court of Appeals.”[29]

No reasonable policy objective is served by insisting that an issue that was timely preserved at trial be preserved *yet again* in the post-trial papers. Moreover, the Committee feels that matters should be resolved on their merits absent good reason to the contrary and it discerns no such reason here. Therefore, the Committee proposes an amendment to CPLR 5501(c), which would effectively codify the rule suggested by the *Powell* Court that any issue properly preserved at trial may be raised on an appeal from an order resolving a post-trial motion.

The Proposed Amendment

The proposed amendment would add a sentence to the end of CPLR 5501(c), the provision which concerns the Appellate Division’s scope of review. The new sentence is specific to appeals from post-trial rulings and would provide, “On an appeal from an order granting or denying a post-trial motion, any party to the appeal may raise any issue that was preserved for appellate review during the trial.”

[29] Elliott Scheinberg, “Powell v. City of New York: CPLR 4404(a), Preservation of Issues,” NYLJ, 5/17/17.

Proposal

AN ACT to amend the civil practice law and rules, in relation to appeals from post-trial orders

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

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

(c) Appellate division. The appellate division shall review questions of law and questions of fact on appeal from a judgment or order of a court of original instance and on an appeal from an order of the supreme court, a county court or an appellate term determining an appeal. The notice of appeal from an order directing summary judgment, or directing judgment no a motion addressed to the pleadings, shall be deemed to specify a judgment upon said order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal, without however affecting the taxation of costs upon the appeal. In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation. On an appeal from an order granting or denying a post-trial motion, any party to the appeal may raise any issue that was preserved for appellate review during the trial.

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

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

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

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

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

Eliminating the requirement that an appeal necessarily affect the final judgment would not increase the workload of the appellate court. Indeed, it may well reduce the number of

interlocutory appeals since litigants will not be compelled to file an interlocutory appeal on matters that do not or may not affect the final judgment. Once the final judgment is entered, that appeal could become moot or of little consequence and therefore would no longer require the involvement of the appellate court.

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

Proposal

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

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

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

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

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

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

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

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

5. a verdict after a trial by jury as of right, when the final judgment was entered in a different amount pursuant to the respondent's stipulation on a motion to set aside the verdict as

excessive or inadequate; the appellate court may increase such judgment to a sum not exceeding the verdict or reduce it to a sum not less than the verdict.

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

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

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

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

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

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

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

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

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

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

Proposal

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

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

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

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

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

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

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

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

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

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

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

The Committee recognizes that the Court of Appeals recently reached a different conclusion as to the application of the separate entity rule in the international context in *Motorola Credit Corp. v. Standard Chartered Bank,* 24 N.Y.3d 149 (October 23, 2014). In that

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

Respectfully, the Committee believes that the reasons offered by the Court of Appeals in Motorola for preserving the separate entity rule in the international banking arena are no longer sustainable, for reasons explored in some depth in the dissent in *Motorola* (Abdus-Salaam, J, joined by Pigott, J.). The supposed difficulty in communicating among branches spread across the world can present a difficulty only if the bank chooses to make it so, as mentioned above in connection with domestic banks and branches. Banks have had to accommodate vast changes in the nature and extent of their relationships with their customers in recent decades, and there is nothing unique about the separate entity rule that should exempt it from adjustment to contemporary expectations of reasonable behavior by banks. As the dissent puts it, "Any burden imposed on the banks is far outweighed by the rights of judgment creditors to enforce their judgments." The existence of the separate entity rule is not a prerequisite to New York's preeminence in international finance, as indicated by New York's continued importance despite much greater governmental burdens such as the USA Patriot Act and the Bank Secrecy Act. Significantly, the long-standing availability to creditors of an injunction from New York courts to freeze assets in foreign bank branches has had no effect on New York's status in the world of finance. *United States v. First Natl. City Bank*, 379 U.S. 378 (1965); *Abuhamda v. Abuhamda*, 236 A.D. 2d 290, 654 N.Y.S. 2d 11 (1st Dept. 1997).

Nor is the limitation of the separate entity rule necessary to achieve any recognition of comity that may arise in the course of enforcing judgments. In the rare instances in which a

conflict with a foreign regulatory body may arise, the courts may, in accordance with CPLR 5240 ("Modification or protective order; supervision of enforcement"), fashion a unique remedy for the unique difficulty encountered.

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

Proposal

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

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

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

(a) Issuance; on whom served; form; service. A restraining notice may be issued by the clerk of the court or the attorney for the judgment creditor as officer of the court, or by the support collection unit designated by the appropriate social services district. It may be served upon any person, except the employer of a judgment debtor or obligor where the property sought to be restrained consists of wages or salary due or to become due to the judgment debtor or obligor. It shall be served personally in the same manner as a summons or by registered or certified mail, return receipt requested or if issued by the support collection unit, by regular mail, or by electronic means as set forth in subdivision (g) of this section. It shall specify all of the parties to the action, the date that the judgment or order was entered, the court in which it was entered, the amount of the judgment or order and the amount then due thereon, the names of all parties in whose favor and against whom the judgment or order was entered, it shall set forth subdivision (b) and shall state that disobedience is punishable as a contempt of court, and it shall contain an original signature or copy of the original signature of the clerk of the court or attorney or the name of the support collection unit which issued it. Service of a restraining notice upon a department or agency of the state or upon an institution under its direction shall be made by serving a copy upon the head of the department, or the person designated by him or her and upon

the state department of audit and control at its office in Albany; a restraining notice served upon a state board, commission, body or agency which is not within any department of the state shall be made by serving the restraining notice upon the state department of audit and control at its office in Albany. Service at the office of a department of the state in Albany may be made by the sheriff of any county by registered or certified mail, return receipt requested, or if issued by the support collection unit, by regular mail. Service of a restraining notice upon a financial institution shall be made by serving any office of the financial institution.

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

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

may determine his or her rights in accordance with section 5239. Service of an order to show cause and petition or notice of petition and petition commencing a special proceeding pursuant to this subdivision upon a financial institution shall be made by serving any office of the financial institution.

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

§ 5227. Payment of debts owed to judgment debtor. Upon a special proceeding commenced by the judgment creditor, against any person who it is shown is or will become indebted to the judgment debtor, the court may require such person to pay to the judgment creditor the debt upon maturity, or so much of it as is sufficient to satisfy the judgment, and to execute and deliver any document necessary to effect payment; or it may direct that a judgment be entered against such person in favor of the judgment creditor. Costs of the proceeding shall not be awarded against a person who did not dispute the indebtedness. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in the proceeding and may determine his or her rights in accordance with section 5239. Service of an order to show cause and petition or notice of petition and petition commencing a special proceeding pursuant to this section upon a financial institution shall be made by serving any office of the financial institution.

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

(a) Levy by service of execution. The sheriff or support collection unit designated by the

appropriate social services district shall levy upon any interest of the judgment debtor or obligor in personal property not capable of delivery, or upon any debt owed to the judgment debtor or obligor, by serving a copy of the execution upon the garnishee, in the same manner as a summons, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318. <u>Service upon a financial institution shall be made by serving any office of the financial institution.</u> In the event the garnishee is the state of New York, such levy shall be made in the same manner as an income execution pursuant to section 5231 of this article. A levy by service of the execution is effective only if, at the time of service, the person served owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property not capable of delivery in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in a notice which shall be served with the execution that a specified debt is owed by the person served to the judgment debtor or obligor or that the judgment debtor or obligor has an interest in specified property not capable of delivery in the possession or custody of the person served. All property not capable of delivery in which the judgment debtor or obligor is known or believed to have an interest then in or thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due or thereafter coming due to the judgment debtor or obligor, shall be subject to the levy. The person served with the execution shall forthwith transfer all such property, and pay all such debts upon maturity, to the sheriff or to the support collection unit and execute any document necessary to effect the transfer or payment. After such transfer or payment, property coming into the possession or custody of the garnishee, or debt incurred by him[,] <u>or her,</u> shall not be subject

to the levy. Until such transfer or payment is made, or until the expiration of ninety days after the service of the execution upon him or her, or of such further time as is provided by any order of the court served upon him or her, whichever event first occurs, the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff or the support collection unit, except upon direction of the sheriff or the support collection unit or pursuant to an order of the court. At the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion of the judgment creditor or support collection unit has provided, the levy shall be void except as to property or debts which have been transferred or paid to the sheriff or to the support collection unit or as to which a proceeding under sections 5225 or 5227 has been brought. A judgment creditor who, or support collection unit which, has specified personal property or debt to be levied upon in a notice served with an execution shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the levy.

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

(a) Method of levy. The sheriff shall levy upon any interest of the defendant in personal property, or upon any debt owed to the defendant, by serving a copy of the order of attachment upon the garnishee, or upon the defendant if property to be levied upon is in the defendant's possession or custody, in the same manner as a summons except that such service shall not be made by delivery of a copy to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318. Service upon a financial

institution shall be made by serving any office of the financial institution.

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

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

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

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

This amendment may also come into play in a parent / subsidiary situation, as it did in the recent decision of the Court of Appeals in *Commonwealth of the N. Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55 (2013) ("*Mariana*"). In *Mariana*, the Court addressed whether a judgment creditor can obtain an Article 52 turnover order against a bank to garnish assets held by the bank's foreign subsidiary. *Mariana*, 21 N.Y.3d at 57. The plaintiff Commonwealth of the Northern Mariana Islands had obtained two separate tax judgments against two individuals, the Millards, who resided in the Commonwealth. *Id.* at 58. The Commonwealth registered the tax judgments in the United States District Court for the Southern District of New York and commenced proceedings as a judgment creditor pursuant to Fed. R. Civ. P. 69(a) and CPLR 5225(b), seeking a turnover order against the Millards. *Id.* The Commonwealth named a bank, CIBC, as a garnishee on the basis that the Millards maintained accounts in 92%-owned foreign subsidiaries of CIBC. *Id.*

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

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

By way of contrast, in other sections of the CPLR, such as disclosure provisions, the concept of "control" is included. *See* CPLR 3111 (requiring production at deposition of books, papers, and other items in "the possession, custody or control" of the person to be examined); see also CPLR 3120(1)(i) (requiring discovery or inspection of documents "in the possession, custody or control" of the party served with a subpoena). Although the issue has not been resolved at the appellate level, "control" has been interpreted by one trial court to mean that discovery can be obtained from a wholly-owned subsidiary, wherever located, of a parent that is a party to the case, because the parent has control over the wholly-owned subsidiary. *See Bank of Tokyo-Mitsubishi, Ltd. v. Kvaerner*, 175 Misc. 2d 408 (Sup. Ct. N.Y. Co. Jan. 15, 1998). The Committee expresses no view as to whether, in the context of a parent/subsidiary or other relationship, the requisite "control" should be found; that is a matter for judicial development and determination in particular cases nor is the Committee expressing any view as to whether the word "control" as used in the context of CPLR 5225 necessarily should be construed in the same manner as it may be construed in the context of CPLR Article 31.

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

Proposal

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

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

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

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

(b) Property not in the possession of judgment debtor. Upon a special proceeding commenced by the judgment creditor, against a person in possession [or], custody or control of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor’s rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff. Costs of the proceedings shall not be awarded against a person who did not dispute the judgment debtor’s interest or right to possession. Notice of the proceeding shall also be served upon the judgment debtor in the same manner as a summons or by registered or certified mail, return receipt requested. The court may permit the judgment debtor to intervene in the proceeding. The court may permit any adverse claimant to intervene in

the proceeding and may determine his or her rights in accordance with section 5239.

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

36. Allowing an Appeal from a Decision or Ruling When No Order Has Been Executed (CPLR 5512)

Proposal

AN ACT to amend the civil practice law and rules, in relation to appealable papers

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

Section 1. Subdivision (a) of section 5512 of the civil practice law and rules is amended to read as follows:

(a) Appealable paper. An initial appeal shall be taken from the judgment or order of the court of original instance and an appeal seeking review of an appellate determination shall be taken from the order entered in the office of the clerk of the court whose order is sought to be reviewed. If a timely appeal is taken from a judgment or order other than that specified in the last sentence and no prejudice results therefrom and the proper paper is furnished to the court to which the appeal is taken, the appeal shall be deemed taken from the proper judgment or order. Where a decision or ruling has been rendered and no order has been executed, and where a proposed order remains unsigned for sixty days, the decision or ruling shall be fully appealable under section 5501(c).

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

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

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

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

However, it has come to the attention of the Committee that the present wording of subdivisions (a) and (b) of section 5704 has been construed to limit the authority of an individual justice from granting a provisional remedy that was denied in the court below. The Committee believes that the denial of a provisional remedy often gives rise to emergency conditions, necessitating immediate relief from a justice of the Appellate Division. The Committee, therefore, recommends an amendment of section 5704 to add language allowing a single Appellate Division or Appellate Term justice to grant an order or provisional remedy applied for without notice to the adverse party and refused by the court below.

Under prevailing case law, a TRO that is granted after informal notice to the opposing party is still considered to be an *ex parte* order for purposes of CPLR § 5704. With the adoption

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

Proposal

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

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

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

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

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

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

§ 5704. Review of ex parte orders or ex parte applications for provisional remedies. (a) By appellate division. The appellate division or a justice thereof may vacate or modify any order granted without notice to the adverse party by any court or a judge thereof from which an appeal would lie to such appellate division; and the appellate division or a justice thereof may grant any order or provisional remedy applied for without notice to the adverse party and refused by any court or a judge thereof from which an appeal would lie to such appellate division.

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

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

38. <u>Amending Orders of Attachment without Notice (CPLR 6211(c) (new); CPLR 6213)</u>

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of the Advisory Committee on Civil Practice. This measure would amend sections 6211 and 6213 of the Civil Practice Law and Rules to offset the delays often encountered by plaintiffs, for reasons beyond their control, in serving ex parte attachment papers in foreign countries within the time limits imposed by those statutes. The amendments give discretion to courts in such circumstances to extend the time for summons service (§ 6213) and modify the procedure for post-attachment hearings (§ 6211(c)).

As global commerce has expanded, so, too, has civil litigation against foreign-based defendants in New York courts. In many of these cases, the plaintiff needs an ex parte order of attachment of the defendant's property.[30] If the ex parte attachment order is granted before service of the summons, which often occurs in exigent circumstances, CPLR 6213 requires that such service be made within sixty days after the granting of the order. The court has discretion to grant an extension for another sixty days, but no extension beyond a total of 120 days is permitted. *Galbraith v. Yancik*, 77 Misc.2d 130, 131, 353 N.Y.S.2d 134, 136 (Sup.Ct.Monroe Co. 1974). Failure to meet the time limit imposed by CPLR 6213 renders the order of attachment void ab initio. *Al-Dohan v. Kouyoumjian*, 93 A.D.2d 714, 715, 461 N.Y.S.2d 2, 4 (2d Dep't 1983).[31]

But when the defendant is located in a foreign country, service within 120 days is often not feasible because of international complications, especially when the foreign country is a signatory to the Hague Service Convention (Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (20 U.S.T. 361)

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[30] Attachment is necessary to obtain quasi-in-rem jurisdiction. A levy must be made on the defendant's property in New York, pursuant to an order of attachment, before service of process can validly occur. CPLR 314(3); *Nemetsky v. Banque de Developpement de la Republique du Niger*, 48 N.Y.2d 962, 425 N.Y.S.2d 277, 401 N.E.2d 388 (1979). Aside from jurisdiction, attachment may be needed for security when the defendant's willingness or ability to pay a money judgment is in serious doubt. *Kohler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 538, 883 N.Y.S.2d 763, 766-67, 911 N.E.2d 825, 828-29 (2009).

[31] The extensions permitted by CPLR 306-b are inapplicable.

[hereinafter cited as Hague]). Under Hague, unless the signatory country has agreed otherwise, commencement papers (e.g., summons and complaint) must be transmitted to the foreign country's "Central Authority," which will effectuate the service of process on the defendant. (Hague art. 5).[32] A plaintiff suing in a New York court must comply with the service requirements of Hague, which preempts New York rules pursuant to the Supremacy Clause. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 108 S.Ct. 2104, 2108 (1988).[33]

Thus, in a Hague country, the plaintiff's attorney is at the mercy of the Central Authority with respect to when service ultimately is made. A procrastinating or uncooperative Central Authority can effectively stymie the plaintiff's ability to comply with CPLR 6213. Service via the Hague-mandated Central Authority in China, for example, can take several months or a year or more, and there is no alternative in the absence of agreement between the parties.[34] Similarly, service in Brazil, governed by a separate Convention, can take between 12-18 months.[35]

The Advisory Committee believes that these impediments to the use of ex parte attachment against defendants in foreign countries should be remedied by amending CPLR 6213. The proposed legislation provides that when service must be made in a foreign country, the

[32] Some Hague countries, such as the U.K., France and Canada, agreed to a provision of Hague (art.10(a)) permitting the alternative of service by mail directly to the defendant (e.g., BCL § 307; VTL § 253). Others, such as China, Germany, and India, refused to so agree.

[33] If the foreign place of service is not a Hague signatory, some other treaty may be applicable, such as the Inter-American Convention on Letters Rogatory. If no treaty applies, plaintiff must fend for herself. If service under state law validly can be made on a foreign defendant's agent in the U.S., service abroad becomes unnecessary. *Schlunk*, supra.

[34] See, e.g., *In re GLG Life Tech. Corp. Sec. Litig*., 287 F.R.D. 262, 266 (S.D.N.Y. 2012); *Samsun Logix Corp. v. Bank of China*, 2011 WL 1844061, *7 (Sup.Ct.N.Y.Co. 2011); see current reports on websites and blogs concerning lengthy service times in China, e.g., https://www.iam-media.com/frandseps/suing-chinese-entity-in-the-united-states-expecct-two-year-wait-serve-process.

[35] *Washington State Investment Board v. Odebrecht S.A*., 2018 WL 6253877, *6 (S.D.N.Y. 2018).

plaintiff will have a minimum of 120 days to serve process with authority vested in the court, upon a showing of good cause, to grant extensions of the time.[36]

The second hindrance to using ex parte attachments against foreign-based defendants is the time limit imposed for post-seizure motions to confirm the attachment. CPLR 6211(b) requires the plaintiff, within five days after a levy pursuant to an ex parte order of attachment, to make a motion by order to show cause to confirm the ex parte order.[37] The purpose of the confirmation motion is to convene a constitutionally-required prompt hearing at which the defendant may challenge the ex parte order, putting the plaintiff to the burden of proving it was issued in accordance with the law and facts. *Mitchell v. W.T. Grant Co*., 416 U.S. 600, 609, 94 S.Ct. 1895, 1901 (1974).

Courts hold that CPLR 6211(b) does not permit any extensions of time for serving the order to show cause. *Thadford Realty Co. v. L.V. Income Properties Corp*., 101 A.D.2d 814, 476 N.Y.S.2d 346 (2d Dep't 1984); *Voice Communications, Inc. v. Bello*, 12 Misc.3d 318, 321, 813 N.Y.S.2d 295, 297-98 (Sup.Ct.Nassau Co. 2006). If the defendant is in a Hague country, and that country has objected to any means of service other than through its Central Authority, the question arises whether the plaintiff can effectively by-pass the Central Authority, such as using Federal Express, when serving a pre-summons order to show cause to confirm an ex parte attachment order. The answer depends on whether serving the order to show cause is a form of serving process, and the answer, unfortunately, is unclear.

An order to show cause ordinarily is nothing more than a substitute for a notice of motion (*In re Citigroup Global Markets, Inc. v. Fiorilla*, 178 A.D.3d 567, 570, 114 N.Y.S.3d 345, 348 (1st Dep't 2019)), and the U.S. Supreme Court has said that Hague applies only to service of process. *Schlunk*, supra, 486 U.S. at 700, 108 S.Ct. at 2108. But the foreign country in which the

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[36] To guard against a potential situation in which the plaintiff would effectively have a longer base period than the 120-day period of CPLR 306-b, the amendment specifies that the time to serve runs from the earlier of the commencement of the action (i.e., filing of the summons and complaint) or the granting of the ex parte order of attachment, rather than simply from the granting of the order, as the statute currently provides.

[37] The period expands to ten days after the levy if the attachment is sought under CPLR 6201(1). Noncompliance with the time periods of CPLR 6211(b) deprives the ex parte order of attachment and any levy made thereunder of any further effect and requires vacatur of the order of attachment upon motion of the defendant

service is made may view a judge-signed order to show cause as the first part of a two-step service of process, reasoning that the order gives the defendant formal notice that an action is about to be commenced in which the defendant's property already has been levied upon, the second step being the follow-up summons and complaint. This would subject the order to show cause to Hague and trigger the requirement that it be served via the Central Authority.

This uncertainty creates another impediment to the use of ex parte attachments in actions against foreign-based defendants. The solution lies in federal maritime practice, where service of a simple "notice of attachment" is not subject to the vagaries of Hague. The court in *Hyundai Merchant Marine Co. v. Grand China Shipping (Hong Kong) Co*., 878 F.Supp.2d 1252 (S.D.Ala. 2012), a case under Admiralty Supplemental Rule B(2)(b), held that a notice of maritime attachment, sent to a defendant in China by Federal Express, was validly served. Because "notice is not service," Hague did not apply. 878 F.Supp.2d at 1256-57. Thus, the Federal Express mailing, though ineffective to confer personal jurisdiction, was sufficient to "legally notif[y] Defendants of the attachment and garnishment," provided a return receipt was requested as required by Rule B(2). 878 F.Supp.2d at 1257. See also *In re Advance Watch Co*., 587 B.R. 598 (Bkrtcy Ct., S.D.N.Y. 2018).

Accordingly, the Advisory Committee recommends that CPLR 6211 be amended to add a subdivision (c), applicable to ex parte attachments when the defendant must be served in a foreign country. Instead of making a motion to confirm, the plaintiff may serve, within five days of the levy, a prescribed "notice of ex parte attachment," by expedited mail or courier, with some form of return receipt requested accompanied by a copy of the order of attachment, the papers upon which it was based, and information advising the defendant of its right to move to vacate the order of attachment (CPLR 6223) with an expedited hearing and the burden on the plaintiff to prove that the order of attachment was issued in accordance with the law and facts. This substitution for the motion to confirm in CPLR 6211(b) achieves the same goal as that motion—swiftly giving the defendant the opportunity for an expedited hearing. The new methodology for convening a hearing will not violate Hague because the notice is an informal paper, not issued by the court, and clearly indicates that it has nothing to do with service of process.

Nor would the proposed procedure deprive the defendant of due process. Although the U.S. Supreme Court held in *Mitchell v. W.T. Grant Co*., supra, that an ex parte attachment comports with due process if it is followed by a "prompt" post-seizure hearing, the Court did not

prescribe any particular mode of procedure or time limits for scheduling the hearing.[38] Indeed, in about half of the states today, it is the *defendant* who must move, or file a request, for a prompt hearing after having been notified of the attachment.[39]

The admiralty post-attachment hearing procedure, which puts the burden on the defendant to move against the attachment, has passed constitutional muster. *Trans-Asiatic Ltd. S.A v. Apex Oil Co*., 743 F.2d 956, 961-62 (1st Cir. 1984). So, too, have state statutes that operate in a similar way. *Parikh v. Frosh*, 2017 WL 4124238, * 7-11 (D.Md. 2017), *aff'd for reasons stated by district court,* 715 Fed.Appx. 288 (4th Cir. 2018) (Maryland); *McLaughlin v. Weathers*, 170 F.3d 577 (6th Cir. 1999), *cert. denied*, 526 U.S. 1134 (1999) (Tennessee); *Johnson & Hardin Co. v. DME Ltd*., 106 Ohio App.3d 377, 666 N.E.2d 276 (1995) (Ohio).

Furthermore, the proposed amendment to CPLR 6211 preserves all the other New York attachment provisions which, together, give the defendant abundant due-process protection.[40]

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

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[38] In *Mitchell,* the defendant, not the plaintiff, was required to move for a post-seizure hearing to dissolve a writ of sequestration. 416 U.S. at 601-03, 94 S.Ct. at 1897-98. Thus, although the plaintiff has the burden of proving the right to the attachment, there is no constitutional mandate that a hearing be scheduled on the plaintiff's initiative. Indeed, the Court wrote, "Due process of law guarantees 'no particular form or procedure; it protects substantial rights.'" Id. at 610, 94 S.Ct. at 1901.

[39] Constitutionally, a state need only give the defendant an "early *opportunity* to put the creditor to his proof" (*Mitchell*, supra, 416 U.S. at 609, 94 S.Ct. at 1901 (emphasis added).[39]

[40] These include a restriction of attachment to circumstances in which the plaintiff may encounter difficulty in collecting a judgment (CPLR 6201); the plaintiff must submit a fact-filled affidavit showing the probability of success on the merits of the underlying case (CPLR 6212(a)); the papers in support of the order of attachment are scrutinized by a court; the plaintiff must post a bond as security for the defendant for costs, damages and attorneys' fees caused by the attachment in the event the defendant wins the case or the attachment turns out to have been improperly granted (CPLR 6212(b) (see also CPLR 6212(e) (personal liability of plaintiff for damages to defendant)); and the defendant may have the attachment discharged by posting a bond in an amount equal to the value of the property levied upon (CPLR 6222). See *Peebles v. Clement*, 63 Ohio St.2d 314, 321, 408 N.E.2d 689, 693 (1980).

Proposal

AN ACT to amend the civil practice law and rules, in relation to serving process and a notice of ex parte attachment following issuance of a pre-summons ex parte order of attachment when the defendant must be served in a foreign country

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

Section 1. Section 6211 of the civil practice law and rules is amended by adding a new subdivision (c) to read as follows:

(c) Notice of attachment to defendant in a foreign country. In lieu of subdivision (b), if a defendant against whom an order of attachment without notice can be effectively served with the summons only in a foreign country, and such defendant has not yet been served with the summons, the plaintiff may use the following procedure. No later than five days after levy, the plaintiff shall serve upon such defendant a notice of ex parte attachment, by any mode of mail or courier service calculated to be delivered within three business days, if feasible, otherwise as soon thereafter as possible, with any form of return receipt requested provided by the mail or courier service. Plaintiff shall execute a proof of service of the notice of ex parte attachment and levy, which shall include the return receipt or a statement that receipt was refused.

The notice of ex parte attachment shall be in substantially the following form and contain the indicated declarations:

NOTICE OF EX PARTE ATTACHMENT

On or about ________________, a sheriff of the State of New York, County of _____________ ____________, levied upon property in which you have an interest, pursuant to an order of attachment signed [date] by ______[identify name and address of court]_________________in an action entitled __________________________________, and with the index number ___ . A copy of the court's order is enclosed, together with the papers upon which the order was based.

You may make a motion within ten days of receipt of this notice for an order pursuant to section 6223 of the New York Civil Practice Law and Rules (CPLR) to vacate the order of attachment if you believe the order was not properly issued. Such motion to vacate shall be made by order to show cause and the court shall set the hearing on the motion at the earliest possible time. Upon the hearing, the plaintiff(s) shall have the burden of establishing the

grounds for the attachment, the need for continuing the levy and the probability that the plaintiff(s) will succeed on the merits of the action.

Your making of the foregoing motion to vacate the order of attachment and participating in the hearing thereof shall not, by themselves, subject you to the court's jurisdiction on any matter other than the adjudication of the motion and any appeal thereof. Your failure to make the motion does not waive any other remedies you may have under CPLR Article 62 or any other provision of law.

THIS NOTICE OF EX PARTE ATTACHMENT DOES NOT CONSTITUTE THE SERVICE OF PROCESS OR OTHERWISE AUTHORIZE THE COURT TO ADJUDICATE THE MERITS OF THE ACTION.

DATED at_____________, New York, this ______ day of ________, ________.

____

Signed name of Plaintiff's Attorney
Printed name of attorney
Firm name
Street address
City, State, Zip Code
Telephone:
Email address:
Facsimile:
Attorney(s) for Plaintiff(s) [party names]

§ 2. Section 6213 of the civil practice law and rules is amended to read as follows:

§ 6213. Service of Summons. An order of attachment granted before service is made on the defendant against whom the attachment is granted is valid only if, within sixty days after the order is granted, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed, except that a person upon whom the order of attachment is served shall not be liable for acting upon it as if it were valid without knowledge of the invalidity. If the defendant dies within sixty days after the order is granted and before the summons is served upon him or her or publication is completed, the order is valid only if the summons is served upon his or her executor or

administrator within sixty days after letters are issued. Upon such terms as may be just and upon good cause shown the court may extend the time, not exceeding sixty days, within which the summons must be served or publication commenced pursuant to this section, provided that the application for extension is made before the expiration of the time fixed. Notwithstanding the foregoing time periods, when service of the summons must be made in a foreign country, the time within which the summons must be served shall be one hundred twenty days from the date the action is commenced or the date the order of attachment is granted, whichever is earlier, except that the court may extend the time for service for good cause shown either before or after the expiration of the one hundred-twenty-day period. Subsequent extensions may also be granted for good cause shown.

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

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

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

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

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

The privilege extends only to mediation communications, and not the underlying facts of the dispute. Evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery by reason of its use in a mediation. A party that

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

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

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

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

Proposal

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

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

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

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

ARTICLE 74

UNIFORM MEDIATION ACT

Section 7401. Definitions.

7402. Scope.

7403. Privilege against disclosure; admissibility; discovery.

7404. Waiver and preclusion of privilege.

7405. Exceptions to privilege.

7406. Prohibited mediator reports.

7407. Confidentiality.

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

7409. Participation in mediation.

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

7411. Uniformity of application and construction.

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

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

(b) "Mediation communication" means a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering,

conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.

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

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

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

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

(g) “Proceeding” means:

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

(2) a legislative hearing or similar process.

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

(i) “Sign” means:

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

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

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

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

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

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

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

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

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

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

(4) conducted under the auspices of:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) a court proceeding involving a felony; or

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

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

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

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

(b) A mediator may disclose:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40. Access to Justice Act of 2017: Remedying Injustices Arising out of Contracts of Adhesion in the Context of Consumer Contracts
(CPLR 7501, 7515(new); Gen. Oblig. L. §5-336, §5-792(new); Exec. L. §94-a; Pub. Health L. §2801-h(new))

The Committee recommends the adoption of this measure to remedy injustices arising out of contracts of adhesion in the context of consumer contracts. It is the policy of the Unified Court System in New York to ensure access to justice for all New Yorkers. The Committee supports and encourages arbitration in the civil practice context. Arbitration is a creature of contract law. The authority to arbitrate instead of proceeding in court depends on the agreement of the parties to arbitrate. Arbitration has proven to be most successful when agreed to between parties of equal bargaining power as part of an arms' length agreement. The Committee believes that a vital component of access to justice is to preserve the ability of New Yorkers to choose either arbitration or litigation as the dispute resolution mechanism. Such a decision must be voluntary. When an arbitration clause is foisted upon a party to a contract, that choice is precluded; thus access to justice may be denied at the very commencement of the parties' relationship.

The Committee believes that the prevalence of arbitration agreements in contracts of adhesion in transactions for personal, family or household services New Yorkers cannot do without - e.g., telephone, internet, nursing home, credit cards - and the interpretation of such arbitration agreements by the courts has resulted in conflicting decisions and substantial inequity in circumstances where the parties have not had the opportunity genuinely to choose arbitration. Another area of concern related to the proliferation of arbitration clauses in contracts affecting the rights, remedies or obligations between health care providers and patients relative to personal injuries to, or wrongful death of, patients. This chapter amends the law to protect some of the most vulnerable New Yorkers from predatory behavior and from being compelled to arbitrate against their wishes contrary to the public policy of this State, to protect fairness in consumer and other types of transactions that affect the health and well-being of New Yorkers, to create remedies targeting unconscionable contracts at the state level and to ensure access to justice for consumers as set forth herein.

This measure seeks to improve access to justice for New Yorkers by amending current law in eight specific ways.

Procedural fairness, reciprocity, mutuality.

The proposal would amend CPLR 7501 to add language requiring a waiver of the enforceability of an arbitration clause upon commencement of an action to enforce a contract in a consumer transaction, other than an action to enforce the arbitration clause, to stay arbitration or in aid of arbitration. This amendment would provide reciprocity or mutuality for the current effect of arbitration agreements that require that any claim against a consumer arising out of or related to the contract must be arbitrated. The current law is patently unfair: a consumer is denied all rights to go to court if a dispute arises but the contracting entity may go to court and obtain a judgment.

Consumer Arbitration Procedure under CPLR Article 75.

The proposal would add a new CPLR 7515 to require that consumer arbitrations be conducted by a panel of arbitrators established and regulated by the Superintendent of the Department of Financial Services. It would require impartiality and competence standards. The arbitration panel would be required to provide written findings of fact and conclusions of law. New York law would control decisions, including New York choice of law principles, where relevant. Any provision in a consumer contract entered into in this state or by a resident of the state that provides for arbitration by anyone other than a consumer arbitrator appointed in accordance with these regulations would be void and unenforceable. Except where expressly agreed otherwise, either party could seek relief by consumer class action arbitration pursuant to regulations promulgated by the Superintendent, in accordance with Article 9 of the CPLR.

Insured Personal Injury Liability.

A new General Obligations Law provision would generally invalidate arbitration provisions where (a) the agreement requires arbitration of claims for personal injury or wrongful death and where, (b) the party seeking to enforce the arbitration provision has applicable liability insurance coverage that applies to the claim in issue. It would provide a prohibition against contractual provisions requiring arbitration of claims for personal injuries or wrongful death where no state statute provides otherwise.\

Consumer Notice.

This measure would amend the General Obligations Law on requirements for use of plain language in consumer transactions by adding requirements regarding the size of type required for any clause relating to arbitration in a consumer credit transaction and prohibiting any clause not complying with that requirement from being received into evidence in any trial, hearing or proceeding. The practical effect would be to prevent a person seeking to enforce a non-complying agreement from moving to compel arbitration.

Consumer Protection Division Powers and *Qui-Tam*:

This measure would amend Executive Law § 94-a and is modeled both on General Business Law § 349 and on State Finance Law Article XIII. The amendments would be limited to consumer contracts of adhesion. First, it would empower the Consumer Protection Division of the Secretary of State upon an application by a consumer to determine whether the contract or agreement in question violates public policy under the laws of this state, including but not limited to § 94-A of the Executive Law, Article 22-A of the General Business Law or § 2801-h of the Public Health Law, and refer the determination to an enforcement entity for appropriate action. Second, if no action is brought to enforce the law by any federal, state or local agency, the statute would provide a new right of action for the consumer to do so on behalf of the State. Remedies available would be an injunction or damages and attorney's fees for the prevailing plaintiff. Treble damages are allowed, up to $1000 in each instance, for willful or knowing conduct, and if awarded, such damages in excess of actual damages shall be payable to the State.

Contracts of adhesion in the health care services context.

This measure would add a new Public Health Law § 2801-h and targets provisions in health care provider contracts affecting the rights, remedies or obligations between health care providers and patients relative to personal injuries to, or wrongful death of, patients. The new Pub. Health L provision would invalidate limitations of legal rights re: personal injuries (not just arbitration agreements) effected by health care services contracts that the patient must sign in order to receive health care.

Not inclusive of definitions, the language provides that any written contract that a health care provider requires a person to sign as a condition to providing health care services which

attempts to affect any legal rights, remedies or obligations relative to personal injuries to, or wrongful death of, patients which may be occasioned in connection with the health care services rendered shall be regarded as a contract of adhesion, and shall be deemed unconscionable and entered into by the person under duress, and is prohibited as against the public policy of the state.

Effective Date.

Sections 2, 3, 5, 6 and 7 of this act shall take effect immediately and apply to contracts entered into or agreements effective on or after the date on which it shall have become law. Section 4 of this act shall take effect immediately and apply to all pending and future actions in which judgment has not yet been entered. Section 8 of this act shall take effect immediately.

Severability.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect any other provisions or application of the provisions of the remainder to any other person or circumstance, and to this end the provisions of this chapter are severable.

Proposal

AN ACT to amend the civil practice law and rules, in relation to contracts in small print, procedural reciprocity for arbitration agreements in consumer transactions and consumer arbitration; to amend the general obligations law, in relation to the prohibition of certain contractual agreements to arbitrate personal injury and wrongful death claims; to amend the executive law in relation to powers and duties of the consumer protection division and contracts of adhesion and to amend the public health law, in relation to protecting against certain contracts of adhesion in the provision of health care

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

Section one. This act shall be known as the Access to Justice Act of 2017: Remedying Injustices Arising out of Contracts of Adhesion in the Context of Consumer Contracts. Findings. The legislature finds that it is the public policy of this state to ensure access to justice for all New Yorkers. The unified court system in this state supports and encourages arbitration in the civil practice context and arbitration is one of a variety of alternative dispute resolution tools which help parties resolve disputes without a trial. Arbitration has proven to be most successful when agreed to between parties of equal bargaining power as part of an arms' length agreement. A vital component of access to justice is to preserve, when possible, the ability of New Yorkers to choose either arbitration or litigation when seeking a remedy if an injury or dispute has occurred. When an arbitration clause is foisted upon a party to a contract, that choice is precluded; thus access to justice may be denied at the very commencement of the parties' relationship. The legislature further finds that the prevalence of arbitration agreements in contracts of adhesion in transactions for personal, family or household services New Yorkers cannot do without - e.g., telephone, internet, nursing home, credit cards - and the interpretation of such arbitration agreements by the courts has resulted in conflicting decisions and substantial inequity between the parties. One area of concern is reflected in the effect of recent arbitrations on contracts affecting the rights, remedies or obligations between health care providers and patients relative to personal injuries to, or wrongful death of, patients. This chapter amends the law to preclude predatory behavior against some of the most vulnerable New Yorkers against the public policy of this State, to protect fairness in consumer transactions and other types of transactions that affect the health and well-being of New Yorkers, to create remedies targeting unconscionable contracts at the state level and to ensure access to justice for consumers.

§ 2. Section 7501 of the civil practice law and rules is amended to read as follows:

§ 7501. Effect of arbitration agreement. A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute. The commencement of an action in a court of law by any person to enforce a contract entered into by, or delivered to, a resident of this state that involves a consumer transaction, as defined in section 4544 of this chapter, shall constitute a waiver of the enforceability of the arbitration clause in that contract or agreement. Such waiver shall not apply to any action brought to enforce the arbitration clause, to stay arbitration or in aid of arbitration.

§ 3. The civil practice law and rules is amended to add a new section 7515 to read as follows:

§ 7515. Arbitration of disputes regarding contracts or agreements in a consumer transaction.

(a)(i) This section shall govern arbitrations of disputes regarding contracts or agreements entered into by, or delivered to, a resident of this state or entered into in this state that involves a consumer transaction. (ii) Proceedings pursuant to this section shall be commenced and conducted in accordance with this article, except as otherwise provided by this section and in accordance with rules promulgated and approved by the superintendent of the department of financial services. (iii) The term "consumer transaction" shall be defined as set forth in section 4544 of this chapter. (iv) Except as provided by an express waiver contained in such contract or agreement, either party to a consumer dispute may seek relief in arbitration by way of class action in accordance with the regulations promulgated by the superintendent of the department of financial services pursuant to article nine of this chapter.

(b)(i) The rules promulgated by the superintendent of the department of financial services shall set forth standards for panels of arbitrators under this section and establish qualifications and compensation of individuals seeking appointment to the arbitration panels. These standards shall require that an arbitrator be impartial and that the arbitrator be competent to arbitrate the subject matter of each arbitration to which he or she is appointed as a panel member. (ii) All

costs of arbitration shall be paid by the party providing the money, property or service. (iii) A consumer that prevails in whole or in part in arbitration under this section shall be awarded reasonable attorney's fees by the arbitrator. (iv) A contract entered into, or delivered to, a resident of this state that provides for arbitration of a dispute shall be void if it provides for arbitration by any arbitrator contrary to the provisions of this section.

(c)(i) Decisions by members of the arbitration panel shall: (1) be provided to all parties; (2) contain written findings of fact and conclusions of law and an explanation of the calculation of any damages; and (3) be based on the applicable, substantive law of this state, or the law of any other jurisdiction that the arbitrator determines, based upon the choice of law principles of this state.

§ 4. The general obligations law is amended by adding a new section 5-336 to read as follows:

§ 5-336. Prohibition of contractual provisions requiring arbitration of claims for personal injuries or wrongful death where the party asserting the contractual right to arbitrate has liability insurance applicable to the claim.

Except where otherwise provided by state statute, any contractual provision requiring arbitration of claims for personal injuries or wrongful death shall be deemed without effect where the party asserting the contractual right to arbitrate has liability insurance applicable to the claim.

§ 5. Subdivision (a) of section 5-702 of the general obligations law is amended by adding a new paragraph 3 to read as follows:

3. Written in clear and legible print no less than eight points in depth or five and one-half points in depth for upper case type. The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print does not comply with this paragraph may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement, or who caused said agreement or contract to be printed or prepared. No provision of any contract or agreement waiving the provisions of this section shall be effective. The provisions of this paragraph shall not apply to agreements or contracts entered into or agreements effective prior to the effective date of this paragraph.

§ 6. Paragraphs (14) and (15) of subdivision 3 of section 94-a of the executive law are amended to read as follows:

(14) cooperate with and assist consumers in class actions in proper cases; [and]

(15) (i) determine, upon an application by a consumer, whether a contract or agreement or any provision therein between the consumer and any person, firm, corporation or association or agent or employee thereof violates the public policy of the state of New York under the laws of this state, including but not limited to the provisions of this section, article 22-A of the general business law or section 2801-h of the public health law, prohibiting unscrupulous or questionable business practices or unconscionable contracts, or required the consumer to enter into an unconscionable contract to obtain the benefits of such contract or agreement, and (ii) refer such determination to the appropriate unit of the department, or federal, state or local agency authorized by law for appropriate action; and

(16) create an internet website or webpage pursuant to section three hundred ninety-e of the general business law.

§ 7. Section 94-a of the Executive Law is amended by adding a new subdivision 6 to read as follows:

6. Right of action. If within sixty days after an application is made by a consumer under paragraph 15 of subdivision three of this section an action is not commenced by any federal, state or local agency, the consumer may bring an action in his or her own name on behalf of the state to obtain such a determination and seek to enjoin enforcement of the contract or agreement or any of its provisions determined to be void under such subdivision, recover his or her actual damages or both. In such action preliminary relief may be granted under article sixty three of the civil practice law and rules. The court, may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars in each instance, if the court finds the defendant willfully or knowingly engaged in an unscrupulous or questionable business practice or required the consumer to enter such contract or agreement to obtain its benefits. Any amount of damages awarded to plaintiff in excess or actual damages shall be payable to the state. The court may award reasonable attorney's fees to a prevailing plaintiff.

§ 8. The public health law is amended by adding a new section 2801-h to read as follows:

§ 2801-h. Prohibition of contractual provisions in health care provider contracts affecting

the rights, remedies or obligations between health care providers and patients relative to personal injuries to, or wrongful death of, patients.

(1) Any written contract that a health care provider requires a person to sign as a condition to providing health care services which attempts to affect any legal rights, remedies or obligations relative to personal injuries to, or wrongful death of, patients which may be occasioned in connection with the health care services rendered shall be deemed unconscionable and entered into by the person under duress, and is prohibited as against the public policy of the state.

(2) For the purpose of this section, the term "health care provider" shall include, but is not limited to: (a) hospitals, nursing homes, and residential health care facilities as defined in section 2801 of this article; (b) home care service agencies as defined in section thirty-six hundred two of this chapter; and, (c) physicians, nurses, dentists, podiatrists, chiropractors, orthodontists, nurse midwives, nurse practitioners, physician assistants, acupuncturists, physical therapists, occupational therapists, speech therapists, home health aides, nutritionists, medical technicians, and dental hygienists, as well as any groups, corporations, partnerships or joint ventures that provides such services.

(3) Nothing herein shall be deemed to prohibit or otherwise invalidate an otherwise legally valid consent form being executed by or on behalf of a person undergoing a medical, dental, podiatric or chiropractic, treatment or procedure where such consent is required, provided that the document does not attempt to define any rights, remedies or obligations relative to personal injuries to, or wrongful death of, patients arising or resulting from, or contributed to by, the health care services rendered.

§ 9. If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity does not affect any other provisions or application of the provisions of the remainder to any other person or circumstance, and to this end the provisions of this chapter are severable.

§ 10. Sections 2, 3, 5, 6 and 7 of this act shall take effect immediately and apply to contracts entered into or agreements effective on or after the date on which it shall have become law. Section 4 of this act shall take effect immediately and apply to all pending and future actions in which judgment has not yet been entered. Sections 8 and 9 of this act shall take effect immediately.

41. Commissions for Receivers of Rents and Profits
(CPLR 8004(a))

This measure amends section 8004(a) of the CPLR, which, under current law, contains a statutory inconsistency. A receiver's commission under § 8004(a) is currently limited by a five percent cap, whereas a receiver's commission under § 8004(b), where the funds are entirely depleted, is only limited by judicial discretion. The five percent limitation not only results in the incongruous treatment of receivers, but also in commissions that are not reflective of the work a receiver actually performs.

There is precedent that a receiver's commission should be based on quantum meruit rather than in accordance with the five percent cap. *See AJ Partners, LLC v. L & V Post Realty, LLC,* 2018 WL 4174179 (Sup. Ct. 2018) ("[T]he discretion of the court as a court of equity should be invoked to suitably compensate the temporary receiver for his time and care"). The present bill would codify the ruling in *AJ Partners* and allow for the congruous and equitable treatment of all receivers under § 8004.

Proposal

AN ACT to amend the civil practice law and rules, in relation to commissions for receivers of rents and profits

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

Section 1. Subdivision (a) of rule 8004 of the civil practice law and rules is amended to read as follows:

(a) Generally. A receiver, except where otherwise prescribed by statute, is entitled to such commissions [, not exceeding five per cent upon the sums received and disbursed by him,] as the court by which [he] the receiver is appointed allows. [, but if in any case the commissions, so computed, do not amount to one hundred dollars, the court, may allow the receiver such a sum, not exceeding one hundred dollars, as shall be commensurate with the services he rendered.]

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

42. Establishing a Uniform Procedure for Applications for Attorney's Fees (CPLR 8405)

The Committee recommends an amendment to establish a uniform procedure that would govern applications for attorney's fees incurred by a prevailing party in an action where a statute, court rule, or agreement of the parties authorizes "fee shifting," i.e., an award of fees against another party in the action.

A uniform statutory procedure to postpone applications for attorney's fees until after a final judgment, i.e., "a judgment that is final and not appealable," would have three benefits. It would:

(1) enable the court to review a fee application based on the outcome of the litigation, rather than review multiple applications in duplicative or piecemeal fee litigation; (2) eliminate procedural anomalies; and (3) ensure that New York courts apply Federal fee-shifting statutes consistently with the U.S. Supreme Court precedent.

The proposal would reinforce New York's historical treatment of attorney's fees as costs in an action rather than as an element of a cause of action. It also would align New York's practice with the procedures in Federal courts of waiting until the parties have litigated and resolved the underlying dispute before requiring a party to submit an application for attorney's fees. *See* Fed. R. Civ. P. 54(d); *see also Ray Haluch Gravel Co. v. Cent. Pension Fund of the Int'l Union of Operating Eng'rs*, 134 S. Ct. 773 (2014).

The proposed statute would apply only to procedural issues about the timing and nature of a motion for fees and would not change the substantive law governing whether a party would be entitled to fees.

Background to Fee Awards

New York law historically has held that attorney's fees in a litigation are costs that are "incidents of litigation," even when the parties agree to fee shifting in some form. *E.g.*, *Mount Vernon City Sch. Dist.*, 19 N.Y.3d 28, 39 (2012); *see Roe v. Smyth*, 278 N.Y. 364 (1938); *In re Low*, 208 N.Y. 25, 32 (1913) (striking "allowances for counsel fees and disbursements" except as statutorily permissible as "costs" under Code of Civil Procedure); *cf. Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989) (at common law, attorney's fees "were regarded as an element of costs and therefore not part of the merits judgment"). They are not damages that are part of a cause of action. *See, e.g.*, *Avalon Const. Corp. v. Kirch Holding Co.*, 256 N.Y. 137, 145

(1931) (stating that any attorney's fees should be assessed in a bill of costs, not as damages to be recovered); *Lurman v. Jarvie*, 82 App. Div. 37 (1st Dep't 1903) (stating that fees are costs governed by statute and ordinarily cannot be awarded as damages), *aff'd on op. below*, 178 N.Y. 559 (1904).

This historical practice relating fees to costs or expenses is reflected in many statutory fee-shifting provisions that allow attorney's fees to be awarded at the conclusion of the litigation. For example, the State's Equal Access to Justice Act directs that certain parties may submit a fee application within thirty days after a final judgment, i.e., "a judgment that is final and not appealable." *See* C.P.L.R. 8601(b), 8602(c); *see also* Agriculture & Markets Law § 308-a(2)(b) (thirty days); Tax Law § 3030 (same); *cf.* C.P.L.R. 8303(a)(4) (after exhaustion of appeals). The law governing class actions similarly anticipates that a fee application would be filed post-judgment. *See* C.P.L.R. 909. In addition, U.S. Supreme Court precedent holds that a fee award under Federal law is not an element of damages; the award is separate from the merits. *See White v. N.H. Dep't of Employment Sec.*, 455 U.S. 445, 452 (1982).

But some cases have categorized attorney's fees under fee-shifting provisions as "damages" that are an "integral part" of a cause of action. *See, e.g.*, *Burke v. Crosson*, 85 N.Y.2d 10, 17 (1995) (fee award under 42 U.S.C. § 1988) (citing *Manko v. City of Buffalo*, 294 N.Y. 109 (1945)). Under this approach, the parties must resolve a fee application before they can exhaust appellate review of the merits through the Court of Appeals. This approach creates an anomaly: fees cannot be assessed until action on the merits is complete.

Benefits of Proposed Amendment

Determining eligibility for and the amount of a fee award while the merits of the claims remain subject to further review is an inefficient use of judicial resources. The better practice would be to enable the court to consider the substantive merits of a fee application based on the outcome of the litigation, i.e., after the merits judgment is final and not appealable. Accordingly, courts and parties would benefit from predictability and consistently treating attorney's fees as incidental to the litigation, regardless of the basis for fee shifting.

By postponing a motion for attorney's fees (and other costs or expenses) incurred by a party in that action until after a final judgment, the amendment would mitigate problems of prematurely litigating fees in the face of uncertain outcomes on the merits. If a judgment is overturned in whole or in part—perhaps with an expectation of further trial court proceedings—

then a previously litigated fee motion would be either in vain, or subject to significant revisions after applying the same analysis to the same billing records a second time. And even if a judgment were affirmed, then the parties would return to the trial court to litigate the fees incurred during appellate proceedings. This CPLR amendment would also ensure that New York State courts follow binding U.S. Supreme Court precedent interpreting Federal law.

This amendment would not affect the law governing an application for attorney's fees from a fund (e.g., a structured settlement) or based on a contingency agreement. *See* CPLR arts. 50-A, 50-B. Nor would this amendment affect an application under laws that expressly contemplate an award of fees during an action not based on a final determination of the merits of a complaint or petition. *See, e.g.*, Domestic Relations Law § 237 (award of fees to enable party to litigate); Rules of the Chief Admin. (22 N.Y.C.R.R.) § 130–1.1(a) (sanctions for frivolous litigation).

This amendment also would not affect, for example, an action to recover attorney's fees incurred in a prior litigation. The current proposal would apply only to fees incurred within an action.

Proposal

AN ACT to amend the civil practice law and rules, in relation to motions for attorney's fees

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 8405 to read as follows:

§ 8405. Motions for Attorney's Fees. (a) 1. Except as may otherwise be provided by applicable statute or rule, in any civil action in which a court is authorized to award attorney's fees incurred by one party against another party in that action, the party seeking an award of fees or costs shall, within thirty days after final judgment in the action, submit to the court a motion seeking such fees.

2. For the purpose of this section:

(1) "Action" means any civil action or proceeding, including any appellate proceeding.

(2) "Final judgment" means a judgment or order that is final and not appealable, and settlement on all claims.

(b) Where fees are sought under this section or another statute or rule authorizing an award of fees from another party within an action, the motion shall have the same effect as a judgment or order in a special proceeding.

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

43. Allowing a Claimant to Amend a Timely Served Notice of Intention under the Court of Claims Act
(Court of Claims Act §11(d) (new)

This measure would amend Court of Claims Act §11 by adding a new subdivision (d) to permit an amendment to the notice of intention or claim to be freely granted at any time during the pendency of an action absent a showing of prejudice by the State.

The committee recommends adoption of this measure to correct the lack of a procedure for a claimant to correct a good faith mistake, omission, irregularity or defect in the notice of intention or claim even when such error resulted in no prejudice to the State.

Background:

The Court of Claims Act (CCA) requires that a claimant either serve and file a claim or serve a notice of intention within a specified time after accrual of the claim in order to permit the State to timely investigate the allegations. (CCA §10–1, 2, 3, 3-a, 3-b, 4 and 5.)

The CCA has provisions for a claimant who fails to timely serve or file a notice of intention or claim, (see §10-6 and 8(a)), but it has no provision allowing a claimant to amend a timely served notice of intention or timely served and filed claim to correct a mistake, omission, irregularity, or other defect.

In contrast to the CCA, the General Municipal Law (GML) 50-e specifically provides a remedy to correct an error in a timely filed notice of claim made in good faith which does not prejudice the municipality.

This proposed measure seeks to incorporate the language of GML 50-e into the CCA.

Justification:

A new provision specifically addressed to circumstances where a notice of intention or claim is timely served or filed but contains an error made in good faith which results in no prejudice to the State is necessary to avoid the dismissal of a potentially meritorious case for purely procedural reasons. As noted by Professor Vincent Alexander (a member of the committee) in the Practice Commentaries to CPLR 2001, a statute permitting the correction of non-prejudicial mistakes is essential in an enlightened system of civil procedure that eschews the elevation of form over substance.

The need for a provision to allow for amending a timely served notice or served and filed claim is demonstrated by *Constable v. State of New York*, 172 A.D. 3d 681 (Second Dept. 2019), where the claim was dismissed because the notice of intention and claim failed to adequately describe the location of the alleged accident. As noted in the decision, the State's motion seeking dismissal was filed six months after the last deposition was conducted.

In another case, *Hyatt v. State of New York*, 2018 NY Slip Op 51983 (U), the claimant's action was dismissed because he had incorrectly described the location of the automobile accident in his otherwise timely notice of intention and claim. The claimant had relied on incorrect information provided in the report issued by the New York State Police which had investigated the accident. The claimant's subsequent attorneys discovered the mistake, and the claimant sought permission to serve an amended notice of intention to file a claim and moved to serve and file a late claim. The Court of Claims noted that there was no provision in the CCA for service of an amended notice of intention to file a claim. Instead, the Court weighed the factors set forth in CCA §10(6) and denied the application to file a late claim. The decision is presently on appeal.

The more stringent requirements for filing a late claim under CCA § 10(6) are not available even to a claimant who has timely served or filed initially unless an application is made within the prescribed statute of limitations. This proposal would ensure that a claimant who has timely served or filed is not precluded from correcting the good faith error or omission solely because the statute of limitations has run. This measure is intended to provide a remedy in the interest of justice to a claimant who timely serves a notice of intention or serves and files a claim which contains an error that caused no prejudice to the State.

Change in Existing Law:

This proposal is intended to provide a remedy in the interest of justice to a claimant who timely serves a notice of intention or serves and files a claim which contains an error that caused no prejudice to the State. This act will take effect immediately.

Proposal

AN ACT to amend the court of claims act, in relation to dismissal of claim in the court of claims based on claimant's failure to comply with pleading requirements

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

Section 1. Section 11 of the court of claims act is amended by adding a new subdivision (d) to read as follows:

d. A claimant may, at any time after the timely service of a notice of intention or timely filing and service of a claim, and at any stage of the action, apply to the court for permission to correct a mistake, omission, irregularity, or defect made in good faith in the notice of intention or claim required to be served by this section, not pertaining to the manner or time of filing and service thereof. The notice of intention and/or claim may be corrected, supplied, or disregarded, as the case may be, in the discretion of the court, provided it shall appear that the other party was not prejudiced thereby. If such permission is granted, the notice of intention and/or claim shall be deemed corrected *nunc pro tunc.* The application to correct shall be accompanied by a copy of the proposed corrected notice of intention and/or claim.

§ 2. This act shall take effect immediately.

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

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

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

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

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

However, there is a problem with the inflexible nature of the current requirement concerning certification of the acknowledgment. The problem was plainly demonstrated by the Court of Appeals' recent ruling in *Galetta*. In that case, it was undisputed that both parties had signed the subject agreement, and, more than that, that both parties had done so in the presence of a notary who was retained specifically for that purpose. Unfortunately, the notary retained to notarize the husband's signature inadvertently omitted a portion of the "boilerplate" language stating that the notary had confirmed the identity of the signatory, with the consequence that the notary's certification of the acknowledgment was defective. For that reason, and also because the notary could (understandably) not remember an entirely unmemorable event that had occurred many years earlier, a prenuptial agreement that both parties had undisputedly signed was deemed legally invalid.

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

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

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

Proposal

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

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

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

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

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

45. <u>Permitting Delay for Filing a Notice of Petition in a Wrongful Death Action (General Municipal Law 50-e(1)(a))</u>

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of the CPLR Advisory Committee on Civil Practice. In many instances, a notice of claim must be filed against a public corporation prior to bringing an action. Section 50-e of the General Municipal Law lays out the procedures for filing such a notice. Subdivision (1)(a) of this section sets forth the timing. It provides that the notice must be served "within ninety days after the claim arises". However, for wrongful death actions, the ninety-day period begins to run "from the appointment of a representative of the decedent's estate.

In *Yates v. Singh*, 60 Misc.3d 1217(A) (Supreme Court, Nassau County, 2018), Justice Marber noted that while this statutory extension applied to a wrongful death claim, it did not apply to a claim for pain and suffering. He recently urged OCA to consider proposing an amendment to the statute so that it would also apply to the pain and suffering claim.

The death of the claimant before the expiration of this deadline presents the same situation without regard to the nature or timing of the claim - - the claimant has died and the executor or administrator of the estate, who will be responsible for filing the notice and pursuing the claim, has not yet been appointed. This measure would toll the ninety-day filing period until that appointment in all such cases.

Subdivision 5 of section 50-e permits a claimant to file an application to serve a late notice of claim. The application in *Yates* was based on this provision. Justice Marber, in granting the application with respect to the pain and suffering claim, noted that the statutory tolling applied only to the claim for wrongful death. He said that he agreed with counsel's argument that this is "a quirk in the law". However, he said that the court is "bound to follow the law."

While it could be argued that the ability to apply for relief solves the problem following the death of a claimant, the Committee believed that requiring such an application results in a waste of the time and money of both the parties and the courts. A statutory tolling solves the problem that Judge Marber recognized. It avoids the need for an application to the court and a judicial proceeding for claims other than wrongful death where the decedent has died prior to the filing deadline and the estate representative has not yet been appointed. This act shall take effect immediately and apply to notices of claim filed on or after such date.

Proposal

AN ACT to amend the general municipal law in relation to notices of claim

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

Section 1. Paragraph (a) of subdivision (1) of section 50-e of the general municipal law is amended to read as follows:

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that [in wrongful death actions, the ninety days shall run from] when the claimant dies prior to the expiration of such ninety day period, the time within which to serve the notice of claim shall be tolled until the appointment of a representative of the decedent's estate.

§2. This act shall take effect immediately and shall apply to all notices of claim filed on or after such date.

46. Addressing Service of Certain Notices of Claim
(Gen. Municipal L. §50-e[1][b], [3][c])

The Committee recommends amendment of General Municipal Law § 50-e[3][c] to provide that service of a notice of claim upon the incorrect municipal entity will be deemed compliant with the statute when, (1) the correct entity is timely apprised of the notice of claim, and, (2) that entity or one acting on its behalf or with its knowledge demands that the claimant or another individual with knowledge be examined with respect to the matter.

The Committee additionally recommends that General Municipal Law § 50-e[1][b] be amended to clarify those circumstances in which the plaintiff who also wishes to directly sue an employee of the public corporation must identify the employee by name in the notice of claim. The proposed amendment would provide that such identification is not required unless, (1) the plaintiff knew or could have with due diligence discovered the individual's name within the time allotted for service of the notice of claim, and, (2) the public entity was prejudiced in its investigation by reason of the plaintiff's failure to identify the individual by name in the notice of claim.

Current Law Regarding GML § 50-e[3][c] [Service Issue]

General Municipal Law § 50-e[3][c] provides that when a notice of claim is timely served "but in a manner not in compliance with the provisions of this subdivision" service is nonetheless valid "if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it."

Although that provision could conceivably have been construed so as to permit commencement of an action where the plaintiff timely served the "wrong" municipal entity but the "right" municipal entity was timely apprised of the claim (as would occur if the wrong entity timely forwarded the notice to the right entity), the Court of Appeals ruled otherwise in *Scantlebury v New York City Health and Hosps. Corp.*, 4 NY3d 606 [2005]. The Court there held that the provision applies only in the instance in which the plaintiff served the correct entity but did so incorrectly. The Court reasoned that if the provision had been "intended to relieve a plaintiff from the consequences of serving a notice of claim on the wrong public entity, one would expect to find some comment somewhere in the legislative history to this effect" (4 NY3d at 613).

So, in *Scantlebury* itself, where the plaintiff intended to sue New York City Health and Hospitals Corporation ("HHC") but instead served her notice of claim on the Comptroller of the City of New York, HHC was deemed entitled to summary judgment for that reason even though, (1) it timely learned of the claim, and, (2) it demanded and received an examination of the plaintiff pursuant to General Municipal Law § 50-h.

It should be noted that the impact of *Scantlebury* was partly ameliorated by the 2012 amendment which created a mechanism by which the plaintiff could file the notice of claim with the secretary of state in lieu of serving it upon the municipal entity. L. 2012, c. 500. The problem is that many plaintiffs continue to serve the entity itself, or try to do so. The plaintiff in such cases generally has no idea of the service defect until the time to correct the error has passed. In such cases, the municipal entities continue to prevail as a matter of law even in those instances in which they were timely apprised of and in fact investigated the claim.

The Proposed Amendment of GML § 50-e[3][c] [Service Issue]

The proposed amendment reflects a compromise. A municipal entity that was timely apprised of the claim could no longer obtain dismissal based upon the service defect if it or another entity acting on its behalf or with its knowledge demanded that the plaintiff or another person with knowledge appear for a GML § 50-h examination.

Current Law Regarding GML § 50-e[1][b] [Naming Issue]

Although the plaintiff will often choose not to directly sue the municipal employee in those instances in which the public corporation would stand vicariously liable for the employee's conduct, plaintiffs sometimes seek to sue the employee as well. This occurs, for example, in some cases involving alleged police misconduct, motor vehicle accidents, and also in some medical malpractice actions.

While current GML § 50-e[1][b] specifies those circumstances in which a plaintiff who sues only the employee and not the employer must serve a notice of claim, it does not specify whether the employee must be identified by name in those cases in which the plaintiff sues the public corporation as well as the employee.

This has given rise to split of authority between the departments of the Appellate Division. The First Department has ruled that "General Municipal Law § 50-e makes unauthorized an action against individuals who have not been named in a notice of claim."

Tannenbaum v City of New York, 30 AD3d 357, 358 [1st Dept 2006]. The Third and Fourth Departments have reached the opposite conclusion. *Goodwin*, 105 AD3d 207, 216 [4th Dept 2013]; *Pierce v Hickey*, 129 AD3d 1287 [3d Dept 2015]. Although the Second Department has apparently not addressed the issue recently, it too subscribed to the latter view. *Schiavone v Nassau County*, 51 AD2d 980, 981 [2d Dept 1976], *aff'd* 41 NY2d 844 [1977].

It should be noted that the dispute relates solely to the content required in the notice of claim, not to the persons on whom it must be served or the manner in which it must be served. With respect to those cases in which the plaintiff wants to sue the public corporation *and* an employee of the corporation, it is clear in all departments that a notice of claim is required (since the public corporation is itself a defendant) and that the notice is served only upon the public corporation itself.

The Proposed Amendment Of GML § 50-e[1][b] [Naming Issue]

Once again, the Committee's proposal reflects a compromise. Rather than stating that an employee must be identified by name in the notice of claim in order for the plaintiff to directly sue that individual (the First Department rule) or that such is not a requirement (the Third and Fourth Department view), the proposed amendment would provide that such is not required unless, (1) the plaintiff knew or with due diligence could have timely discovered the individual's name, and, (2) the public corporation was thereby prejudiced in its investigation of the claim.

The Committee feels, first, that the proposal represents a sensible and fair balance between the competing concerns, and, second, that the public corporation is best situated to show that it was prejudiced (as opposed to the plaintiff having to prove the negative).

Proposal

AN ACT to amend the general municipal law, in relation to service of certain notices of claim.

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

Section 1. Subdivision (1)(b) of section 50-e of the general municipal law is amended to read as follows:

(b) Service of the notice of claim upon an officer, appointee or employee of a public corporation shall not be a condition precedent to the commencement of an action or special proceeding against such person. If an action or special proceeding is commenced against such person, but not against the public corporation, service of the notice of claim upon the public corporation shall be required only if the corporation has a statutory obligation to indemnify such person under this chapter or any other provision of law. If an action or special proceeding is commenced against such person and against the public corporation itself, the notice of claim need not identify the person by name unless, (1) the plaintiff knew or with due diligence could have discovered the person's name within the time allotted for service of the notice of claim, and, (2) the failure to identify the person by name prejudiced the public corporation in its investigation of the claim.

§ 2. Subdivision (3)(c) of section 50-e of the general municipal law is amended to read as follows:

(c) (1) if the notice is served within the period specified by this section, but in a manner not in compliance with the provisions of this subdivision, the service shall be valid if the public corporation against which the claim is made demands that the claimant or any other person interested in the claim be examined in regard to it, or if the notice is actually received by a proper person within the time specified by this section, and the public corporation fails to return the notice, specifying the defect in the manner of service, within thirty days after the notice is received.

(2) if the notice is served within the period specified by this section, but not upon the correct public corporation, the service shall be deemed to have been made upon the correct public corporation if that corporation was apprised of the notice of claim within the time specified by this section and the corporation or another entity acting on its behalf

or with its knowledge demands that the claimant or any other person interested in the claim be examined in regard to it.

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

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

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

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

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

The decision in *Rink v. State of New York*, 27 Misc.3d 1159 (Ct. Claims 2009), *aff'd*, 87 AD 3d 1372 (4th Dept. 2011) demonstrates that further clarification is necessary so that the goals underlying GOL §5-335 can be accomplished. The *Rink* court granted a health insurer's motion to intervene in a pending medical malpractice action, holding that GOL §5-335 addresses only situations in which the tortfeasor has settled an action and not those in which litigation is still pending. The Committee believes that such intervention is impliedly precluded by current law except where intervention is sought to enforce certain benefits specified in subdivisions (b) and (c) of section 5-335. The measure, adopting the predominant view in the Appellate Divisions, under which intervention by health insurers is precluded (*see Fasso*, 12 NY3d at 89), would make that explicit.

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

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

Proposal

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

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

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

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

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

(b) This section shall not apply to a subrogation claim for recovery of additional first-party benefits provided pursuant to article fifty-one of the insurance law. The term "additional first-party benefits", as used in this subdivision, shall have the same meaning given it in section

65-1.3 of title 11 of the codes, rules and regulations of the state of New York as of the effective date of this statute.

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

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

48. Amending the General Obligations Law Governing Structured Settlement Transfers
(Gen. Obligations Law §§ 5-1703, 5-1705 & 5-1708)

This measure would add certain procedural requirements to the laws governing structured settlement transfers. For reasons explained more fully below, the Committee recommends that §§ 5-1703, 5-1705 and 5-1708 of the General Obligations Law be amended to require (1) that the caption of a petition to transfer structured settlement payments identify the transferee as the petitioner and the transferor (i.e., the beneficiary, or payee, of the structured settlement payments) as the respondent; (2) that a guardian ad litem be appointed when the payee is an infant; and (3) that an independent advisor be appointed when the payee needs assistance in understanding the legal and financial implications of the transfer. The Committee further recommends that any advance payments by the transferee prior to court approval be at the transferee's risk, in the event the transfer is disallowed, and that the transferee so advise the payee prior to any advance payment.

Background

The underlying problem is all-too-familiar to the courts: beneficiaries of future payments from structured settlements seek to sell without sufficient legal or financial advice the right to long-term security in the form of those future payments for an immediate lump-sum payment, at a significantly discounted rate that represents only a fraction of the present value of the structured payout. While there are of course legitimate reasons for such transfers, the bench and bar alike have reported numbers of instances of predatory practices by funding companies and ill-informed beneficiaries such that there is, yet again, urgent need for proper safeguards to legislate preventative measures against these practices.

Requiring caption to include name of funding company and name of beneficiary/transferor

The proposal adds a new subdivision (c) to § 5-1705, as follows: "The caption of a petition for approval of a transfer of structured settlement payment rights must identify the transferee as the petitioner and the payee as the respondent." Standardizing the caption of the petition in this way will make it easy to identify the real parties in interest in the proceeding and will also facilitate searches for other applications involving the same parties.

Appointing a guardian ad litem if the payee is an infant

Under the proposal, the court would appoint a guardian ad litem to appear for an infant payee in a structured settlement transfer proceeding. Currently, under CPLR §1201, infants ordinarily appear in actions by a parent or other person having legal custody. However, there is an inherent risk that a parent facing financial difficulties may seek immediate funds by transferring an infant's structured settlement at the expense of the infant's best interest. While section 1201 authorizes the appointment of a guardian ad litem because of a conflict of interest, that authority is rarely exercised when an infant appears by a parent. Given the substantial potential of a conflict of interest when a parent seeks immediate funds that may significantly impair or eliminate an infant's entitlement to future payments, the proposal would require that an infant appear in a transfer proceeding by a guardian ad litem. Compensation for the reasonable value of the guardian ad litem's services would be paid by the transferee.

Appointing an independent advisor to assist the payee in assessing the financial and legal implications of the transfer

Even when an adult seeks to transfer his or her own structured settlement in exchange for an immediate payment, there is a risk that the adult may, particularly if financially unsophisticated, agree to a transaction that is grossly ill-advised or unfair. Currently, under sections 5-1703 and 5–1706 of the General Obligations Law, the party seeking to acquire structured settlement payment rights is required to disclose certain financial aspects of the transaction to the payee and advise the payee to seek independent professional advice regarding the transfer. Before the court can approve the transfer, it must find that the payee obtained such independent advice or knowingly waived it. In practice, many payees do not obtain independent professional advice and, without a proper understanding of the transaction, agree to the transfer despite terms that may be unfair. Under this proposal, if the court determines that the payee is unsophisticated concerning the legal, tax or financial implications of the transfer, the court would appoint an independent advisor to counsel the payee about the terms of the transaction. Where appropriate, the advisor could also recommend less costly means of meeting the payee's financial need. The advisor could also assist the court in making the findings required by

section 5-1706 as to whether the transaction is in the best interest of the payee and whether the discount rate and any fees and expenses are fair and reasonable.

The court would not appoint an independent advisor if it was satisfied that the payee had already received such advice or understood the implications of the transfer. Compensation for the reasonable value of the advisor's services would be paid by the transferee.

Providing that advance payments by the transferee to the beneficiary prior to judicial approval of the transfer are at the transferee's risk

The Committee considered forbidding altogether advance payments by the funding company to the beneficiary before the transfer is approved. Because there are situations where such payments are likely necessary before the court approval process is complete, however, the Committee recommends that such payments be permitted but only at the transferee's risk, so that the funding company would have no recourse against the beneficiary if the transfer is not approved. The payee would be so advised prior to receiving the advance payment. Placing the risk on the funding company would serve as an appropriate check on abusive and predatory practices by funding companies who entice beneficiaries with promises of easy and fast money.

Proposal

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

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

Section 1. Section 5-1703 of the general obligations law is amended to read as follows:
§ 5-1703. Required disclosures to payee. Not less than ten days prior to the date on which the payee signs a transfer agreement, the transferee shall provide to the payee by first class mail and certified mail, return receipt requested or United States postal service priority mail, a separate disclosure statement, in bold type no smaller than fourteen points, setting forth:

(a) the amounts and due dates of the structured settlement payments to be transferred;

(b) the aggregate amount of such payments;

(c) the discounted present value of the payments to be transferred, which shall be identified as the "calculation of current value of the transferred structured settlement payments under federal standards for valuing annuities", and the amount of the applicable federal rate used in calculating such discounted present value;

(d) the price quote from the original annuity issuer or, if such price quote is not readily available from the original annuity issuer, then a price quote from two other annuity issuers that reflects the current cost of purchasing a comparable annuity for the aggregate amount of payments to be transferred;

(e) the gross advance amount and the annual discount rate, compounded monthly, used to determine such figure;

(f) an itemized listing of all commissions, fees, costs, expenses and charges payable by the payee or deductible from the gross amount otherwise payable to the payee and the total amount of such fees;

(g) the net advance amount including the statement: "The net cash payment you receive in this transaction from the buyer was determined by applying the specified discount rate to the amount of future payments received by the buyer, less the total amount of commissions, fees, costs, expenses and charges payable by you";

(h) the amount of any penalties or liquidated damages payable by the payee in the event of any breach of the transfer agreement by the payee; [and]

(i) a statement that the payee has the right to cancel the transfer agreement, without penalty or further obligation, not later than the third business day after the date the agreement is signed by the payee; and

(j) a statement that the payee has no obligation to pay back any sums received from the transferee unless and until a court has approved the transfer.

§ 2. Section 5-1705 of the general obligations law 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.

(c) The caption of a petition for approval of a transfer of structured settlement payment rights must identify the transferee as the petitioner and the payee as the respondent.

(d) A copy of the 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)](e) 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;

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

(g) Notwithstanding any other provision of law, the court shall appoint a guardian ad litem for the payee when the payee is an infant. The guardian ad litem's fees shall be paid by the transferee.

(h) The court shall appoint an independent advisor to counsel the payee about the terms of the transfer if the court determines that the payee would benefit from assistance in understanding the legal and financial implications of the transfer and in identifying possible alternatives to the transfer. The independent advisor may also assist the court in making the findings required under section 5-1706. The independent advisor's fees shall be paid by the transferee.

§ 3. Section 5-1708 of the general obligations law is amended by adding a new subdivision (h) to read as follows:

(h) In the event that a petition for approval of a transfer of structured settlement payment rights is denied, the transferee will have no right to recover from the payee any funds that have been advanced to the payee.

§ 4. This act shall take effect immediately.

49. Amending the General Obligations Law to Facilitate Flexible Tolling Agreements (Gen.Oblig.Law § 17-103; CPLR 201)

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of the Advisory Committee on Civil Practice. This measure would amend § 17-103(1) & (3) of the General Obligations Law to give parties greater flexibility in making agreements extending the statute of limitations. CPLR 201 would contain an appropriate cross-reference to § 17-103. The act will have retroactive effect in order to validate pre-existing tolling agreements.

The modern policy of civil procedure is to facilitate private dispute resolution without resort to the courts. *Wimbledon Fund, SPC v. Weston Capital Partners Master Fund II, Ltd.*, 184 A.D.3d 448, 450 (1st Dep't 2020) (New York's "public policy favors the settlement of disputes"). This goal is furthered by judicial enforcement of private agreements to extend or toll the statute of limitation (often called "tolling" or "standstill" agreements) while the parties to a dispute negotiate a settlement, compromise or modified performance. See, e.g., *Byron Community Unit School No. 226 v. Dunham-Bush, Inc.*, 215 Ill.App.3d 343, 345, 350-51 (1991); 4B N.Y.Prac., *Comm. Litig. In N.Y. Courts* § 71:13 n.1 (5th ed.). One frequent extension technique, for example, is an agreed-upon toll that is "terminable by either party upon 30 days' written notice." See, e.g., *Stantec Consulting Group v. Fonda-Fultonville Central School District*, 36 A.D.3d 1051, 1052 (3d Dep't 2007), leave to appeal denied, 9 N.Y.3d 807 (2007) (enforcing such a tolling agreement in architectural malpractice case not governed by Gen.Oblig.Law § 17-103).

The current language and judicial interpretation of Gen.Oblig.Law § 17-103(1) & (3), however, frustrate and impede that policy. The statute currently prohibits private extension periods that exceed the otherwise-applicable period of limitation and disallows any agreement providing for indefinite or uncertain periods of time or periods based on the occurrence of contingent events. *Deutsche Bank Nat'l Trust Co. v. Flagstar Capital Markets Corp.*, 32 N.Y.3d 139, 153 (2018); *Bayridge Air Rights, Inc. v. Blitman Constr. Corp.*, 80 N.Y.2d 777, 779-80 (1992); *T&N PLC v. Fred S. James & Co.*, 29 F.3d 57, 61 (2d Cir. 1994). These restrictions are counter-productive.

The amendment, therefore, amends Gen.Oblig.Law § 17-103(1) & (3) to provide, as to any cause of action (not just contract claims), that after the accrual of the cause of action, the parties may, by written agreement, waive, extend or agree not to plead the statute of limitation pursuant to any arrangement that suits their situation. They may specify any extended period of time (certain or uncertain) or may specify any event from which the time for commencement is to be computed.

The proposed amendment will facilitate the flexibility that parties need to work out their private dispute efforts. The new language would permit, for example, a toll that ends "upon 30 days' written notice of either party." Under the revised statute, the parties will have the freedom to fashion a timing plan that suits their particular circumstances and may eliminate entirely the need for litigation.

A tolling agreement that meets the technical requirements of GOL 17-103(1) would be unenforceable, nonetheless, upon a showing of such grounds as exist at common law or in equity for invalidating any contract, including fraud, duress, or unconscionability. See, e.g., *Friedman v. Egan*, 64 A.D.2d 70, 84-85 (2d Dep't 1978) (consignment of artwork subject to challenge on ground of unconscionability; court noted that N.Y. UCC 2-302's statutory provision on unconscionability codified common-law doctrine); *Conifer Realty LLC v. Envirotech Services, Inc.*, 106 A.D.3d 1251, 1253-55 (3d Dep't 2013) (arbitration agreement subject to challenge on ground of unconscionability); *Gottlieb v. Gottlieb*, 138 A.D.3d 30, 36-37 (1st Dep't 2016), leave to appeal dismissed, 27 N.Y.3d 1125 (2016) (prenuptial marital agreement subject to challenge on grounds of fraud, duress, and overreaching resulting in manifest unfairness), *Divito v. Fiandach*, 200 A.D.3d 1564, 1565-66 (4th Dep't 2021) (attorney retainer agreement subject to challenge on ground of unconscionability). And, of course, a tolling agreement would be voidable if it violated a statute or regulation governing the legality of contracts in general, such as prohibitions on usury or discrimination.

Although the amendment implicitly incorporates common-law and equity contract defenses, there is no intent to revive any judge-made "reasonableness" standard that pre-dated the adoption of GOL 17-103. See, e.g., *Watertown Nat'l Bank v. Bagley*, 134 A.D. 831, 837 (4th Dep't 1909); *Gorowitz v. Blumenstein*, 84 Misc. 111, 115 (Sup.Ct.N.Y.Co. 1944). Prior to 1961, some lower courts said that contracts extending the statute of limitations must be "reasonable," but the Court of Appeals never decided the issue.

The drafters of the original GOL 17-103 correctly observed that a reasonableness test for extending the statute of limitation is too indefinite. *Recommendation of the Law Revision Commission to the Legislature Relating to Agreements Extending the Statutes of Limitation*, Leg.Doc. (1961) No. 65 (E), p.99. In applying contractual limitations periods, as with contracts generally, New York policy favors "objective, reliable, predictable and relatively definitive rules." *ACE Securities Corp. v. DB Structured Products, Inc*., 25 N.Y.3d 581, 594 (2015) (internal quotation marks omitted). The traditional common-law and equitable defenses to contract enforcement serve this goal, whereas an uncertain rule of "reasonableness" does not.

Rejection of a reasonableness gloss on GOL 17-103, however, is not intended to affect the reasonableness rule that courts apply to contractual *shortening* of the statute of limitations. See, e.g., *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 551 (1979). The shortening of a limitations period arises in the very different context of the bargaining that occurs at the time of the original transaction, not after a dispute has arisen and the parties are seeking to avoid, or at least delay, litigation. The New York Court of Appeals long ago articulated a standard to govern the reasonableness of truncated limitation periods: they must not constitute "flagrant" or "shocking" departures from statutory standards. *South & Central American Commercial Co. v. Panama Railroad Co*., 237 N.Y. 287, 291 (1928) (B. Cardozo); *Sapinkopf v. The Cunard Steamship Co*., 254 N.Y. 111, 114 (1930). That rule, applicable in cases involving shortened periods of limitation, remains untouched by the amendment of GOL 17-103.

In the amended GOL 17-103, any waiver or extension agreement made in the original transaction is per se unenforceable, as under existing law. This preserves longstanding public policy in New York and elsewhere that protects parties, especially those in debtor-creditor relationships, from a contractual statute-of-limitation extension that may someday subject them to debt collection or enforcement proceedings for a longer period than they expected under the law. *John J. Kassner & Co. v. City of New York*, supra, 46 N.Y.2d at 551. See also N.Y. UCC 2-725(1) (prohibiting extension of limitation period in original agreement); *Haggerty v. Williams*, 84 Conn.App. 675, 680-82 (2004) (collecting cases); 31 *Williston on Contracts* § 79-110.

But after a cause of action accrues, the parties may find it to be in their mutual interest to extend the time for payment, performance, or compromise. *Gorowitz v. Blumenstein*, supra, 84

Misc. at 115 (B. Shientag). See also *U.S. v. Curtiss Aeroplane Co*., 147 F.2d 639, 641 (2d Cir. 1945) (L. Hand).

The act amending GOL 17-103 is to have retroactive effect and therefore will apply to tolling agreements made before as well as after the effective date. The act is remedial, and retroactive application will further New York's public policy favoring settlement by maximizing the number of tolling agreements subject to the new rule of flexibility. The effective-date clause, in compliance with New York law, is an explicit and unequivocal expression that retroactivity is intended. See *Regina Metropolitan Co. v. New York State Division of Housing and Community Renewal*, 15 N.Y.3d 332, 370-71 (2020). See also *Bloomfield v. Bloomfield,* 97 N.Y.2d 188, 194 (2001); *Majewski v. Broadalbin-Perth Central School District*, 921 N.Y.2d 577, 584 (1998).

While retroactive application of the act may affect some pre-existing tolling agreements, it does not impair such contracts and therefore meets the test of constitutionality under the non-impairment clause of the U.S. Constitution (art. I, § 10). The act supports, rather than impairs, tolling contracts. It gives effect to the terms chosen by the parties, allowing them to rely on their own agreements. *Sveen v. Melin*, 138 S.Ct. 1815, 1821-22 (2018); *Massachusetts Municipal Wholesale Elec. Co. v. State*, 161 Vt. 346, 361 (1994). Furthermore, the validation of pre-existing tolling agreements reasonably advances the significant and legitimate public interest in promoting settlement as a means of avoiding the time and expense of litigation. See *Sveen v. Melin*, supra, 138 S.Ct at 1821-22; *Energy Resources Group, Inc. v. Kansas Power & Light Co*., 459 U.S. 400, 411-13 (1983).

Proposal

AN ACT to amend the general obligations law and the civil practice law and rules to give parties greater flexibility in making agreements extending the statute of limitations

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

Section 1. Sections 17-103(1) & (3) of the general obligations law are amended to read as follows:

§ 17-103. Agreements waiving the statute of limitation

1. A promise to waive, to extend, or not to plead the statute of limitation applicable to

2. [an action arising out of a contract express or implied in fact or in law] a cause of action, if made after the accrual of the cause of action and made, either with or without consideration, in a writing signed by the promisor or his agent is effective, according to its terms, to prevent interposition of the defense of the statute of limitation [in an action or proceeding commenced within the time that would be applicable if the cause of action had arisen at the date of the promise, or within such shorter time as may be provided in the promise] to the cause of action. The promise to waive, to extend, or not to plead the statute of limitation, as authorized herein, may specify any period of time (certain or uncertain) within which the action may be commenced or may specify any event from which the time for commencement is to be computed.

3. A promise to waive, to extend, or not to plead the statute of limitation may be enforced as provided in this section by the person to whom the promise is made or for whose benefit it is expressed to be made or by any person who, after the making of the promise, succeeds or is subrogated to the interest of either of them.

[4. A promise to waive, to extend, or not to plead the statute of limitation has no effect to extend the time limited by statute for commencement of an action or proceeding for any greater time or in any other manner than that provided in this section, or unless made as provided in this section.]

[4.] 3. This section

a. does not change the requirements or the effect with respect to the statute of limitation, of an acknowledgment or promise to pay, or a payment or part payment of principal or interest, or a stipulation made in an action or proceeding;

b. does not affect the power of the court to find that by reason of conduct of the party to be charged it is inequitable to permit him to interpose the defense of the statute of limitation; and

c. does not apply in any respect to a cause of action to foreclose a mortgage of real property or a mortgage of a lease of real property, or to a cause of action to recover a judgment affecting the title to or the possession, use or enjoyment of real property, or a promise or waiver with respect to any statute of limitation applicable thereto

§ 2. Section 201 of the civil practice law and rules is amended to read as follows:

CPLR 201. Application of article

An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action. A promise to waive, to extend, or not to plead the statute of limitation applicable to a cause of action may be made only in accordance with section 17-103 of the general obligations law.

§ 3. This act shall take effect immediately and shall apply to all promises to waive, to extend, or not to plead the statute of limitation whenever made.

50. Regarding the Effect of Res Judicata on Awards in Small Claims Court (New York City Civil Court Act §1808, New York City Civil Court Act §1808-A; Uniform City Court Act §1808, Uniform City Court §1808-A; Uniform District Court Act §1808, Uniform District Court Act §1808-A; Uniform Justice Court Act §1808)

This is one in a series of measures being introduced at the request of the Chief Administrative Judge upon the recommendation of his Advisory Committee on Civil Practice. This measure would amend section 1808 of the New York Civil Court Act, as well as a number of parallel provisions in that and the other Uniform Court Acts, so as to curtail the hidden penalty that is currently visited upon small claims plaintiffs. This measure is intended to abrogate the Court of Appeals' recent ruling in *Simmons v. Trans Express, Inc.*, 37 NY3d 107 [2021].

Recovery under the small claims provisions of the New York City Civil Court Act, entitled "Small Claims," is capped at $10,000. N.Y. City Civ. Ct. Act § 1801.[41] As the *Simmons* dissenters aptly observed, the small claims procedures were intended to be "simple, informal and inexpensive," mindful that many if not most litigants who bring a small claim will be doing so without benefit of counsel. Precisely because small claims are not litigated "full blown" litigation,[42] section 1808 provides that "[a] judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court." For example, a small claims finding that the subject contract was breached or alternatively that it was not breached will not preclude a court or jury from concluding differently in a subsequent action.

A problem for the small claims claimant arises when the claimant does not obtain full relief in the initial (small claims) proceeding. If the claimant's full damages far exceed what he or she was awarded in the small claims proceeding, it is not clear the claimant who prevails, but is only partly compensated, then commences an action with the benefit of counsel, can recover their remaining damages. The statute currently provides "that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the

[41] The same cap applies to "commercial claims" brought under Article 18-a of the New York City Civil Court Act. Recovery under the parallel provisions of the Uniform District Court Act, the Uniform City Court Act, and the Uniform Justice Court Act is variously capped at $5,000, or $3,000, with the difference that the Uniform Justice Court Act does not have a separate article governing small "commercial" claims.

[42] *See Gilberg v. Barbieri*, 53 NY2d 285, 292 [1981] (holding that a city court harassment conviction, which was relatively minor in nature, "should not be given conclusive effect in [a] civil action for damages").

amount of a judgment awarded under this article." Courts may construe that to mean that the claimant can bring the second action, but that the second recovery, if any, would be reduced by the amount of the small claims judgment. Such is how the *Simmons* dissenters construed the current statute. However, the majority ruled differently.

The *Simmons* majority reasoned that the common law doctrine of res judicata generally precludes a party from commencing a second action against the same defendant concerning the same claim, that the statute was "not a paragon of clarity" and did not clearly say otherwise, and that the common law doctrine of res judicata, also known as claim preclusion, therefore governed. As the dissenters accurately observed, the majority's construction of the statute will impose "a severe hardship on small claims pro se claimants—who, because they are unaware of their rights and in urgent need of money to meet their basic needs, or because they cannot afford lengthy and costly litigation, accept a quick and modest small claims payout rather than initially pursuing a larger award in another court."

Significantly, the *Simmons* majority did not defend or debate the policy implications of its ruling. Its only answer was that "there may well be reasonable policy arguments in favor of further limiting the preclusive effect of small claims judgments" but that "those arguments—some of which are advanced by plaintiff and accepted by the dissent—are best made to the legislature, not the courts." The impact of the ruling was nicely illustrated by the facts in *Simmons*. There the plaintiff alleged that she worked for approximately two years "for $12.50 an hour, for 60-to-84 hours per week, five-to-seven days per week, without additional payment for overtime, as required by state and federal law." She filed a pro se complaint in small claims court because she "needed the money as quickly as possible." The strategy worked insofar as she obtained a judgment and received a check within six weeks of filing.
The problem was that she was awarded only $1,000, which amounted to "approximately one to two weeks' pay at her regular $12.50 hourly rate, without an overtime differential." By virtue of the majority's construction of the statute, that meant that the employer would have to pay only a small fraction of the money in dispute.

This measure would amend the statute so as to clearly provide (1) the prevailing small claims plaintiff is not barred from pursuing a second action against the same defendant but (2) any recovery in the second action must be reduced, to the extent duplicative, by the small claims recovery. The bill would similarly amend the identical provisions of the Uniform City Court Act,

the Uniform District Court Act, and the Uniform Justice Court Act. This act shall take effect immediately and shall apply to all actions pending on or after the effective date.

Proposal

AN ACT to amend the New York City civil court act, the uniform district court act, the uniform city court act, and the uniform justice court act in relation to the res judicata consequences arising from recovery under each of such laws

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

Section 1. Section 1808 of the New York City civil court act is amended to read as follows:

§ 1808. [Judgment obtained to be res judicata in certain cases] Impact of a small claims judgment upon subsequent actions

A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court [except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article]. When a party obtains a judgment under this article, such judgment, whether in favor of or against the party, shall not bar the party from pursuing a new action involving the same facts, issues, transactions or parties, except that any recovery in the second action will be reduced by the amount of the judgment obtained under this article to the extent such recovery is duplicative of the judgment obtained under this article.

§ 2. Section 1808 of the uniform district court act is amended to read as follows:

§ 1808. [Judgment obtained to be res judicata in certain cases] Impact of a small claims judgment upon subsequent actions

A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court [except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article]. When a party obtains a judgment under this article, such judgment, whether in favor of or against the party, shall not bar the party from pursuing a new action involving the same facts, issues, transactions or parties, except that any recovery in the second action will be reduced by the amount of the judgment obtained under this article to the extent such recovery is duplicative of the judgment obtained under this article.

§ 3. Section 1808-A of the uniform district court act is amended to read as follows:

§ 1808-A. [Judgment obtained to be res judicata in certain cases] Impact on a small claims judgment upon subsequent actions

A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court [except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article]. When a party obtains a judgment under this article, such judgment, whether in favor of or against the party, shall not bar the party from pursuing a new action involving the same facts, issues, transactions or parties, except that any recovery in the second action will be reduced by the amount of the judgment obtained under this article to the extent such recovery is duplicative of the judgment obtained under this article.

§ 4. Section 1808 of the uniform city court act is amended to read as follows:

§ 1808. [Judgment obtained to be res judicata in certain cases] Impact of a small claims judgment upon subsequent actions

A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court [except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article]. When a party obtains a judgment under this article, such judgment, whether in favor of or against the party, shall not bar the party from pursuing a new action involving the same facts, issues, transactions or parties, except that any recovery in the second action will be reduced by the amount of the judgment obtained under this article to the extent such recovery is duplicative of the judgment obtained under this article.

§ 4. Section 1808-A of the uniform city court act is amended to read as follows:

§ 1808-A. [Judgment obtained to be res judicata in certain cases] Impact of a small claims judgment upon subsequent actions

A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court [except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article]. When a party obtains a judgment under this article, such judgment, whether in favor of or against the party, shall not bar the party from pursuing a new action involving the same facts, issues, transactions or parties, except that any

recovery in the second action will be reduced by the amount of the judgment obtained under this article to the extent such recovery is duplicative of the judgment obtained under this article.

§ 5. Section 1808 of the uniform justice court act is amended to read as follows:

§ 1808. [Judgment obtained to be res judicata in certain cases] Impact of a small claims judgment upon subsequent actions

A judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court [except that a subsequent judgment obtained in another action or court involving the same facts, issues and parties shall be reduced by the amount of a judgment awarded under this article]. When a party obtains a judgment under this article, such judgment, whether in favor of or against the party, shall not bar the party from pursuing a new action involving the same facts, issues, transactions or parties, except that any recovery in the second action will be reduced by the amount of the judgment obtained under this article to the extent such recovery is duplicative of the judgment obtained under this article.

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

51. <u>Amending Workers Compensation Board Forms for Application and Opposition</u> (WCL §23)

The Committee recommends an amendment to the section 23 of the Workers' Compensation Law to allow a party to file a new submission for Workers' Compensation Board ("the Board") review if the application is denied or rejected for non-compliance with the rules of the board for any reason, other than untimeliness or lack of merit. The new submission will be deemed timely if it is filed within thirty days after the party has been served notice of the Board's decision to deny or reject for such non-compliance.

Current law permits an aggrieved party to appeal an adverse workers' compensation decision to the Board. The application for Board review must be filed within 30 days after notice of the filing of the decision or award. When submissions for worker's compensation do not completely comply with the Board's detailed procedural requirements, the Board will reject a party's rebuttal due to defect. For example, even though the Board-authorized instructions for completing the Board-authored form invite the applicant to append a legal brief to the form (provided that the brief conforms to the Board's specifications concerning the length, font and margins of any such document), the Board will reflexively deny the application if the applicant answers any question by stating, in substance, "Please see attached brief." Although the Board-authored instructions do not tell the applicant not to do that, much less warn that such will of itself result in denial of the application, the Board reasons that the applicant should be able to deduce the prohibition from the fact that the instructions require that each question be answered "completely," or, alternatively that the applicant should know of that prohibition amid many detailed rules. (However, it should be noted that the Board will overlook non-compliance by "a claimant who is unrepresented.")

The Board will also deny the application for Board review, no matter now meritorious it may be, if the applicant fails to list the exact transcript page or pages on which the allegedly erroneous ruling appears, if the applicant errs in listing the applicable hearing date(s), if the applicant leaves any answer blank, or if the applicant provides an answer the Board deems overly conclusory. This is so irrespective of whether the applicant is an employer or claimant (except, again, for unrepresented claimants).

In all or almost all instances in which such non-merits dismissals occur, the thirty days for filing the application for review is long gone by the time the application is dismissed on some non-merits ground.

An analogous albeit less drastic penalty is imposed upon rebutting parties whose submission runs afoul of the often highly arcane rules. The Board may then consider the application without considering the rebuttal -- even if the rebuttal contains information which would have resulted in dismissal of the application.

The Committee recognizes that the Board receives thousands of application and rebuttals and that it is quite understandable that the Board would want them to be submitted in a form and manner that facilitates efficient review. On the other hand, decisions premised on a party's divergence from the detailed procedural rules for filing do not advance the interests of justice — particularly when the divergence is inadvertent, and the non-merits denial or rejection can have life-long consequences.

This measure strikes a fair and sensible balance. The Board has unfettered discretion to promulgate whatever procedural requirements it deems appropriate, but the party can then re-file if he or she does so promptly, within 30 days.

Proposal

AN ACT to amend the workers' compensation law, in relation to non-merits denials of applications for workers' compensation board review.

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

Section 1. Section 23 of the workers' compensation law is amended to read as follows:

§23. Appeals. An award or decision of the board shall be final and conclusive upon all questions within its jurisdiction, as against the state fund or between the parties, unless reversed or modified on appeal therefrom as hereinafter provided. Any party may within thirty days after notice of the filing of an award or decision of a referee, file with the board an application in writing for a modification or rescission or review of such award or decision, as provided in this chapter. The board shall render its decision upon such application in writing and shall include in such decision a statement of the facts which formed the basis of its action on the issues raised before it on such application. If such any submission or the rebuttal to that application is denied or rejected by reason of the party's non-compliance with the rules of the board or for any reason other than untimeliness or lack of merit, the party may file a new submission for board review and such submission will be deemed timely if filed within thirty days after notice of the decision of the board upon such application has been served upon the parties. Within thirty days after notice of the decision of the board upon such application has been served upon the parties, or within thirty days after notice of an administrative redetermination review decision by the chair pursuant to subdivision five of section fifty-two, section one hundred thirty-one or section one hundred forty-one-a of this chapter has been served upon any party in interest, an appeal may be taken therefrom to the appellate decision of the supreme court, third department, by any party in interest, including an employer insured in the state fund; provided, however, that any party in interest may within thirty days after notice of the filing of the board panel's decision with the secretary of the board, make application in writing for review thereof by the full board. If the decision or determination was that of a panel of the board and there was a dissent from such decision or determination other than a dissent the sole basis of which is to refer the case to an impartial specialist, or if there was a decision or determination by the panel which reduced the loss of wage earning capacity finding made by a compensation claims referee pursuant to

subparagraph w of subdivision three of section fifteen of this article from a percentage at or above the percentage set forth in subdivision three of section thirty-five of this article whereby a claimant would be eligible to apply for an extreme hardship redetermination to a percentage below the threshold, the full board shall review and affirm, modify or rescind such decision or determination in the same manner as herein above provided for an award or decision of a referee. If the decision or determination was that of a unanimous panel of the board, or there was a dissent from such decision or determination the sole basis of which is to refer the case to an impartial specialist, the board may in its sole discretion review and affirm, modify or rescind such decision or determination in the same manner as herein above provided for an award or decision of a referee. Failure to apply for review by the full board shall not bar any party in interest from taking an appeal directly to the court as above provided. The board may also, in its discretion certify to such appellate division of the supreme court, questions of law involved in its decision. Such appeals and the question so certified shall be heard in a summary manner and shall have precedence over all other civil cases in such court. The board shall be deemed a party to every such appeal from its decision upon such application, and the chair shall be deemed a party to every such appeal from an administrative redetermination review decision pursuant to subdivision five of section fifty-two of this chapter. The attorney general shall represent the board and the chair thereon. An appeal may also be taken to the court of appeals in the same manner and subject to the same limitations not inconsistent herewith as is now provided in the civil practice law and rules. It shall not be necessary to file exceptions to the rulings of the board. An appeal to the appellate division of the supreme court, third department, or to the court of appeals, shall not operate as a stay of the payment of compensation required by the terms of the award or of the payment of the cost of such medical, dental, surgical, optometric or other attendance, treatment, devices, apparatus or other necessary items the employer is required to provide pursuant to section thirteen of this article which are found to be fair and reasonable. Where such award is modified or rescinded upon appeal, the appellant shall be entitled to reimbursement in a sum equal to the compensation in dispute paid to the respondent in addition to a sum equal to the cost of such medical, dental, surgical, optometric or other attendance, treatment, devices, apparatus or other necessary items the employer is required to provide pursuant to section thirteen of this article paid by the appellant pending adjudication of the appeal. Such reimbursement shall be paid from administration expenses as provided in section

one hundred fifty-one of this chapter upon audit and warrant of the comptroller upon vouchers approved by the chair. Where such award is subject to the provisions of section twenty-seven of this article, the appellant shall pay directly to the claimant all compensation as it becomes due during the pendency of the appeal, and upon affirmance shall be entitled to credit for such payments. Neither the chair, the board, the commissioners of the state insurance fund nor the claimant shall be required to file a bond upon an appeal to the court of appeals. Upon final determination of such an appeal, the board or chair, as the case may be, shall enter an order in accordance therewith. Whenever a notice of appeal is served or an application made to the board by the employer or insurance carrier for a modification or rescission or review of an award or decision, and the board shall find that such notice of appeal was served or such application was made for the purpose of delay or upon frivolous grounds, the board shall impose a penalty in the amount of five hundred dollars upon the employer or insurance carrier, which penalty shall be added to the compensation and paid to the claimant. The penalties provided herein shall be collected in like manner as compensation. A party against whom an award of compensation shall be made may appeal from a part of such award. In such a case the payment of such part of the award as is not appealed from shall not prejudice any rights of such party on appeal, nor be taken as an admission against such party. Any appeal by an employer from an administrative redetermination review decision pursuant to subdivision five of section fifty-two of this chapter shall in no way serve to relieve the employer from the obligation to timely pay compensation and benefits otherwise payable in accordance with the provisions of this chapter.

Nothing contained in this section shall be construed to inhibit the continuing jurisdiction of the board as provided in section one hundred twenty-three of this chapter.

§2. This action shall take effect on the thirtieth day after it shall have become a law and shall apply to all workers' compensation board determinations rendered on or after such date.

IV. 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 the following rules that are consistent with this delegation and are not in conflict with existing law

1. Remedying Problems in E-Filing Actions
(22 NYCRR 202.5-b)

The purpose of these amendments is to remedy problems encountered by lawyers in e-filed actions. The mischief created in some e-filed cases is caused by 22 N.Y.C.R.R. section 202.5-b(h)(2), which allows a party, as an alternative to e-filing and electronically serving an order or judgment with notice of its entry, to "serve a copy of the order or judgment and written notice of its entry in hard copy by any method set forth in CPLR 2103(b)(1) to (6)." *See also* 22 N.Y.C.R.R. § 202.5-bb(a)(1) (noting that rules for consensual e-filing program govern in actions subject to mandatory e-filing, unless the rules for mandatory e-filing provide otherwise). Similarly, 22 N.Y.C.R.R. section 202.5-b(f)(2)(ii) permits a party in an e-filed action to "utilize other service methods permitted by the CPLR provided that, if one of such other methods is used, proof of that service shall be filed electronically."

If a party chooses to serve a hard copy of the order or judgment, proof of that service must be filed electronically. See 22 N.Y.C.R.R. § 202.5-b(f)(2)(ii). As seen in *JBBNY v. Dedvukaj*, 171 A.D.3d 898 (2d Dep't 2019), a case that was previously circulated by Helene, that has also created problems.

The Committee recommends that the option for hard copy service of orders with notice of entry be removed from the e-filing rules. It does not seem to make sense to allow a party to essentially temporarily opt out of e-filing and serve a hard copy of an order.

Proposal

Subdivision (2) of §202.5-b is amended to read as follows:

(2) Service of interlocutory documents in an e-filed action.

(i) E-mail address for service. The e-mail service address recorded at the time of registration is the e-mail address at which service of interlocutory documents on that party may be made through notification transmitted by the NYSCEF site. It is the responsibility of each filing user to monitor that address and promptly notify the Resource Center in the event of a change in his or her e-mail service address.

(ii) How service is made. An e-filing party causes service of an interlocutory document to be made upon another party participating in e-filing by filing the document electronically. Upon receipt of an interlocutory document, the NYSCEF site shall automatically transmit electronic notification to all e-mail service addresses in such action. Such notification shall provide the title of the document received, the date received, and the names of those appearing on the list of e-mail service addresses to whom that notification is being sent. Each party receiving the notification shall be responsible for accessing the NYSCEF site to obtain a copy of the document received. Except as provided otherwise in subdivision (h) (2) of this section, the electronic transmission of the notification shall constitute service of the document on the e-mail service addresses identified therein; however, such service will not be effective if the filing party learns that the notification did not reach the address of the person to be served. Proof of such service will be recorded on the NYSCEF site. [A party may, however, utilize other service methods permitted by the CPLR provided that, if one of such other methods is used, proof of that service shall be filed electronically.]

Subdivision (h) of §202.5-b is amended to read as follows:

(h) Entry of Orders and Judgments and Notice of Entry.

(1) Entry; date of entry. In an action subject to e-filing, the County Clerk or his or her designee shall file orders and judgments of the court electronically and enter them. The County Clerk may affix a filing stamp to orders or judgments by stamping the original hard copy

document before filing it electronically or by affixing a stamp to the document after it has been electronically filed. The filing stamp shall be proof of the fact of entry and the date and time thereof. The date of entry shall be the date shown on the stamp, except that if the County Clerk receives an order or judgment and places a filing stamp and date thereon reflecting that the date of receipt is the date of filing but does not e-file the document until a later day, the Clerk shall record at the NYSCEF site as the date of entry the date shown on the filing stamp.
(2) Notification; service of notice of entry by parties. Upon entry of an order or judgment, the NYSCEF site shall transmit to the e-mail service addresses a notification of receipt of such entry, which shall not constitute service of notice of entry by any party. A party shall serve notice of entry of an order or judgment on another party by serving a copy of the order or judgment and written notice of its entry. A party [may] <u>shall</u> serve such documents electronically by filing them with the NYSCEF site and thus causing transmission by the site of notification of receipt of the documents, which shall constitute service thereof by the filer. [In the alternative, a party may serve a copy of the order or judgment and written notice of its entry in hard copy by any method set forth in CPLR 2103 (b) (1) to (6). If service is made in hard copy by any such method and a copy of the order or judgment and notice of its entry and proof of such hard copy service are thereafter filed with the NYSCEF site, transmission by NYSCEF of notification of receipt of those documents shall not constitute additional service of the notice of entry on the parties to whom the notification is sent.]

2. <u>Allowing a 5-day Cure in E-Filed Cases for Failure to Provide Hard Copies of Prior Papers Filed Electronically</u>
(22 NYCRR 202.5-b(d)(4))

It is of great concern to the Committee that there exists a practice in some courts to deny motions in e-filed cases, without regard to whether pursuant to the consensual e-filing or the mandatory e-filing rules, on the ground that the movants did not provide the court with "working copies" (see 22 NYCRR 202.5-b(d)(4)). The term “working copies” has no statutory basis in the CPLR, yet at this time it is recognized widely in practice and exists in court rules. Therefore, the Committee recommends, consistent with the statutory measure proposed above (see, I. New Measures, No. 5), an amendment of the Uniform Rules of the Supreme and County Courts to provide for a "safe harbor" provision, requiring a court, prior to denying a motion on the basis

that the movant did not provide a working copy, to provide the movant with a brief 5-day cure period.

Proposal

22 NYCRR 202.5-b(d)(4)

(5) Working copies. The court may require the parties to provide working copies of documents filed electronically; provided, however, that the court shall not dismiss a motion for failure to provide hard copies of prior papers filed electronically unless it first gives notice of the failure to the filing party and allows five days from the date of such notice for the filing party to correct the failure. In such event, each working copy shall include, firmly affixed thereto, a copy of a confirmation notice in a form prescribed by the Chief Administrator.

3. Videotape Recording of Civil Depositions
(22 NYCRR 202.15(c))

The Committee recommends eliminating the requirement that parties provide the name of a videographer be twenty days in advance of a deposition. Over the years, there has been consolidation in the industry, and unless a party hires an independent videographer, it is often impossible to designate a specific videographer more than twenty days ahead of the deposition. In addition, the rule in its current form does not contemplate the situation where a videographer suffers illness or emergency that prevents him or her from appearing at the scheduled deposition.

Proposal

22 NYCRR 202.15(c)

Every notice or subpoena for the taking of a videotaped deposition shall state that it is to be videotaped [and the name and address of the videotape operator and of the operator's employer, if any]. The operator may be an employee of the attorney taking the deposition. [Where an application for an order to take a videotaped deposition is made, the application and order shall contain the same information.]

4. Clarifying the Remedies Available to the Court for Failure to Appear
(22 NYCRR 202.26(e) & 202.27)

The Committee recommends that subdivision (e) of section 202.26 of the Uniform Rules for the Supreme Court and the County Court (22 NYCRR 22.26(e)) be amended to clarify the remedies that may be available to the court where the court has required attendance by a party's insurer who has failed to attend on more than one occasion.

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

Proposal

First proposed amendment:

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

Section 202.26. Pretrial Conference and Settlement Conferences.

Second proposed amendment:

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

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

submitted by the plaintiff and by any defendant who counterclaims. The judge may require additional data or may waive any requirement for submission of documents on suitable alternate proof of damages. Failure to comply with this [paragraph] subdivision may be deemed a default under [CPLR 3404] section 202.27. Absence of an attorney's file shall not be an acceptable excuse for failing to comply with this [paragraph] subdivision. Where a representative of an insurance carrier has been directed by the judge to appear for a settlement conference in a case and fails to so appear on more than one occasion, the judge may grant a judgment by default against the defendant whose insurance carrier failed to so appear, up to the amount of the available insurance coverage; provided that (a) if the defendant did not independently violate a directive to appear at a settlement conference, that defendant shall retain the right to litigate the action on its merits, including liability and damages, for any amounts not covered by the non-appearing insurance carrier's coverage, and (b) nothing herein shall be deemed to impair the rights of the defendant or a plaintiff to pursue a claim for bad faith against the non-appearing insurance carrier.

Third proposed amendment:

§202.27 is amended to read as follows:

Section 202.27. [Defaults] Failure to Appear.

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

(a) If the plaintiff appears but the defendant does not, the judge may, but is not required to, grant judgment by default or order an inquest, or may make such order as appears just including, but not limited to, imposing monetary sanctions, issuing orders of preclusion or holding the defendant or his or her counsel in contempt;

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

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

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

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

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

Proposal

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

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

6. Amending Litigation Financing of Disbursements for Infants and Incapacitated Persons' Claims and Proceedings and Compromises
(22NYCRR 202.38; 22 NYCRR 202.67)

Amending N.Y. Ct. Rules § 202.67. Infants and Incapacitated Persons' Claims and Proceedings and §202.38. Compromises. Subsections (b) and (d).

The purpose of these amendments is to require the provision of additional information to courts hearing petitions or applications for compromise orders approving settlements in cases where such court approval is required. The additional information which would be required relates to litigation funding arrangements entered into pertaining to the action. Requiring disclosure of this additional information to the courts being asked to approve such settlements is necessary in light of the proliferation of litigation funding arrangements in recent years and the potential impact that such arrangements may have on the value of settlements to the persons receiving the settlements. In summary, the amendments would require full disclosure to the court of any funding agreement, deferred payment, assignment of money or other financial agreement which adversely impacts the recovery of an infant, incapacitated person, or beneficiary of an estate.

The committee recommends adoption of these amendments since the information is clearly relevant in a proceeding seeking court approval of a compromise, particularly on the issues of attorney fees and disbursements.

N.Y. Ct. Rule § 202.67 governs the settlement of an action or claim by an infant or judicially declared incapacitated person. Subsection **(b)** delineates the information to be set forth in the petition or affidavit in support of the application for compromise. Subsection **(d)** delineates the information required to be set forth in the affidavit or affirmation of the attorney for the plaintiff.

N.Y. Ct. Rule § 207.38 governs applications for leave to compromise a claim for wrongful death or personal injuries or both. Subsection **(b)** delineates the information required to be set forth in the petition. Subsection **(d)** delineates the information required to be set forth in the supporting affidavit of the attorney for petitioner. Currently, the above said Rules do not require disclosure to the court of litigation funding, assignments or other financial agreements that may diminish the net settlement proceeds.

The need for disclosure was discussed at length in the decision rendered by Hon. Paul I. Marks on January 11, 2019 in the case of *S.D., an Infant by his Mother and Natural Guardian, Jennifer Trelles v. St. Luke's Cornwall Hospital et. al.*, 63 Misc.3d 384 (Sup. Ct., Rockland Co. 2019). The matter was before Judge Marx in the context of a Rule §202.67 petition to compromise the second portion of a medical malpractice settlement obtained on behalf of the infant, S.D. During the course of the compromise proceedings, it came to light that the amount of claimed disbursements included significant "Assumption of Risk" fees charged by a lending company pursuant to a non-recourse funding agreement. The assumption of risk charges began at 65% of the amount advanced if not repaid within the first six months after the advance was made and then increased by 1.5% per month thereafter. Further, it was learned that the funding company was owned by the brother of the attorney for the plaintiff. This information was not disclosed to the court which approved the first portion of the settlement and was learned by Judge Marks only after extensive probing. There was a further financial arrangement that was not initially disclosed to the court, namely an agreement whereby appellate counsel charged one fee if he was unsuccessful, and another, 400% of that amount, if successful. At the end of his decision, Judge Marks respectfully suggested that Court Rule § 202.67 be amended to require disclosure of any litigation financing agreements used to finance disbursements in personal injury and medical malpractice claims involving infants and to require full disclosure of all terms of the agreements and relationships between counsel and the financing companies, financial and otherwise, be disclosed to the court in connection with any application for leave to compromise such cases. "Only where such information is presented to the court can a fair evaluation of the propriety of fees and disbursements be made." 63 Misc.3d at 418.

The proposed amendments herein seek to implement and broaden the disclosure sought by Judge Marx. There is clear justification to amend the existing Rules for all petitions seeking court approval of a settlement, including not only infant compromises but also matters involving incapacitated persons or wrongful death compromises, to require full disclosure by the petitioner and counsel for the petitioner of any financial arrangement affecting the settlement funds. The language proposed by the committee is intended to be broad enough to encompass not only financing agreements affecting disbursements or attorney fees but also other financial agreements that adversely affect the recovery by the injured plaintiff. An example would be an arrangement whereby a physician or other medical provider defers the payment of medical bills

until the end of the case but is then reimbursed an inflated amount far exceeding standard and customary fees. Further, the language is intended to require disclosure where a portion of the proceeds have been assigned, sold, pledged or otherwise transferred to a person or entity other than the named plaintiff. The proposed amendments would change existing law and practice by requiring full disclosure by both the plaintiff and the plaintiff's attorney of information that is not currently required but which is clearly germane.

Amending N.Y. Ct. Rule §202.67 subsections (a)(7).

The purpose of the amendment is to add language that "Attorneys representing the petitioner may not charge or receive interest on disbursements without express approval in the court order." While there is no statutory or ethical bar to attorneys charging a reasonable amount of interest on disbursement payments advanced by the attorney, the Committee recommends this language to underscore that the appropriateness of interest on disbursements and the reasonableness of the amount is a matter for the court's scrutiny.

Amending N.Y. Ct. Rule §202.67(f), adding subsections (9), (10), and (11).

N.Y. Ct. Rule 202.67(f) delineates the information to be set forth in a petition seeking the expenditure of settlement funds which have been set aside for the infant's benefit. The Committee proposes that further information be provided to the court setting forth: **(9).** the relationships, if any, among the direct or indirect recipients of the expenditures; **(10).** that there is no other entitlement, benefit or fund available to pay the expenditures; and **(11).** the complete terms and conditions of any agreement for litigation funding and fee arrangements. The Committee recommends these additions to assist the court in overseeing the appropriateness of any expenditure of an infant's funds.

Proposal

First proposed amendment:

Subdivision (b) of §207.38 is amended to read as follows:

(b) The petition also shall show the following:

(1) the age, residence, occupation and earnings of the decedent at time of death;

(2) the names, addresses, dates of birth and ages of all the persons entitled to take or share in the proceeds of the settlement or judgment, as provided by EPTL 5-4.4, or by the applicable law of the jurisdiction under which the claim arose, and a statement whether or not there are any children born out of wedlock;

(3) a complete statement of the nature and extent of the disability other than infancy, of any person set forth in (2);

(4) the gross amount of the proceeds of settlement, the amount to be paid as attorneys' fees, and the net amount to be received by petitioner as a result of the settlement;

(5) any obligations incurred for funeral expenses, or for hospital, medical or nursing services, the name and address of each such creditor, the respective amounts of the obligations so incurred, whether such obligations have been paid in full and/or the amount of the unpaid balance due on each of said claims as evidenced by proper bills filed with the clerk;

(6) whether any hospital notice of lien has been filed under section 189 of the Lien Law, and if so, the particulars relating thereto;

(7) on the basis of the applicable law, a tabulation showing the proposed distribution including the names of the persons entitled to share in the proceeds and the percentage or fraction representing their respective shares, including a reference to the mortality table, if any, employed in the proceeding which resulted in the settlement or judgment, and the mortality table employed in the proposed distribution of the proceeds; [and]

(8) the cost of any annuities in compromises based upon structured settlements in wrongful death actions[.]; and

(9) the terms and documentation of any interest or any other fees charged to the personal representative of the decedent or any person entitled to take or share in the proceeds of the settlement and any contingency or deferred payments agreement and any money borrowed against anticipated settlement proceeds.

Subdivision (d) of §207.38 is amended to read as follows:

(d) A supporting affidavit by the attorney for petitioner must be filed with each petition for leave to compromise showing:

(1) whether the attorney has become concerned in the application or its subject matter at the instance of the party with whom the compromise is proposed or at the instance of any representative of such party;

(2) whether the attorney's fee is to be paid by the administrator and whether any payment has been or is to be made to the attorney by any other person or corporation interested in the subject matter of the compromise;

(3) if the attorney's compensation is to be paid by any other person, the name of such person;

(4) the services rendered by the attorney in detail; [and]

(5) the amount to be paid as compensation to the attorney, including an itemization of disbursements on the case, and whether the compensation was fixed by prior agreement or based on reasonable value, and if by agreement, the person with whom such agreement was made and the terms thereof[.]; and

(6) The terms and documentation of any interest or any other fees charged to the personal representative of the decedent or any person entitled to take or share in the proceeds of the settlement and any contingency or deferred payments agreement and any money borrowed against anticipated settlement proceeds.

Second proposed amendment:

Subdivision (b) of §202.67 is amended to read as follows:

(b) The petition or affidavit in support of the application also shall set forth the total amount of the charge incurred for each doctor and hospital in the treatment and care of the infant or incapacitated person, and the amount remaining unpaid to each doctor and hospital for such treatment and care, and shall set forth and provide documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements pertaining, and any money borrowed against anticipated settlement proceeds. If an order be made approving the application, the order shall provide that all such charges for doctors and hospitals shall be paid from the proceeds, if any, received by the parent, guardian, or other person, in settlement of any action or claim for the loss of the infant's or incapacitated person's services; provided, however, that if there be any bona fide dispute as to such charges, the judge presiding, in the order, may make such provision with respect to them as justice requires. With respect to an incapacitated person, the judge presiding may provide for the posting of a bond as required by the Mental Hygiene Law.

Subdivision (d) of §202.67 is amended to read as follows:

(d) The affidavit or affirmation of the attorney for a plaintiff, in addition to complying with CPLR 1208, must show compliance with the requirements for filing a retainer statement and recite the number assigned by the Office of Court Administration, or show that such requirements do not apply. Such affidavit or affirmation also shall set forth and provide documentation of the terms of any interest or other fees charged to the infant or incapacitated person, any contingency or deferred payment agreements and any money borrowed against anticipated settlement proceeds.

Subdivision (f) of §202.67 is amended to read as follows:

(f) A petition for the expenditure of the funds of an infant shall comply with CPLR Article 12, and also shall set forth:

(1) a full explanation of the purpose of the withdrawal;

(2) a sworn statement of the reasonable cost of the proposed expenditure;

(3) the infant's age;

(4) the date and amounts of the infant's and parents' recovery;

(5) the balance from such recovery;

(6) the nature of the infant's injuries and present condition;

(7) a statement that the family of the infant is financially unable to afford the proposed expenditures;

(8) a statement as to previous orders authorizing such expenditures; and

(9) [any other facts material to the application.] a statement detailing the relationships, if any, among the direct or indirect recipients of such expenditures;

(10) a statement that no other entitlement, benefit or fund is available to pay the proposed expenditures; and

(11) any other facts material to the application, including but not limited to the complete terms and conditions of any agreement for litigation funding and fee arrangements.

7. Providing Greater Flexibility for the Court to Address Confidentiality in the Submission of Court Papers in the Commercial Division of the Supreme Court (22 NYCRR 202.70(g) Rule 11)

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

The Committee believes that an appropriate balance can be struck by a new rule that would allow confidential documents, so designated pursuant to a protective order, to be filed under seal in the commercial trial court. This measure would establish a procedure under a new section 202.70(g) Rule 11 whereby, at a preliminary conference, a standard stipulation, approved by the court under the existing good cause standard, would allow the parties to file under seal pleadings containing documents exchanged in discovery and designated by the parties as confidential, such as those containing trade secrets or other information which if disclosed would cause substantial economic injury to a commercial enterprise. The court would be required to approve the stipulation. Whenever papers are filed under seal, this rule would require the parties to file a redacted copy in the public record. Both the papers filed under seal and the redacted copy must prominently display on the front page a reference to the order allowing the filing under seal and the date of that order.

The Committee also urges the adoption of the Stipulation and Order for the Production and Exchange of Confidential Information and Order for the Partial Sealing of a File or the Sealing of an Entire File (see Appendix A), as model recommended forms, rather than mandatory, for use in the Commercial Division under Rule 11.

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

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

Proposal

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

Rule 11-h. Confidentiality Orders.

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

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

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

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

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

The following previously endorsed legislative and regulatory proposals continue to be endorsed fully by the Committee and are hereby incorporated into and made a part of this 2023 report, and are available via the following link:
http://ww2.nycourts.gov/ip/judiciaryslegislative/archive.shtml

A. Temporarily Tabled Legislative Proposals

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

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

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

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

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

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

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

8. Amending the Rate of Interest (CPLR 5004)

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

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

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

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

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

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

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

16. Neglect to Proceed
(CPLR 3216, 3404)

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

18. 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)

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

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

21. 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)

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

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

24. Ensuring 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))

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

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

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

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

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

B. Temporarily Tabled Regulatory Proposals

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

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

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

VI. Subcommittees

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

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

Subcommittee on Appellate Jurisdiction
Chair, Thomas R. Newman, Esq
.
Subcommittee on Civil Jury Trial Procedures
Chair, Richard B. Long, Esq.

Subcommittee on Class Actions
Chair, Richard Rifkin, Esq.

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

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

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

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

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

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

Subcommittee on Courts of Limited Jurisdiction
Chair, Lance D. Clarke, Esq.

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

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

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

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

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

Subcommittee on Ethics
Chair, Richard Rifkin

Subcommittee on Evidence
Chair, Burton N. Lipshie

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

Subcommittee on Forms
Chair, Prof. Vincent Alexander

Subcommittee on Improving Efficiency in the Courts
Chair, Lucille A. Fontana, Esq.

Subcommittee on Interest Rates on Judgments
Chair, Brian Shoot, Esq.

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

Subcommittee on Legislation
Chair, George F. Carpinello, Esq.

Subcommittee on Liability Insurance and Tort Law
Chair, George F. Carpinello, Esq.

Subcommittee on Matrimonial Procedures
Chair, Myrna Felder, Esq.

Subcommittee on Medical Malpractice
Chair, Richard Rifkin, Esq.

Subcommittee on Mortgage Foreclosure Procedure
Chair, John Werner, Esq.

Subcommittee on Motion Practice
Chair, Richard Rifkin, Esq.

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

Subcommittee on Preliminary Conference Orders
Chair, Hon. John R. Higgitt

Subcommittee on Pretrial Procedure
Chair, Lucille A. Fontana, Esq.

Subcommittee on Procedures for Specialized Types of Proceedings
Chair, Jeffery Glen, Esq.

Subcommittee on Provisional Remedies
Chair, James N. Blair, Esq.

Subcommittee on Records Retention & CPLR 3404
Chair, John F. Werner, Esq.

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

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

Subcommittee on Statutes of Limitations
Chair, Prof. Vincent C. Alexander

Subcommittee on Structured Settlement Guidelines
Chair, Celeste L. M. Koeleveld, Esq.

Subcommittee on Technology & E-Filing
Chair, Thomas F. Gleason, Esq.

Subcommittee on Tribal Court Judgments
Chair, Lucille A. Fontana, Esq.

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

Subcommittee on the Use of the Regulatory Process to Achieve
Procedural Reform
Chair, Richard Rifkin, Esq.

Subcommittee on Venue & Choice of Law
Chair, Thomas R. Newman, Esq.

Ad Hoc Subcommittee on COVID-19 and the Civil Courts
Chair, George F. Carpinello, Esq.

Ad Hoc Subcommittee on Medicare Liens and Settlement
Chair, Lucille Fontana, Esq.

Ad Hoc Subcommittee on Uniform Unsworn Foreign Declarations Act
Chair, Richard. B. Long, Esq.

Ad Hoc Subcommittee on Plaintiff Funding Advances
Chair, Helene E. Blank, Esq.

Ad Hoc Subcommittee on G.O. L. 5-335
Chair, George F. Carpinello, Esq.

Ad Hoc Subcommittee on Relief of Counsel; CPLR 321
Chair, Lucille Fontana

Joint Subcommittee with Surrogate's Court Advisory Committee on
Substituted Service
Chair for Civil Practice, Patrick Connors

Ad Hoc Subcommittee on CPLR 5501
Chair, Thomas R. Newman, Esq.

Ad Hoc Subcommittee on Improving Efficiency and Commercial
Division Rules Report
Chair, Lucille Fontana, Esq.

Ad Hoc Subcommittee on Achieving Civil Justice for All
Chair, Lance D. Clarke, Esq.

Respectfully submitted,

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James N. Blair, Esq.

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Lance D. Clarke, Esq.

Kathryn C. Cole, Esq.

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Jessica M. Cherry, Esq., Counsel