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

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

January 2004

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I. Introduction

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

In this 2004 Report, the Advisory Committee recommends a total of thirty-six (36) measures for enactment by the 2004 Legislature. Of these, twenty-eight (28) measures previously have been endorsed in substantially the same form, two (2) are modified measures, and six (6) are new measures.

Part II sets forth and summarizes the six new measures proposed for 2004. These measures seek to: (1) clarify the applicable statute of limitations for a claim based upon fraud (CPLR 213(4); (2) extend the time in which a voluntary discontinuance may be obtained without court order or stipulation (CPLR 3217); (3) address current deficiencies in CPLR Article 65 dealing with notices of pendency (CPLR Article 65); (4) revise CPLR Articles 50-A and 50-B; (5) address a time of service problem involving CPLR 306-b when a court order extending the time for filing is granted pursuant to CPLR 304 (CPLR 306-b); and (6) expand the court system's electronic filing pilot to enlarge the case types and locales subject to the pilot (Ch.367, L.1999).

Part III sets forth and summarizes the modified measures proposed for 2004. These measures would address: (1) the timing of disclosure of surveillance evidence (CPLR 3101(i)); and (2) accelerating access to medical records needed for litigation (Public Health Law §18).

Part IV summarizes the previously endorsed measures not enacted into law in 2003, but once again recommended by the Committee for enactment in 2004 in substantially the same form.

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

Only one proposal recommended by the Committee, which reauthorized the Judiciary's experimental filing by fax and electronic means program (L.2003, ch.261), was enacted by the Legislature in 2003.

Part V summarizes regulatory recommendations made by the Committee to create four new regulations and amend five existing regulations. The first set of regulations would complement the Committee's legislative proposals to create a range of court-annexed ADR options for litigants. The first four regulatory proposals would be incorporated into the Uniform Civil Rules for the Supreme and County Courts and would address the following topics: (1) ADR by appointment of a referee to hear and determine; (2) ADR by court-annexed mediation and neutral evaluation; (3) ADR by court-annexed voluntary arbitration; and (4) ADR through the use of a mandatory settlement conference. Although these rules are limited to cases filed in the Supreme and County Courts, it was the Committee's intention to eventually expand them to the courts of limited jurisdiction. This task would be shared with the Standing Committees on Local Courts and Alternative Dispute Resolution.

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

The sixth regulatory proposal would amend section 202.21(b)(7) of the Uniform Civil Rules for the Supreme and County Courts to clarify that a party may take a post-note of issue deposition of his or her own medical witnesses to preserve their testimony for trial.

The seventh regulatory proposal is designed to instill greater civility into the conduct of depositions by adding a new Part 221 of the Uniform Rules for the Trial Courts to govern certain abuses of deposition practice not currently addressed by the CPLR.

The eighth regulatory proposal seeks to add a provision to section Part 202.7 of the Uniform Civil Rules for the Supreme and County Courts to insure that a party seeking a TRO must either notify the other party of the application or explain to the judge why notice would be impracticable or would defeat the purpose of the order.

Several other matters were brought to the Committee's attention during the course of 2003 which required considerable study and activity by the Committee. For example, the Committee, through its Subcommittee on Technology, continues to work closely with the Technology Division of the Office of Court Administration, court personnel, leaders of the bench and bar, and the federal judiciary to expand recent legislation and regulations permitting the Chief Administrative Judge to conduct a pilot program providing for the filing of court papers by fax or electronic means in selected locations throughout the state.

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

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

(2) The Committee recommends that, aside from corrective or remedial bills, which become effective immediately, the effective date of bills should be deferred a sufficient time after enactment to publicize them. For example, this Committee sets the effective date of most of its legislative proposals as "the first day of January next succeeding the date on which it shall have become a law." Further, because mere designation of an effective date is often insufficient to resolve ambiguities as to when actions or claims come within its ambit (See, e.g., Majewski v. Broadalbin-Perth Central School District, 231 A.D. 2d 102 (3d Dept. 1997)), 91 N.Y.2d 577 (1998); Morales v. Gross, 230 A.D. 2d 7 (2d Dept. 1997) [interpreting the Omnibus Worker's Compensation Reform Act of 1996, Ch. 635], bills that alter substantive rights or shorten statutes of limitations should specify by stating, for example, that they apply to injuries occurring, actions commenced or trials commenced after a certain date.

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

Part VI of the Report briefly discusses 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 Measures

1. Clarifying the Applicable Statute of Limitations for a Claim Based Upon Fraud (CPLR 213(8))

The Committee recommends that CPLR 213(8) be amended to clarify that the applicable statute of limitations for an action for fraud is not six years from the discovery of the fraud, but six years from the time of the fraud or two years from discovery, whichever is longer. In its current form, CPLR 213(8) provides that among the actions which "must be commenced within six years" is "an action based upon fraud; the time within which the action must be commenced shall be computed from the time the plaintiff or the person under whom he claims discovered the fraud, or could with reasonable diligence have discovered it."

Any reader of that provision would naturally assume that the statute of limitations for an action for fraud is governed by a discovery statute, and that the six year period runs from that discovery. That reader would be incorrect, although nothing in CPLR 213(8) would give any guidance. CPLR 203(g), which is not referenced in CPLR 213(8), applies. And CPLR 203(g) provides that whenever "the time within which an action must be commenced is computed from the time when facts were discovered" or could have been discovered, "the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer."

Thus, the statute of limitations for an action for fraud is not six years from discovery of the fraud. It is six years from the time of the fraud, or two years from discovery, whichever is longer. See, Hammond v. Reichback, 232 A.D.2d 254 (1st Dept. 1996); Gargulio v. Garguilo, 240 A.D.617 (2nd Dept. 1994).

The proposed amendment to CPLR 213(8) is not intended to change the law. It is intended to avoid the trap for the unwary currently set by the language of the provision. With no reference to either the existence or contents of CPLR 203(g), the current language of CPLR 213(8) will mislead any layperson, or indeed, any lawyer not otherwise familiar with CPLR 203(g) or the relevant case law. Particularly since this is a statute of limitations, it is important that the law be clear, and easily found. No one reading current CPLR 213(8) would assume the need for continued search for a provision defining the term "shall be computed from."

The proposed amendment, therefore, simply builds the substance of CPLR 203(g) into the language of CPLR 213(8). It thereby makes clear to the reader that the statute of limitations for a cause of action for fraud is six years from the fraudulent conduct, or two years from discovery, whichever is longer.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the applicable statute of limitations for a cause of action for fraud

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

Section 1. Paragraph 8 of section 213 of the civil practice law and rules is amended to read as follows:

8. an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or [computed from] two years from the time the plaintiff or the person under whom [he] the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it.

§2. This act shall take effect immediately.

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

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

Currently, subdivision (a) of CPLR 3217 provides:

Rule 3217. Voluntary discontinuance

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

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

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

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

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

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

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

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

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

Proposal

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

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

Section 1. Paragraph (1) of subdivision (a) of rule 3217 of the civil practice law and rules is amended to read as follows:

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

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

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

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

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

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

rejected an attempt to file a second notice of pendency after an initial notice was vacated and no stay of the order vacating it was obtained pending the outcome of what ultimately was a successful appeal.

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

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

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

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to notices of pendency

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

Section 1. Section 6514 of the civil practice law and rules, subdivision (d) as added by chapter 440 of the laws of 1967, subdivision (e) as added by chapter 668 of the laws of 1971, is amended to read as follows:

§6514. Motion for cancellation of notice of pendency. (a) Mandatory cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if:

1. service of a summons has not been completed within the time limited by section 6512; [or if]

2. the action has been settled, discontinued or abated; [or if]

3. the time to appeal from a final judgment against the plaintiff has expired; [or if]

4. enforcement of a final judgment against the plaintiff has not been stayed pursuant to section 5519; or

5. the court finds that the pleading on which the notice of pendency is based does

not contain a demand for judgment that would affect the title to, or the possession, use or enjoyment of, the real property affected.

(b) Discretionary cancellation. The court, upon motion of any person aggrieved and upon such notice as it may require, may direct any county clerk to cancel a notice of pendency, if the court finds that:

1. the plaintiff has not commenced or prosecuted the action in good faith, or

2. the plaintiff who filed the notice of pendency has not established, by affidavit and such other evidence as may be submitted, (i) that the plaintiff's claim arises out of a written instrument, other than a contract of sale or memorandum thereof, that appears of record with respect to the title of the property affected, or (ii) a likelihood of success on the merits of the plaintiff's claim, or sufficiently serious questions going to the merits of the plaintiff's claim to make them a fair ground for litigation and a balance of hardships decidedly in the plaintiff's favor.

(c) Costs and expenses. The court, in an order canceling a notice of pendency under this section, may direct the plaintiff to pay any costs and expenses occasioned by the filing and cancellation, in addition to any costs of the action.

(d) Cancellation by stipulation. At any time prior to entry of judgment, a notice of pendency shall be cancelled by the county clerk without an order, on the filing with him or her of

1. an affidavit by the attorney for the plaintiff showing which defendants have been served with process, which defendants are in default in appearing or answering, and which defendants have appeared or answered and by whom, and

2. a stipulation consenting to the cancellation, signed by the attorney for the plaintiff and by the attorneys for all the defendants who have appeared or answered including those who have waived all notices, and executed and acknowledged, in the form required to entitle a deed to be recorded, by the defendants who have been served with process and have not appeared but whose time to do so has not expired, and by any defendants who have appeared in person.

(e) Cancellation by plaintiff. At any time prior to the entry of judgment a notice of pendency of action shall be canceled by the county clerk without an order, on the filing with him or her of an affidavit by the attorney for the plaintiff showing that there have been no appearances and that the time to appear has expired for all parties.

(f) No undertaking required. The court shall not order an undertaking to be given as a condition of cancelling a notice of pendency under this section.

§2. Section 6515 of the civil practice law and rules, subdivision 2 of such section as amended by chapter 1029 of the laws of 1973, is amended to read as follows: follows:

§6515. Undertaking for cancellation of notice of pendency; security by plaintiff. In any action other than one to foreclose a mortgage or for partition or dower,

the court, upon motion of any person aggrieved and upon such notice as it may require, and without regard to the merits of the plaintiff's cause of action, may direct any county clerk to cancel a notice of pendency that is not subject to cancellation under paragraph two of subdivision (b) of section 6514, upon such terms as are just, whether or not the judgment demanded would affect specific real property, if the moving party shall give an undertaking in an amount to be fixed by the court, and if:

1. the court finds that adequate relief can be secured to the plaintiff by the giving of such an undertaking; or

2. in such action, the plaintiff fails to give an undertaking, in an amount to be fixed by the court, that the plaintiff will indemnify the moving party for the damages that he or she may incur if the notice is not cancelled.

§3. The civil practice law and rules is amended by adding two new sections 6516 and 6517 to read as follows:

§ 6516. Effect of cancellation of notice of pendency. Cancellation of a notice of pendency pursuant to section 6514 shall relate back to the time of filing of the notice, and neither the notice of pendency nor any information derived from it prior to cancellation shall constitute actual or constructive notice of any matters contained, claimed, alleged, or contended therein, or of any of the matters related to the action, or create a duty of inquiry in any person thereafter dealing with the affected real property.

§6517. Successive notices of pendency. A notice of pendency may be filed at any time prior to entry of judgment, notwithstanding that the plaintiff previously filed a notice of pendency affecting the same property in the same or a different action, which prior notice of pendency:

1. is ineffective because service of a summons has not been completed within the time limited by section 6512;

2. has been cancelled by an order of the court made pursuant to paragraph one of subdivision (a) of section 6514; or

3. has expired pursuant to section 6513.

§4. This act shall take effect immediately and shall apply to all actions and notices of pendency filed or pending as of such effective date or thereafter.

4. Revision of the Structured Verdict Provisions of CPLR Articles 50-A and 50-B and the repeal of CPLR Article 50-B (CPLR 50-A and 50-B; CPLR 4111)

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

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

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

It appears that the Legislature rejected the alternative of outright repeal in favor of modifying Article 50-A, at least in part because it felt that malpractice defendants should be entitled to the savings that would arise when a malpractice plaintiff dies appreciably sooner than the jury had anticipated. In any event, whether that was the primary rationale or not, it is readily apparent that the Legislature has considered and has rejected the alternative of repeal. The Committee has, accordingly, reset its focus in light of this changed landscape.

The Committee's new proposed amendment of the periodic payment schemes is predicated on the template set forth in newly enacted CPLR § 5031. In essence, the Committee recommends that the same basic scheme that was devised for malpractice actions now be extended to all personal injury and wrongful death actions, but that

certain changes be made in the process. It is the Committee's hope that most of the proposed changes (particularly those that are contingent upon the parties' consent) will be non-controversial.

The key features of the Committee's proposal are as follows:

1. The "new" CPLR Article 50-A, which now applies only to medical malpractice actions, would be amended to apply to all actions for personal injury, wrongful death and property damage. CPLR Article 50-B would be simultaneously repealed.

There are two reasons for the proposed change. First, the Committee feels that it does not make sense to have a very complicated scheme for non-malpractice actions and to have a completely different and even more complicated scheme in malpractice actions. Whichever scheme is "better" should apply to all actions.

Second, apart from being very different from each other, the two different formats are fundamentally incompatible. For example, CPLR 50-B requires the trial court to first make any General Obligations Law 15-108 set-offs (i.e., prior settlements); and to then structure the remaining amounts. New CPLR 50-A dictates the very opposite course: set-offs are effected after structuring. This difference in methodology can be very significant. So what methodology does the court employ in a case where, as will occur, some liable defendants are 50-A defendants and others are 50-B defendants?

Our assumption is that, in enacting the new CPLR Article 50-A, the Legislature stated by implication that it preferred such scheme to the alternative embodied in CPLR Article 50-B. If so, it makes sense to extend 50-A to all personal injury, injury to property and wrongful death actions.

It should be noted that there is one substantive difference between the "old" CPLR Article 50-A and the current CPLR Article 50-B. Right now, each article permits the victorious plaintiff to seek a "hardship" payment in which all or some of the remaining annuity payments are reduced to present value and paid in lump sum on the ground that the plaintiff currently needs the money. The difference is that such hardship payments, if made at all, are made by the annuity provider in non-malpractice actions, but are made by the medical malpractice insurance association in medical, dental and podiatric malpractice actions. This difference has been retained in the proposed statutes.

Although proposed CPLR §5036 appears to be almost entirely new, it actually consists of language that has been transplanted from other provisions. Proposed CPLR

§5036(b)(1) tracks the language of CPLR §5046(b), currently governing hardship payments in non-malpractice actions. Proposed CPLR §5036(b)(2) substantially tracks the language of current CPLR §5036(b), which now governs hardship payments in malpractice actions.

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

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

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

New 50-A deals with the Desiderio problem by eliminating the 4% additur that was previously used in structuring the plaintiff's economic damages. The ostensible trade-off was that the Desiderio-type plaintiff would now obtain even more money than before in lump sum. It is possible that, in enacting a new statute that would now enable the plaintiff to obtain the first $500,000 of the pain and suffering award in lump sum, the Legislature felt that it was contracting the scope of Article 50-A as compared to the prior law (under which the plaintiff would receive no more than $250,000 of all future damages in lump sum). The Legislature may have also felt that plaintiffs who had formerly received only $250,000 in lump sum could hardly complain about now receiving $500,000, plus 35% of the economist loss, in lump sum.

Yet, the issue is not one of percentages, nor of fairness or balance to "large verdict plaintiffs," but one of threshold. As the new CPLR 5031 currently stands, any plaintiff who obtains any award of future economic loss is subject to the new CPLR Article 50-A. Even a plaintiff whose only future award is $3,000 for future medical expenses - - perhaps the cost of some prescription medication - - will now have to go through the complications of CPLR Article 50-A, as will the defendant, as will the court. In such a case, the cost of the experts could exceed the award itself. We think that the Legislature could not have intended this.

The proposed bill would make no change as compared to the current 50-A with respect to the amount of percentage of the verdict that is paid in lump sum in those instances in which the total future damages exceeds $250,000. However, CPLR 5031 would be amended to wholly exclude cases with lesser recoveries from the scope of the statute, as is still true of CPLR Article 50-B. A related amendment of CPLR 4111 would enable the plaintiff to obtain a simplified lump sum verdict if the plaintiff stipulates to a $250,000 ceiling on all future damages. We feel that, for obvious reasons, defendants would not object to the provisions authorizing such a ceiling.

The Committee very briefly considered whether the $250,000 threshold set in 1985-1986 should be raised or lowered, but concluded that any such recommendation could politicize a change that is sought not to benefit one side over the other, but simply to avoid having to go through the complications of structuring in the smaller cases that comprise the great majority of the court dockets.

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

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

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

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

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

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to periodic payment of judgments in actions for personal injury, wrongful death and property damage

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

Section 1. Subdivision (d) of rule 4111 of the civil practice law and rules, as added by chapter 86 of the laws of 2003, is amended to read as follows:

(d) Itemized verdict in [medical, dental, or podiatric malpractice] actions for personal injury, injury to property or wrongful death.

1. In all actions [seeking damages for medical, dental, or podiatric malpractice, or damages for wrongful death as a result of medical, dental, or podiatric malpractice], for personal injury, injury to property or wrongful death, the court shall instruct the jury that if the jury finds a verdict awarding damages it shall in its verdict specify the applicable elements of special and general damages upon which the award is based and

the amount assigned to each element, including, but not limited to medical expenses, dental expenses, podiatric expenses, loss of earnings, impairment of earning ability, and pain and suffering. In all such actions, each element shall be further itemized into amounts intended to compensate for damages which have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future wrongful death damages, future loss of services, and future loss of consortium, the jury shall return the total amount of damages for each such item. In itemizing amounts intended to compensate for future pain and suffering, the jury shall return the total amounts of damages for future pain and suffering and shall set forth the period of years over which such amounts are intended to provide compensation. In itemizing amounts intended to compensate for future economic and pecuniary damages other than in wrongful death actions, the jury shall set forth as to each item of damage, (i) the annual amount in current dollars, (ii) the period of years for which such compensation is applicable and the date of commencement for that item of damage, (iii) the growth rate applicable for the period of years for the item of damage, and (iv) a finding of whether the loss or item of damage is permanent. Where the needs change in the future for a particular item of damage, that change shall be submitted to the jury as a separate item of damage commencing at that time. In all such actions other than wrongful death actions, the jury shall be instructed that the findings it makes with reference to future economic

damages, shall be used by the court to determine future damages which are payable to the plaintiff over time. In wrongful death actions, the jury shall be instructed that any future losses should be measured in present value.

2. Notwithstanding the provisions of paragraph one of this subdivision, the jury shall be instructed to award a lump sum award for each element of future damages for which an award is made, and the jury shall not be required to make any additional findings of fact as to such elements of damages, where the plaintiff stipulates that his or her total future damages will not exceed the sum of $250,000. In such actions, the jury shall not be instructed to award such damages in present value. If the jury's verdict for future damages in such an action exceeds $250,000, each element of the future damages shall be proportionally reduced so as to reduce the total future damages to $250,000.

3. Notwithstanding the provisions of paragraphs one and two of this subdivision, the parties may, with the trial court's approval, stipulate to any jury instructions and jury questions regarding assessment of the future damages as seem appropriate to the case.

§ 2. Subdivision (f) of rule 4111 of the civil practice law and rules is REPEALED.

§ 3. The opening paragraph and subdivision (b) of section 5031 of the civil practice law and rules, as added by chapter 86 of the laws of 2003, are amended to read as follows:

§ 5031. Basis for determining judgment to be entered. In order to determine what judgment is to be entered on a verdict in an action to recover damages for [medical, dental, or podiatric malpractice, or damages for wrongful death as a result of medical, dental, or podiatric malpractice] personal injury, injury to property or wrongful death, the court shall proceed as follows:

(b) Awards for all past damages, all damages for future loss of services, all damages for future loss of consortium, all damages in wrongful death actions, and damages for future pain and suffering of five hundred thousand dollars or less shall be paid in a lump sum. In addition, the plaintiff's entire future damages shall be paid in a lump sum if the plaintiff's total future damages do not exceed $250,000, or if the plaintiff stipulates to accept reduction of his or her future damages to the sum of $250,000. In any case in which all damages are to be paid in lump sums, the judgment shall be entered on the total of the lump sums, without further regard to this section.

§4. Section 5031 of the civil practice law and rules is amended by adding a new subdivision (i) to read as follows:

(i) With the consent of the plaintiff and any party liable, in whole or in part, for the judgment, the court shall enter judgment for the amount found for future

damages attributable to said party as such are determinable without regard to the provisions of this article.

§ 5. Subdivision (b) of section 5036 of the civil practice law and rules is amended to read as follows:

(b)(1) If a lump sum payment is ordered by the court, [such payment shall be made by the medical malpractice insurance association created pursuant to article fifty-five of the insurance law and shall not be the obligation of the insurer providing the initial annuity contract. Such insurer shall thereafter make all future payments due under its annuity contract to the association, except that, if the lump sum payment ordered by the court is a portion of the remaining periodic payments, such insurer shall appropriately apportion future payments due under its annuity contract between the association and the judgment creditor or successor in interest. Such lump sum payment to be paid to the judgment creditor or successor in interest by the association shall be calculated on the basis of the present value of the annuity contract, which shall be based on its cost at such time, for remaining periodic payments, or portions thereof, that are converted into a lump sum payment. In no event shall such lump sum payment be greater than the present value of the annuity contract for the remaining periodic payments.] such lump sum shall be calculated on the basis of the present value of remaining periodic payments, or portions thereof, that are converted into a lump sum payment. Unless specifically waived by all parties, the annuity contract shall contain a

provision authorizing such a lump sum payment if such payment is approved pursuant to this section. The remaining future periodic payments, if any, shall be reduced accordingly. For the purpose of this section, present value shall be calculated based on the interest rate and mortality assumptions at the time such a lump sum payment is made as determined by the insurer who has provided the annuity contract, in accordance with regulations issued by the superintendent of insurance.

(2) In an action to recover damages for medical, dental, or podiatric malpractice, or damages for wrongful death as a result of medical, dental, or podiatric malpractice, any lump sum payment ordered pursuant to this section, shall be made by the medical malpractice insurance association created pursuant to article fifty-five of the insurance law and shall not be the obligation of the insurer providing the initial annuity contract. Such insurer shall thereafter make all future payments due under its annuity contract to the association, except that, if the lump sum payment ordered by the court is a portion of the remaining periodic payments, such insurer shall appropriately apportion future payments due under its annuity contract between the association and the judgment creditor or successor in interest.

§ 5. Article 50-B of the civil practice law and rules is REPEALED.

§ 6. This act shall take effect thirty days after such shall have become law, and it shall apply to all actions commenced on or after that effective date.

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

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

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

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

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

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

Proposal

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

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

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

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

§ 2. This act shall take effect immediately.

6. Expansion of the Court System's E-Filing Pilot Program to Enlarge the Case Types and Locales Subject to the Pilot
(Ch.367, L.1999)

This past June, the New York State Legislature reauthorized the New York State Unified Court System's ("UCS") pilot program permitting the electronic filing of court documents for designated case types in selected jurisdictions until September 1, 2005. (L.2003, c.261). No change was made in its scope.

Begun in 1999, the pilot was designed to explore the usefulness of electronic transmission of legal papers in three contexts: (1) filing the initiating papers required to commence a lawsuit with a court; (2) service of process upon adversaries for the purpose of obtaining personal jurisdiction over them; and (3) service of interlocutory papers between parties to litigation. This technology offered the potential for more rapid filing and service of papers; round-the-clock access to court documents; reduction in paper handling, service, and storage costs; and greater protection against loss and destruction of important documents.

Currently, filing by electronic means ("FBEM") is permitted for the following case types in the indicated locales:

- Commercial claims in the Monroe, Albany, Westchester, New York, Nassau, and Suffolk County Commercial Divisions of the Supreme Court;

- Tax certiorari claims in the Monroe, New York, Suffolk, and Westchester County Supreme Courts; and

- Cases against the State of New York in the Court of Claims designated by the Attorney General and the Court of Claims (those handled by the Albany Trial Bureau).

In 2003, the project was in a consolidation phase after an earlier expansion in 2002 (L. 2002, c.110). Since its inception, approximately 6,300 cases have been filed - - the vast majority of them, tax certiorari claims filed in New York County. This year, we would like to expand the program further by permitting the filing of tort claims and commercial cases in all six original counties and the five counties comprising the City of New York. In addition, we would like to expand the opportunity to file tax certiorari claims in all five New York City counties. Since a large portion of the court system's

inventory is tort claims, it makes sense to open that class of cases to e-filing in the pilot jurisdictions. In addition, the New York City Tax Commission and the tax certiorari bar in New York City have asked the UCS to expand the cases subject to the e-filing pilot to include the four other New York City Counties - the Bronx, Kings, Queens, and Richmond. Since the Commercial Divisions are expanding to other counties as well in the City (there is currently one in Brooklyn and Manhattan, and another one is under consideration in Queens), the City and the UCS believe that it would make sense to expand the program in the City to include commercial claims in the other four boroughs as well.

The success of the broader electronic filing programs in the federal courts demonstrates the promise of e-filing. As of September, 2003, 88 of the 196 federal courts were accepting e-filed cases, with 148 actually in some stage of the implementation process. The remaining courts are expected to join them by 2005. Implementation continues to advance rapidly. Groups of ten courts are scheduled to begin the implementation process every two months, with approximately 39,000 new cases filed electronically each month.

Within the federal courts in New York State alone, approximately 3,755 new electronic cases were filed in the month of September, 2003. The implementation of e-filing in the federal courts in New York State is considerably more advanced in the bankruptcy courts. The Eastern, Southern, Northern and Western District Bankruptcy Courts are all accepting e-filed cases, with each court setting its own criteria for which cases are eligible. Some courts, such as the Southern District of New York Bankruptcy Court, have made e-filing mandatory for designated categories of cases (such as Chapter 11 cases). Most of the new courts, however, have limited the use of e-filing to cases filed with designated judges.

The federal District Courts in New York State have been a little slower to implement e-filing. Although the Eastern District has accepted electronically filed cases since 1997, the remaining three district courts have just begun. The Western and Southern Districts began to accept e-filed claims at the end of 2003, and the Northern District is expected to accept e-filed cases early in 2004. Each court will set its own criteria as to which cases are eligible for e-filing, and it will be important to check the local rules to determine their guidelines.

The UCS's FBEM program was developed in close collaboration with members of the New York bar. An Attorneys' Advisory Committee, comprised of representatives of bar associations from the pilot locales; the New York State Bar Association; and major institutional litigants (such as the New York City Corporation Counsel and the

New York State Attorney General's Office) worked hand in hand with UCS representatives to review the proposed FBEM software and write the necessary implementing regulations. To further enhance New York State attorneys' familiarity with the program and stimulate interest in the use of the FBEM pilot, the UCS has engaged in extensive outreach to practitioners and bar associations in the designated locales, as well as to statewide association of commercial litigators. It has offered multiple training programs at the courthouse or at the attorneys' workplaces (which provide two CLE credits); formed partnerships with local bar associations to deliver the same training to their members; provided answers to frequently asked questions on the website; and has sought to be as "customer friendly" as possible by supplying one-to-one assistance over the phone, or in person, when needed. Participating judges, UCS staff, and attorneys who have filed FBEM cases have also sought to spread the word by speaking at bar gatherings and writing articles for legal periodicals.

The UCS is aware that some attorneys and their clients have been particularly concerned about the security and privacy of information contained in court documents placed on the internet and thus have not ventured into the FBEM arena. The UCS recognizes that these concerns are serious ones. However, the need to address legitimate privacy concerns must be juxtaposed against the equally compelling interest in public access to court records and to the court system.

In recognition of the importance of the privacy/public access issues involving both paper and electronic records, Chief Judge Judith S. Kaye appointed a blue ribbon Commission on Public Access to Court Records in 2001, chaired by the eminent First Amendment expert, Floyd Abrams. It has sought to examine all aspects of the public access/privacy debate involving access to court records. The Committee has been at work for the past two years and expects to deliver its report by mid-2004.

In addition, to protect against identify theft and safeguard sensitive personal information, the UCS has revised its software to require all filers to indicate if certain personally identifiable information (e.g. social security numbers, financial account numbers, names and addresses of minor children, medical records) is contained within court documents filed. If it is, the document will not be subject to access from the Internet, and will only be available remotely to the parties, their counsel, and the court.

It is important to note that the security system used by the UCS is the same as that employed by major commercial vendors engaged in e-commerce and the federal court's e-filing program. Furthermore, the PDF format which converts a word processing document to an image of the document to be transmitted over the Internet, provides another safeguard against document alteration.

As all three branches of New York State government contemplate the future, it is clear that more and more business between state residents and their government will be done on an electronic basis. Currently, a resident can pay his or her taxes by electronic filing, renew a driver's license electronically, and even obtain copies of important records electronically. Computer-based interactive transactions provide individuals with rapid, cost-effective access to government services from virtually anywhere.

The UCS is confident that, with continued outreach, training, and one-to-one assistance, the interest in electronic filing will only grow - especially since New York attorneys already are beginning to file electronic cases in significant numbers in federal courts in New York State and the UCS software is very similar to that employed by the federal courts. The recent expansion of the case types and locales for which electronic filing is available will permit more attorneys around the state to have an opportunity to sample the UCS system and experience its benefits for themselves.

Proposal

AN ACT to amend chapter 367 of the laws of 1999, amending the civil practice law and rules and the judiciary law relating to authorization of pilot program permitting use of facsimile transmission or electronic means to commence an action or special proceeding, in relation to authorizing additional counties to participate in such experimental program, and adding tort claims to the authorized case types

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

Section 1. Section 6 of chapter 367 of the laws of 1999, amending the civil practice law and rules and the judiciary law relating to authorization of pilot programs permitting use of facsimile transmission or electronic means to commence an action or special proceeding, as amended by chapter 110 of the laws of 2002, is amended to read as follows:

§6. Notwithstanding any other provision of law, the chief administrator of the courts, with the approval of the administrative board of the courts, may promulgate rules authorizing an experimental program in which actions and special proceedings in supreme court may be commenced in the supreme court of Albany, Monroe, Westchester, New York, Bronx, Kings, Queens, Richmond, Nassau and Suffolk counties and the New York court of claims. Participation in this program shall be strictly voluntary, and will take place only upon consent. For purposes of this section, "facsimile transmission" and "electronic means" shall be as defined in subdivision (f) of rule 2103 of the civil practice law and rules. The cases subject to filing by facsimile shall be limited to commercial claims, mental hygiene and conservatorship proceedings, tax certiorari claims in Monroe, Westchester, New York and Suffolk counties, and claims against the state of New York. The cases subject to filing by electronic means shall be limited to those involving commercial and tort claims in Albany, Monroe, Westchester, New York, Bronx, Kings, Queens, Richmond, Nassau and Suffolk counties[,and]; tax certiorari claims in Monroe, Westchester, New York, Bronx, Kings, Queens, Richmond and Suffolk counties; and claims against the state of New York.

§2. This act shall take effect immediately.

II. Modified Measures

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

The Committee proposes an amendment to CPLR 3101(i) relating to the timing of the disclosure of films, photographs, video tapes or audio tapes (together, "surveillance evidence"). The proposed amendment would add a new phrase in subdivision (i) of section 3101, which would expressly limit the timing of the disclosure of surveillance evidence until after the party against whom the evidence is proffered has been deposed.

The proposal has been amended this year to add a sentence requiring that the disclosure must be made within 30 days of the deposition or the creation of such material, whichever is later.

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

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

In the spring of 2003, the Court of Appeals issued its decision in the Tran appeal. 99 N.Y.2d 383 (2003). It overruled the First Department. Siding with the Second, Third, and Fourth Departments, the Court held that the amendment to CPLR 3101(i) requiring "full disclosure of any films, photographs, viedeotapes or audiotapes . . . " of a party to the action meant that such items should be turned over as soon as they were requested - - even if it was before the party surveilled could be deposed. The court acknowledged that

such a policy might increase the potential for tailored testimony, but felt constrained to adhere to a "plain meaning" interpretation of the legislation enacted in 1993. However, the Committee believes that the view articulated by the First Department is the better policy since it is more likely to prevent fraudulent claims. Thus, the amendment proposed below would expressly limit a court's discretion regarding the sequence of discovery. Such a step would minimize the potential of tailor-made testimony and support New York's preference for more in-depth discovery and honest and forthright explanations of the evidence, rather than gamemanship.

Proposal

AN ACT to amend the civil practice law and rules, in relation to the timing of disclosure of films, photographs, video tapes or audio tapes

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

Section 1. Subdivision (i) of CPLR 3101 is amended to read as follows:

(i) In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section, after a deposition of that person has been held. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. Such disclosure shall be made within thirty days of the deposition or the creation of such material, whichever is later. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under section eighty-seven of the public officers law.

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

2. Improving the Efficiency of the Processing of Medical Malpractice Cases by Speeding Up Access to Medical Records (Public Health Law §18)

The Committee recommends the amendment of section 18 of the Public Health Law to accelerate the release of medical records and access to patient information, thereby enhancing the efficiency of the processing of medical malpractice cases. In 2001, the Hon. Stanley Sklar brought to the Committee's attention that there still were delays occurring in the processing of medical malpractice cases in the New York City metropolitan area because of delays in obtaining authorization for the production of medical records, as well as their actual delivery by medical providers. To address this situation, he recommended that several provisions of the Public Health Law be amended to speed up authorizations for the production of medical records, as well as the response by medical providers. The Committee concurred, and initially recommended that sections 17 and 18 of the Public Health Law be amended to (1) permit a guardian of an incapacitated person or the holder of a power of attorney from the patient to authorize the production of the patient's medical records, and (2) require that a physician or hospital respond within 15 days of the receipt of the written request to advise the patient's representative of the reasonable charge for the copies of the records, and to produce the records within 10 days of receipt of payment.

In the past two years, several changes were made to the original proposal. First, in response to a request by the Medical Society, the time frame for the response by medical providers was removed, as it was deemed too burdensome. Second, the proposed amendment to section 17 of the Public Health Law was deleted because, after reflection, it was felt that the most critical section to be amended was section 18 which covers release of medical records to family members and personal representatives, rather than the release of medical records to other medical providers, as does section 17. Lastly, the text of the proposal was amended to tighten the overall language; require the person seeking the records to submit a written statement establishing his or her authorization to seek the records; and clarify that the release of medical records under this new version would be subject to statutory limitations on the release of certain medical records, such as those involving HIV/AIDS patients, and the Federal Health Insurance Portability and Accountability Act ("HIPAA"). The Office of Court Administration has also indicated to the Committee that it plans to promulgate an official form to be used to obtain medical records in civil and criminal cases.

The proposed amendments would create the following changes in personal injury practice:

1. Instead of signing multiple authorization forms, the plaintiff would now execute a single power of attorney authorizing his lawyer (or whoever his lawyer might designate) to obtain any and all medical records.

2. The holder of the power of attorney (i.e., the plaintiff's attorney) would now "qualify" as a person who could request medical records. He or she would be able to request records by stating in writing that he or she holds such a power of attorney, being careful to insure that a copy of the actual power of attorney is attached to the request.

3. The designee of the holder of the power of attorney (usually, the defense lawyer) will now constitute a "qualified person" as well. The revised language would require that the designee be an attorney or an agent of an attorney. A designee may request records by stating in writing that he or she has been designated to obtain records by the holder of a power of attorney and accompany that request with a copy of the power of attorney and of the designation; and

4. The release of medical records is subject to certain other confidentiality statutes relating to records about HIV-related information, pregnancy termination, treatment for sexually transmitted diseases, alcohol and drug treatment, and HIPAA.

Proposal

AN ACT to amend the public health law, in relation to access to medical records

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

Section 1. Paragraph (g) of subdivision 1 of section 18 of the public health law, as amended by chapter 576 of the laws of 1998, is amended to read as follows:

(g) "Qualified person" means any properly identified subject [,]; or a guardian appointed [pursuant to] under article eighty-one of the mental hygiene law [,]; or a parent of an infant [,]; or a guardian of an infant appointed [pursuant to] under article seventeen of the surrogate's court procedure act or other legally appointed guardian of

an infant who may be entitled to request access to a clinical record [pursuant to] under paragraph (c) of subdivision two of this section [,]; or an attorney representing [or acting on behalf of the subject] any of the above-qualified persons or the subject's estate who holds a power of attorney from the qualified person or the subject's estate explicitly authorizing the holder to obtain medical records; or the designee of the holder of the power of attorney, who shall be an attorney or the agent of an attorney.

§2. Section 18 of the public health law is amended by adding three new subdivisions 3-a, 3-b and 3-c to read as follows:

3-a. A qualified person shall request medical records under this section by submitting a signed written statement which sets forth the facts establishing his or her qualifying status under this section.

3-b. Where the written request is from the holder of a power of attorney, a copy of the power of attorney shall be attached to the request. Where the written request is from a designee of a holder of a power of attorney, a copy of the power of attorney and of the designation shall be attached to the request. A request under this subdivision shall be subject to the duration and terms of the power of attorney and designation, as the case may be. A person receiving medical records under this subdivision shall not use or disclose the medical records or any information contained therein, except for the purpose for which they were authorized to be received.

3-c. The release of medical records shall be subject to: (1) article twenty-seven-f of this chapter in the case of confidential HIV-related information; (ii) section seventeen of this article and sections twenty-three hundred one, twenty-three hundred six and twenty-three hundred eight of this chapter in the case of termination of a pregnancy and treatment for sexually transmitted disease; (iii) article thirty-three of the mental hygiene law; and (iv) any other provisions of law creating special requirements relating to the release of medical information, including the federal health insurance portability and accountability act and its implementing regulations.

§ 3. This act shall take effect immediately.

IV. Previously Endorsed Measures

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

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

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

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

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

computed on awards only, since settlements are concluded with interest in mind, and the imposition of additional interest where settlements are achieved would be inequitable.

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

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

Proposal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Committee recommends that CPLR 1603 and 3018 (b) be amended to resolve a technical disagreement between decisions of the Second and Fourth Departments which is unlikely to reach the Court of Appeals for resolution. The proposal would require reliance on Article 16 to be pleaded as an affirmative defense.

Under CPLR Article 16, a defendant found liable to a plaintiff in an action for personal injury, in certain circumstances, may reduce its liability for non-economic loss by showing that its liability, if any, is fifty percent or less of the total liability assigned to all persons liable.

Under this proposal, CPLR 3018 (b) would be amended to require a defendant to raise a CPLR l603 reduction claim as an affirmative defense. This would be analogous to the defense of comparative negligence (i.e., reduction of liability by virtue of the plaintiff's own contribution to the accident or occurrence). The primary consequence of the amendment is that the plaintiff then would be entitled to receive in advance a bill of particulars with respect to the Article 16 defense. Thus, the amendment would limit the risk of surprising the plaintiff at the trial with new factual claims not asserted in any pleading. CPLR 1603 also would be amended to the same effect.

Although CPLR 1603 currently places the burden of proving another's culpability on the party asserting the claim, there is a split between the Second and Fourth Departments as to whether a plaintiff is entitled to receive a bill of particulars with respect to the limitation of liability defense.

In Ryan v. Beavers, 170 A.D.2d 1045 (1991), the Appellate Division for the Fourth Department concluded that plaintiffs are entitled to receive such a bill of particulars. The Court reasoned that it was "well settled that a party must provide a bill of particulars on matters on which he bears the burden of proof."

However, in Marsala v.Weinraub, 208 A.D.2d 689 (1994), a divided panel of the Appellate Division for the Second Department reached the opposite conclusion. It reasoned that "[s]ince the respondents need not plead CPLR Article 16 as an affirmative defense, it follows that the respondents need not provide a bill of particulars with regard to CPLR Article 16." Obviously, the Marsala majority's premise, and therefore its conclusion as well, would be altered with the proposed amendment. (cf. Rodi v. Landau, 170 Misc.2d 180 (Sup. Ct., Rockland Co. 1996)).

In a concurring opinion in Marsala, Justice David S. Ritter argued that CPLR Article 16 should be pleaded as an affirmative defense so as to prevent unfair surprise. At the same time, Justice Ritter felt that a defendant seeking the benefits of CPLR Article 16 should be entitled to rely upon the factual claims pleaded and evidence adduced by the other parties (including the plaintiff) in those instances in which the defendant chose not to advance further claims or proof. In such cases, the defendant's bill of particulars merely would advise the plaintiff of such claim. The Committee agrees with Justice Ritter's views, and it is the Committee's intent that the amendments give them effect.

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, but are not intended to require a defendant relying upon Article 16 to particularize beyond what the defendant would have to prove at trial to establish entitlement to an Article 16 set-off. The intent is to require the defendant to provide the plaintiff with fair notice of whatever factual claims the defendant intends to prove at trial.

Proposal

AN ACT to amend the civil practice law and rules, in relation to pleading a defense premised upon article sixteen thereof

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

Section 1. 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] 1601 or section [sixteen hundred two] 1602 applies. A party asserting 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 is fifty percent or less of the total liability assigned to all persons liable.

§2. 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.

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

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

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

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

With the repeal of CPLR 4545(a) and (b), there will no longer be a need for CPLR 4111(d) and (e) or for certain portions of CPLR 4213(b), and accordingly, the Committee recommends that they be repealed as well. CPLR 4111 and 4213(b) currently differentiate among medical malpractice actions, actions against public employers and other tort actions in prescribing the requirements for itemized verdicts and judicial decisions. With the repeal of CPLR 4545 (a) and (b) (i.e., with the

standardizing of treatment of collateral sources for these types of actions), there will no longer be a need for distinguishing among these actions in the rendering of itemized verdicts and decisions. Repeal of these sections would leave rule 4111(f) and the balance of section 4213(b) as the standardized requirements for verdicts and decisions in all personal injury actions, including actions against public employers and medical malpractice actions.

Proposal

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

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

Section 1. Subdivisions (a) and (b) of section 4545 of the civil practice law and rules are REPEALED.

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

[(c) Actions for personal injury, injury to property or wrongful death.]

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

under title XVIII of the social security act), workers' compensation or employee benefit programs (except such collateral sources entitled by law to liens against any recovery of the plaintiff). If the court finds that any such cost or expense was or will, with reasonable certainty, be replaced or indemnified from any collateral source, it shall reduce the amount of the award by such finding, minus an amount equal to the premiums paid by the plaintiff for such benefits for the two-year period immediately preceding the accrual of such action and minus an amount equal to the projected future cost to the plaintiff of maintaining such benefits. In order to find that any future cost or expense will, with reasonable certainty, be replaced or indemnified by the collateral source, the court must find that the plaintiff is legally entitled to the continued receipt of such collateral source, pursuant to a contract or otherwise enforceable agreement, subject only to the continued payment of a premium and such other financial obligations as may be required by such agreement.

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

(f) Itemized verdict in certain actions. In an action brought to recover damages for personal injury, injury to property or wrongful death [which is not subject to subdivisions (d) and (e) of this rule], the court shall instruct the jury that if the jury finds a verdict awarding damages, it shall in its verdict specify the applicable elements

of special and general damages upon which the award is based and the amount assigned to each element including, but not limited to, medical expenses, dental expenses, loss of earnings, impairment of earning ability, and pain and suffering. Each element shall be further itemized into amounts intended to compensate for damages that have been incurred prior to the verdict and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the jury shall set forth the period of years over which such amounts are intended to provide compensation. In actions in which article fifty-A or fifty-B of this chapter applies, in computing said damages, the jury shall be instructed to award the full amount of future damages, as calculated, without reduction to present value.

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

(b) Forms of decision. The decision of the court may be oral or in writing and shall state the facts it deems essential. In [a medical, dental or podiatric malpractice action or in an action against a public employer or a public employee who is subject to indemnification by a public employer with respect to such action or both, as such terms are defined in subdivision (b) of section forty-five hundred forty-five, for personal injury or wrongful death arising out of an injury sustained by a public employee while acting within the scope of his public employment or duties, and in] any [other] action

brought to recover damages for personal injury, injury to property, or wrongful death, a decision awarding damages shall specify the applicable element of special and general damages upon which the award is based and the amount assigned to each element, including by not limited to medical expenses, dental expenses, podiatric expenses, loss of earnings, impairment of earning ability, and pain and suffering. In [a medical, dental or podiatric malpractice action, and in] any [other] such action [brought to recover damages for personal injury, injury to property, or wrongful death], each element shall be further itemized into amounts intended to compensate for damages which have been incurred prior to the decision and amounts intended to compensate for damages to be incurred in the future. In itemizing amounts intended to compensate for future damages, the court shall set forth the period of years over which such amounts are intended to provide compensation. In computing said damages, the court shall award the full amount of future damages, as calculated, without reduction to present value.

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

4. Settlements in Tort Actions (GOL §15-108)

The Committee recommends the amendment of section 15-108 of the General Obligations Law so that it can achieve its original purpose -- the encouragement of speedy and equitable settlements in multi-party tort actions.

Section 15-108 of the General Obligations Law prescribes the consequences which ensue when a personal injury or wrongful death plaintiff releases from liability one or more, but fewer than all, of the alleged tortfeasors. Although the statute was enacted to encourage settlements, most commentators who have addressed its merits and demerits have concluded that it actually rewards non-settlers at the expense of settlers and that, by doing so, it generally discourages settlement. This was also the opinion of the Law Revision Commission when it recommended substantial amendment of the statute back in 1986.

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

This benefits the non-settlor in two ways. First, in those instances in which the settling tortfeasor's payment turns out to exceed what the trier of fact later determines to be the settlor's equitable share of the damages, the non-settlor benefits by the difference between those two sums. The second benefit accorded to the non-settlor is that the risk of settlor's insolvency, formerly borne by the non-settlor, is now eliminated. The non-settlor is able to deduct the settlor's equitable share whether or not settlor actually could have paid such sums. By virtue of these features, the non-settlor often obtains windfall reductions of liability, usually, but not invariably, at the plaintiff's expense.

In 1986, the Law Revision Commission proposed that the nonsettling tortfeasor obtain a reduction of only the "amount" paid by a settling tortfeasor, unless the settlement was itself made in "bad faith." Such plan was modeled upon section 4 of the 1955 Uniform Contribution Amongst Tortfeasors Act. The Committee believes that this proposal goes too far in the other direction and treats non-settlors unfairly. The non-settlor's liability would be effectively increased by virtue of a settlement to which the

non-settlor did not accede and which the non-settlor was powerless to prevent. Moreover, this proposal would inevitably spawn litigation on whether particular settlements were made in good faith.

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

The Committee's proposal would also resolve other problems and ambiguities in the current statute.

The statute is vague as to which agreements will trigger its operation. Currently, the statute requires a formal release to be exchanged. The courts, however, have ignored this requirement. Under the Committee's proposal, the statute would be triggered by the occurrence of a "settlement", thus codifying the case law.

Also, the current statute has been construed as applying even to voluntary discontinuances in which the plaintiff releases a defendant without obtaining payment. This deters plaintiffs from discontinuing actions against those defendants who appear not to be liable, because such a plaintiff may, by operation of statute, suffer a reduction of damages if the defendant whom plaintiff gratuitously released turns out to bear some responsibility. Under the Committee's proposal, the statute would apply to settlements in which more than a dollar was paid. The provision would not prevent other tortfeasors from suing the gratuitously released tortfeasor if the other tortfeasors differed with plaintiff's assessment and believed there was a sound basis for such a suit.

The current statute is also ambiguous as to the manner in which the non-settlors' liability is calculated in those instances in which the plaintiff reaches settlement with more than one tortfeasor. The Committee's proposal, consistent with recent Court of Appeals' decisions, adopts the "aggregate," rather than "pick-and-choose," method of calculation.

Neither GOL §15-108 nor CPLR Article 16 (the "limited liability" law, which partially abrogates the general rule of joint and several liability) specifies the interrelationship between these provisions. There are a number of logically tenable methods in which the statutes could be applied to a given fact pattern; selection of one such method rather than another could conceivably make hundreds of thousands of dollars of difference to the parties. The instant proposal precisely delineates the manner in which the two statutes would operate, essentially codifying the approach adopted in In Re Brooklyn Navy Yard Asbestos, 971 F.2d 831 (2d Cir. 1992).

The statute has been construed by the courts to render the settling defendant immune from contribution claims but not from indemnity claims. Because, as a practical matter, it is often difficult to distinguish a contribution claim from a claim for common law indemnity, it is not uncommon for a defendant who thinks that he or she has "bought peace" to be rudely surprised with a successful indemnity claim. This serves as yet another disincentive to settle. The Committee's proposal, like that of the Law Revision Commission, would apply the statute to common law indemnification, but not to contractual indemnification. As per the Law Revision Commission's suggestion, public employees could, however, seek common law indemnification. However, while rendering the settlor immune from common law indemnity claims, the proposal would not otherwise displace the rule set forth in Riviello v. Waldron, 47 N.Y.2d 297 (1979). Riviello holds that a non-settlor who stands vicariously liable for a settling defendant's wrong is entitled to an "amount paid" credit, but cannot claim an "equitable share" credit. An "equitable share" apportionment in such a case would result in a total elimination of the non-settlor's liability, thereby defeating the purpose of vicarious liability.

The Committee's proposal, like that of the Law Revision Commission, would allow a tortfeasor, upon settlement with the plaintiff, to also "buy" the plaintiff's claims against one or more other tortfeasors. There are many cases in which this option would streamline the litigation and induce quicker settlements.

The current statute is silent as to the manner in which a structured settlement should be valued for purposes of the statute. This proposal would require structured settlements to be valued in terms of their cost.

Finally, our proposal specifies the manner in which settlement would be credited towards and reduce the non-settlor's liability in actions governed by CPLR Article 50-A or 50-B in which the future damages are paid periodically in subdivision (a)(4). This is a matter not currently addressed by any statute, and it has caused some confusion. The proposal would require the settlement credit to be apportioned pro rata between the past and the future damages.

Proposal

AN ACT to amend the general obligations law, in relation to settlements in tort actions

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

Section 1. Section 15-108 of the general obligations law is REPEALED and a new section 15-108 is added to read as follows:

§15-108 Settlements in tort actions. (a) Effect of settlement.

(1) A settlement reached with one of two or more persons who are liable or claimed to be liable in tort for the same injury or wrongful death does not discharge any other tortfeasor from liability unless its terms expressly so provide, except that each of the remaining tortfeasors may choose to reduce his or her liability to the plaintiff or claimant by the stated settlement amount, the consideration actually paid, or the settling tortfeasor's equitable share of the damages as determined under article fourteen of the civil practice law and rules.

(2) When more than one person settles with a plaintiff or claimant, each of the remaining tortfeasors may choose to reduce his or her liability to the plaintiff or claimant by the total of all stated settlement amounts, the total consideration actually paid for all of the settlements, or the total of the settling tortfeasors' equitable shares of the damages as determined under article fourteen of the civil practice law and rules.

(3) The choice authorized by this subdivision shall be made in open court or in a writing subscribed on behalf of the party seeking to limit liability, and shall be made prior to the first opening statement of the trial unless the party making the election only later becomes aware that a settlement has occurred. In the latter event, the election shall be made as soon as reasonably practicable after the party making the election is apprised of the settlements in issue, and, if feasible, prior to the return of a verdict. In the absence of a specific and timely election otherwise, a party limiting liability will be deemed to have elected reduction in the total amount of the equitable share or shares of all settling tortfeasors.

(4) For purposes of calculating the reduction of liability under this subdivision in a case where a remaining tortfeasor is subject to a periodic payment judgment pursuant to article fifty-A or article fifty-B of the civil practice law and rules, the manner in which such reduction is effected shall depend on the type of credit chosen by the remaining tortfeasors.

(A) In those instances in which the remaining tortfeasor has elected pursuant to paragraph (1) of this subdivision to receive a credit equivalent to the amount or amounts which the plaintiff or claimant received in settlement, the credit provided by this subdivision shall be ratably apportioned between the past damages of the plaintiff and the future damages. This shall be done by determining the ratio between the plaintiff's past damages and the plaintiff's total damages, and then apportioning that same percentage of

the settlement towards payment of the plaintiff's past damages. The remainder of the settlement credit would be credited towards, and would thus reduce the plaintiff's future damages.

For purposes of the apportionment of the settlement credit between the past and future damages, the ratio between past damages and total damages will be premised upon the amounts of damages awarded by the trier of fact after adjustment has already been made for all other set-offs, credits and reductions otherwise dictated by subdivision (a) of section fifty hundred thirty-one, or subdivision (a) of section fifty hundred forty-one, of the civil practice law and rules, and before consideration of any of the calculations dictated by subdivision (b), (c), (d) or (e) of such sections.

(B) In those instances in which the remaining tortfeasor has elected pursuant to paragraph one of this subdivision to receive an equitable share credit, each of the plaintiff's awards for past damages and for future damages as remain after all other set-offs, credits and reductions otherwise dictated by subdivision (a) of section fifty hundred thirty-one, or subdivision (a) of section fifty hundred forty-one, of the civil practice law and rules shall be reduced by the settlor's equitable share of the total culpability.

(b) Liability of settling tortfeasor. Except as otherwise provided in subdivision (f) of this section, a settlement between the plaintiff or claimant and a tortfeasor relieves such tortfeasor from liability to any other person for contribution or indemnification.

(c) Waiver of contribution and indemnification. Except as otherwise provided in subdivisions (d) and (f) of this section, a tortfeasor who has settled with the plaintiff or claimant shall not be entitled to contribution or indemnification from any other person.

(d) Settling tortfeasor's limited right to contribution or indemnification. Notwithstanding the provisions of subdivision (c) of this section, a tortfeasor who has entered into a settlement with a plaintiff or claimant may seek contribution or indemnification from any other tortfeasor if, in consideration for such settlement, the plaintiff or claimant has released from liability the person or persons from whom contribution or indemnification is sought. Contribution or indemnification shall be available pursuant to this subdivision except to the extent that it is established by the party or parties from whom contribution or indemnification is sought that the amount paid in settlement was not reasonable.

(e) Relationship with article sixteen of the civil practice law and rules. If a person seeks to limit liability pursuant to both subdivision (a) of this section and article sixteen of the civil practice law and rules, the limitation shall be made by determining the percentage that the plaintiff's or claimant's non-economic loss bears to such person's total loss, and then applying the same percentage of the settlement credit to the plaintiff's or claimant's non-economic loss. A person whose liability is reduced under this section shall be entitled to an additional reduction of liability pursuant to article

sixteen of the civil practice law and rules, but only to the extent that such person's remaining liability for non-economic loss exceeds the limitation of liability, if any, established by such article.

(f) Exemptions. Nothing contained in this section shall be construed to affect or impair:

(1) any claim for indemnification if, prior to the accident or occurrence on which the claim is based, the party seeking indemnification and the party from whom indemnification is sought had entered into a written contract in which the latter had expressly agreed to indemnify the former for the type of loss suffered; or

(2) a claim for indemnification by a public employee, including indemnification pursuant to section fifty-k of the general municipal law or section seventeen or section eighteen of the public officers law.

(g) Settlements within the scope of this section. An agreement between a plaintiff or claimant and a person who is liable or claimed to be liable in tort shall be deemed a settlement for the purposes of this section only if:

(1) the agreement completely or substantially terminates the dispute between those parties;

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

(3) such settlement occurs prior to entry of a judgment.

(h) Valuation of structured settlements. Where the monetary consideration for a settlement includes one or more payments which are to be made more than one year after the date of the settlement, the value of such future payments shall, for purposes of subdivision (a) of this section, be deemed to be the settling tortfeasor's cost in providing such payments.

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

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

The Committee recommends that CPLR 217(1) be amended to make it clear when the period of limitations commences to run within which an aggrieved party may bring a proceeding to review a determination made by or a refusal to act by a public agency, body or officer. At present, although CPLR 217 provides that the period begins when the determination or refusal becomes final and binding, that point often factually is ambiguous, and much litigation takes place to determine the point of "finality". An aggrieved party unwittingly may permit the period of limitations to expire; alternatively, a public agency may be unsure if its determination remains subject to legal challenge. The purpose of this proposal is to end this ambiguity and require the agency to give notice to potentially aggrieved parties as to precisely when the period commences during which they may seek court review. The need for such clarification was once again made evident in the recent Court of Appeals decision of Essex County v. Zagata, 91 N.Y.2D 447 (1998), where the Court struggled to determine in a complex factual situation when an applicant for agency review of a requested permit to enlarge a landfill within the Adirondack Park boundary became "final" so as to trigger the sixty day statute of limitations under Executive Law § 818(1).

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

The provision makes no change in current caselaw regarding the right to seek judicial review of an administrative decision. However, by directing the public agency to fix the limitation timetables in its mailings, the amendment will go far to ending the ambiguities surrounding determination of "finality" in special proceedings.

Proposal

AN ACT to amend the civil practice law and rules, in relation to a written notice of the commencement of the period of limitations in a proceeding against a body or officer

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

Section 1. Subdivision 1 of section 217 of the civil practice law and rules, as amended by chapter 467 of the laws of 1990, is amended to read as follows:

1. [Unless] (a) Except where paragraph (b) of this subdivision is applicable, or a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom [he] the petitioner represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom [he] the petitioner represents, to perform its duty [; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of such refusal, was under a disability specified in section 208, within two years after such time].

(b) Whenever a body or officer mails or delivers, in accordance with its determination procedures, a written determination or refusal to a petitioner or the person whom he or she represents in law or in fact, a proceeding by the petitioner or that person against such body or officer must be commenced within four months, or any shorter time

provided in the law, from the mailing or delivery to such petitioner or person of the determination or refusal, with written notice stating that such petitioner or person is entitled to seek review of such determination or refusal, and setting forth the amount of time provided by law to commence a proceeding against the particular body or officer.

(c) With leave of the court, where the petitioner or the person the petitioner represents, at the time the determination to be reviewed became final and binding, or at the time of the respondent's refusal to perform its duty, was under a disability specified in section 208, a proceeding may be brought within two years after the times or events specified in paragraph (a) or (b) of this subdivision, as applicable.

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

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

The Committee recommends that CPLR 5519(a) be amended to provide that the automatic stay granted to municipal corporations and municipalities when appealing from a judgment or order be limited to stay only the enforcement of the order that was the subject of appeal.

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

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

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to the stay of enforcement on appeal available to municipal corporations and municipalities

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

Section 1. The opening paragraph of subdivision (a) of section 5519 of the civil practice law and rules is amended to read as follows:

Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal [stays] shall not of itself stay litigation of the action, except that it shall stay all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:

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

7. Unsworn Affirmation of Truth Under Penalty of Perjury (CPLR 2106) (Penal Law § 210.46)

The Committee recommends the amendment of CPLR 2106 (affirmation of truth of statement by attorney, physician, osteopath or dentist), which now permits certain professional persons to substitute an affirmation for an affidavit in judicial proceedings, to replace the use of an affidavit for all purposes in a civil action by the use of an affirmation -- a procedure modeled upon the federal declaration procedure system (28 USC §1746; unsworn declarations under penalty of perjury).

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

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

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

Lastly, the Committee recommends that the Penal Law be amended to add a new section 210.46 to create a class E felony for making a false statement contained in an affirmation. Currently, the penalty for making a false statement in an affidavit with a jurat is a class E felony, while the penalty for making a false statement in an affirmation is a class A misdemeanor. This amendment will make uniform the criminal consequences for making a false statement.

The Committee notes that perjury is easier to prove under an affirmance procedure than under the affidavit-notary procedure, because under the former it is unnecessary to prove that an oath had been administered.

Proposal

AN ACT to amend the civil practice law and rules and the penal law, in relation to unsworn affirmation of truth of statement under penalty of perjury and in relation to making a punishable false written statement in a civil action

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

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

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

"I affirm under the penalties of perjury that
the foregoing is true and that this affirmation
was signed by me on [_____].
If the foregoing is knowingly false, I may be
prosecuted for the crime of perjury and if
convicted may be sentenced to fine or
imprisonment."

§ 2. The penal law is amended by adding a new section 210.46 to read as follows:

§210.46 Making a punishable false written statement in a civil action. A person is guilty of making a punishable false written statement in a civil action when he or she makes a written statement known to be false that is (a) intended to be served or filed in a civil action or proceeding, (b) served or filed in a civil action or proceeding, (c) material to the action or proceeding involved, and (d) affirmed under the penalties of perjury.

Making a punishable false written statement in a civil action is a class E felony.

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

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

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to clarifying the need for expedited relief when seeking an order to show cause

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

Section 1. Subdivision (d) of rule 2214 of the civil practice law and rules, as amended by chapter 752 of the laws of 1972, is amended to read as follows:

(d) Order to show cause. The court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein. The party seeking the order to show cause shall state in the application why such expedited relief is necessary. An order to show cause against a state body or officers must be served in addition to service upon the defendant or respondent state body or officers upon the attorney general by delivery to an assistant attorney general at an office of the attorney general in the county in which venue of the action is designated or if there

is no office of the attorney general in such county, at the office of the attorney general nearest such county.

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

9. Enactment of a Comprehensive Court-Annexed Alternative Dispute Resolution Program (Judiciary Law §39-c; Public Officers Law §17(1)(n); CPLR 4510-a)

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

ADR has become a growing force around the country and indeed around the world. Court systems have explored ADR in recognition of the imperative to find means by which to ensure swift, efficient and inexpensive justice for civil litigants at a time of large caseloads, limited judicial resources, and rapidly escalating legal costs. Judges in this State typically carry very large civil caseloads. The demands upon the judges' time are great. The expense of litigation is significant and unlikely to decline. Court-annexed ADR offers an opportunity for the achievement by the court system of swift, efficient and inexpensive resolution of some matters, while freeing up judicial time that can be expended on matters that really must be tried to a conclusion.

Study groups and bar groups have urged that the New York court system put into place reasonable programs of court-annexed ADR and expand existing initiatives. See, e.g. Final Report, Chief Judge Kaye's New York State Court Alternative Dispute Resolution Project (May 1, 1996); Report of the New York State Bar Association Committee on Alternative Dispute Resolution, *Bringing ADR into the New Millennium – Report on the Current Status and Future Direction of ADR in New York* (Feb. 22, 1999); Report of the New York County Lawyers' Association on the Comprehensive Civil Justice Program (Sept. 21, 1999); Task Force on the Commercial Division, New York State Bar Association Commercial and Federal Litigation Section, *A Case Study in Successful Judicial Administration; Commercial Division, New York State Supreme Court*, 3 NY Litigator (Aug. 1997).

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

the view that these safeguards are necessary to encourage qualified persons to serve as neutrals in court-annexed ADR programs and thus expand the benefit to the public from such programs. It is important that ADR not become the private preserve of the well-to-do. If that goal is to be achieved, encouragement of service as a neutral in court-annexed programs will be most important, especially if such service involves limited prospect of pecuniary reward.

The Committee also believes that there is clear need for other legislative action to foster the use of court-annexed ADR in this state. In particular, the Committee believes that legislation to ensure the confidentiality of court-annexed mediation and neutral evaluation is needed if ADR is to achieve the fullest possible benefit to litigants. In New York, in contrast with many other jurisdictions, there currently is no statutory provision for confidentiality in the broad range of court-annexed mediations and evaluations. Assurance that communications made in these proceedings will not be revealed to the Judge assigned to the case nor used as weapons in litigation is necessary if these processes are to be as productive as possible. In mediation, parties are encouraged to be candid with the adversary and with the mediator. The process is most likely to be beneficial when parties speak freely. There may very well be hesitation on the part of participants unless they are assured that what they say in joint mediation sessions or in "caucus" sessions with the mediator will not affect the case if the mediation fails nor be used against them in that case or other litigation. Absent the protection of confidentiality, the mediator, as a neutral third party, might become a tempting target for subpoenas seeking testimony or the production of notes and other documents. This would undermine the mediator's neutral status, which is critical to successful mediations. Neutral evaluation proceedings often are accompanied by analogous communications addressed to the possibility of settling the case.

The Final Report of the Chief Judge's Alternative Dispute Resolution Project stated (at p.66):

> The mediation process is built on trust and its success depends in large measure on the full and open participation of the parties. Without strong assurance of confidentiality, parties may be reluctant to speak candidly with the mediator and with each other. Confidentiality in mediation also helps to ensure the mediator's continued neutrality. The possibility that a mediator would be permitted to testify at a subsequent trial in favor of either party might destroy both the appearance and reality of mediator neutrality.

The Report recommended adoption of confidentiality rules for all cases referred by the court to mediation and neutral evaluation. A similar suggestion was made by the Report of the New York State Bar Association Committee on Alternative Dispute Resolution, cited above (at p.17). See also Judiciary Law § 849-b (providing confidentiality for mediation proceedings in the Community Dispute Resolution Center Program).

Accordingly, the Committee recommends that a new rule 4510-a be added to the Civil Practice Law and Rules to ensure confidentiality in court-annexed mediations and evaluations.

The Committee is of the opinion that ethical standards for neutrals are needed and will continue to study that topic.

It should be noted that the Committee has removed its earlier proposal to amend CPLR 3405, which authorizes compulsory arbitration of certain actions for money only where the demand does not exceed $6,000 outside of New York City or $10,000 within New York City. The proposed amendment would have provided for a broader scope to the ADR effort by increasing the application of mandatory arbitration to all actions for money damages up to $50,000. Legislative counsel informed the Committee that upstate residents found this higher threshold level to be excessive since it removes access to a judge in a relatively large claim, making the proposal currently unviable.

The Committee also recommends the issuance of certain rules by the Chief Administrative Judge for the establishment of a broad range of court-annexed ADR programs. Specifically, the Committee recommends the following additions to the Uniform Rules for the Supreme and County Courts:

(1) Alternative Dispute Resolution by Appointment of a Referee to Hear and Determine on Consent of the Parties

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

complex ones, which can be protracted and extremely expensive to try.

(2) Alternative Dispute Resolution by Court-Annexed Mediation and Neutral Evaluation

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

(3) Alternative Dispute Resolution by Court-Annexed Voluntary Arbitration

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

(4) Mandatory Settlement Conference

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

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

later than 60 days before trial. The aim would be to achieve settlement prior to jury selection.

The text of the proposed rules can be found in Part V of this report.

The Committee points out that the development of court-annexed ADR is designed to be complementary to private ADR programs. The Committee urges the expansion of both court-annexed and private ADR programs.

Lastly, the Committee recognizes that other elements of the bench and bar are extremely interested in this topic, and welcomes their comments and reactions. Towards that end, the Committee has joined in a task force with members of the Chief Administrative Judge's Statewide ADR Committee, and is working closely with them to refine its legislative and regulatory proposals. Thus, some of the ADR proposals contained in this report may be modified once the 2004 legislative session begins.

Proposal

AN ACT to amend the civil practice law and rules, the judiciary law, and the public officers law, in relation to court-annexed alternative dispute resolution programs

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

Section 1. The judiciary law is amended by adding a new section 39-c to read as follows:

§39-c. Immunity of arbitrators, mediators, neutral evaluators and referees to hear and determine in court-annexed alternative dispute resolution programs. Any person who serves as an arbitrator, mediator, neutral evaluator or referee to hear and determine in a case referred to a court-annexed alternative dispute resolution program pursuant to rules of the chief administrator of the courts shall be immune from civil suit for damages by

virtue of that service to the same extent as is a justice of a supreme court in the performance of official duties.

§ 2. Subdivision 1 of section 17 of the public officers law is amended by adding a new paragraph (n) to read as follows:

(n) For the purposes of this section, the term "employee" shall include arbitrators, mediators, neutral evaluators and referees to hear and determine as referred to in section 39-c of the judiciary law.

§ 3. The civil practice law and rules is amended by adding a new rule 4510-a to read as follows:

Rule 4510-a. Confidentiality in Court-Annexed Mediation and Neutral Evaluation

(a) Confidentiality. Except as otherwise provided by law, communications, oral or written, made or presented in, or generated in connection with, mediation or neutral evaluation proceedings conducted pursuant to statute, court order or rule shall be confidential. No person present at any such mediation or evaluation session shall disclose any such communications to anyone else voluntarily, nor be required to disclose any such communications in discovery or by compulsory process in any civil judicial, administrative, or arbitral proceeding. This rule shall not bar disclosure of, or render inadmissible, evidence that would otherwise be discoverable solely because of presentation during the mediation or evaluation, even if the existence of such evidence became known during such mediation or evaluation session.

(b) Exceptions. Subdivision (a) shall not apply: (i) to a written agreement to submit to, or a settlement agreement in writing or on the record reached in, such mediation or neutral evaluation or evidence relevant to the enforceability or meaning of the settlement agreement; (ii) if the protection hereof is waived in writing by all parties; (iii) when disclosure is mandated by statute; (iv) to a serious threat by a participant to inflict bodily harm or unlawful property damage or to commit a crime; (v) to evidence necessary to disciplinary proceedings arising out of the mediation or evaluation; (vi) to evidence necessary to prove or defend against a claim for fees brought by the mediator or evaluator for services rendered in the proceeding; (vii) to communications with the program administration regarding scheduling of the process; and (viii) to disputes arising out of or relating to a collective bargaining relationship. However, in (i), (ii), (vii), (viii) of this subdivision, the mediator or evaluator shall nevertheless not disclose covered communications voluntarily nor be compelled to testify or produce documents in response to a subpoena unless all parties and the mediator or evaluator agree in writing.

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

10. Neglect to Proceed (CPLR 3216, 3404)

This measure would modernize rules 3216 and 3404 of the CPLR -- provisions which permit the court to remove inactive or abandoned cases from its inventory.[1] Promulgated at a time when case management was not considered the responsibility of the courts, these rules have become cumbersome and ineffective in assisting the courts to manage their large case inventories.

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

The problems with rule 3216 are easily seen:

- Under the statute, courts are loath themselves to send the 90-day demand required as a predicate to dismissal of an inactive case because such a demand must be served by registered or certified mail. Such service represents a significant burden and expense for busy courts.

- For some defendants, use of rule 3216 to secure dismissal of an apparently abandoned case presents an even bigger problem. The filing of a note of issue in such a case, which is the object of the 90-day demand and which is necessary to keep the case alive, requires acknowledgment that all

[1] Cases may be struck from the trial calendar for a variety of reasons including, most often, a lack of readiness to proceed on a scheduled trial date.

> discovery in the case has been concluded.[2] It may, however, be the situation that the defendant requires further discovery at that point in the proceedings. Thus in order to secure dismissal of the case against him or her, or, alternatively, to get the plaintiff moving on the case, the defendant must demand that the plaintiff perform an act that presupposes a state of readiness in the litigation that does not in fact exist. Indeed, if plaintiff does comply with the demand and file the note of issue, defendant will be constrained either to forego the desired discovery or to move that the note of issue be stricken so as to permit him or her to conduct further discovery. Obviously, this can be very awkward.

The problem with rule 3404 is similarly apparent. For a case that has been struck from the trial calendar, the rule gives plaintiff an entire year within which to have it restored before it can be dismissed. In an age of active case management, a one-year period of additional delay in a case that supposedly is trial-ready is excessive, particularly when the Uniform Rules for the Trial Courts allot the same time period for the completion of all disclosure in the normal case.

This measure would revise rules 3216 and 3404 to make them more flexible, practical, and effective.

Revised Rule 3216

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

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[2] See, 22 NYCRR §202.21, requiring that the note of issue be accompanied by a certificate of readiness, pursuant to which the applicant for the note must stipulate that "[discovery proceedings now known to be necessary [are] completed"].

Third, proposed rule 3216 also would broaden the options available to the sender of the 90-day notice. The court or the demanding party may request the service and filing of either a note of issue or a written request for a conference. The availability of the latter option should preserve the parties' right to complete disclosure in the event the inactive party indicates an interest in proceeding with the case, while eliminating the potentially awkward situation faced by defendants under the current statute. The Committee notes that, as the rule now reads, when a plaintiff timely files a note of issue in response to a 90-day demand, the court is precluded from dismissing the case by reason of the previous neglect to prosecute. With the option of demanding a conference, however, as provided in the proposal, the situation should be different; the demanding party will be able to compel a lax plaintiff to take some action to move the case along while preserving a right to seek dismissal for failure to declare the case trial-ready at some future point.

It should be noted that since the scope of the proposed rule 3216 is limited to the period prior to filing of the note of issue, while the proposed rule 3404's scope is limited to the period afterward, inclusion of a provision akin to current rule 3216(f) is no longer necessary. However, in a regime of active case management, it is reasonable to expect that many cases will be governed by preliminary conference or other disclosure scheduling orders during the pre-note phase. Should there be neglect to proceed in such instances, affected cases should be governed by CPLR 3126 (which sets forth penalties for failure to meet disclosure requirements) as the proposal provides.

Revised Rule 3404

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

If the neglect or failure is unreasonable, the court may strike the pleadings in whole or in part, dismiss the action in whole or in part, render a judgment by default, or direct an inquest. If the neglect to prosecute is due to an unexpected and extraordinary need for additional disclosure (disclosure supposedly having been completed), the court may issue an order requiring completion of discovery within 90 days. The court also would enjoy several additional options. It could treat the case as inactive and mark it off the trial calendar, impose costs or sanctions, or issue such order as may be just. If the case is marked off the trial calendar, it must be restored in 90 days or else be deemed abandoned. To be sure, there might be a few situations in which the 90-day period could prove insufficient, such as where the plaintiff dies and his or her estate must be substituted as a party. In such instance, or where there is some other good reason for doing so, the court could enter such order as is just and avoid penalizing the plaintiff.

This measure, which would have no fiscal impact on the State, would take effect on January first next after enactment. This proposal is not intended to change the substantive standard by which the court exercises its discretion to determine whether the neglect to proceed is sufficient to merit judicial sanction.

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

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

Section 1. Rule 3216 of the civil practice law and rules is REPEALED and a new rule 3216 is added to read as follows:

Rule 3216. Neglect to proceed prior to note of issue. (a) Where a party unreasonably neglects to proceed generally in an action in which no note of issue has been filed, the court, on it own initiative or upon motion, may, as provided herein, strike that party's pleading in whole or in part, dismiss the action or any part thereof or render a judgment by default or direct an inquest. Unless the order specifies otherwise, a dismissal pursuant to this subdivision is not on the merits.

(b) The court may issue an order pursuant to subdivision (a) of this rule only if the following conditions precedent have been complied with:

(1) one year must have elapsed since the joinder of issue or, in any case in which the court serves a demand in compliance with subdivision (c) of this rule, one year must have elapsed since the filing of the request for judicial intervention;

(2) the court or party seeking such relief shall have served upon the party who has neglected to proceed a written demand in compliance with subdivision (c) of this rule that prosecution of the action be resumed; and

(3) the period set forth in the demand shall have passed without compliance.

(c) The demand shall be served by regular mail and shall require, at the election of the court or the party who sends it, that, within ninety days after service, the party who has neglected to proceed shall serve and file with the court either a written request for a conference with the court or a note of issue. The demand shall further state that failure to comply within said ninety-day period will serve as a basis for, in the case of a demand sent by a party, a motion pursuant to subdivision (a) of this rule, or, in the case of a demand sent by the court, dismissal by the court on its own initiative.

(d) In the event that the party upon whom is served the demand specified in subdivision (b) of this rule serves and files a request for a conference or a note of issue within such ninety-day period, the same shall be deemed sufficient compliance with such demand and diligent prosecution of the action; and in such event, the court shall not take action pursuant to subdivision (a) of this rule, either upon motion or on its own initiative.

(e) After a party has served and filed a note of issue, within the ninety-day period if a demand therefor was made or otherwise, the action may not be dismissed, in whole or in part, by reason of that party's neglect to prosecute prior to the service and filing of the note of issue.

(f) In the event that the party upon whom is served the demand specified in subdivision (b) of this rule fails to comply therewith, the court may issue an order pursuant to subdivision (a) of this rule unless the said party shows justifiable excuse for the delay and a good and meritorious cause of action.

(g) The provisions of this rule shall not apply to proceedings within section 3126.

§2. Rule 3404 of the civil practice law and rules is REPEALED and a new rule 3404 is added to read as follows:

Rule 3404. Neglect to proceed after note of issue. (a) If a party, in an action in which a note of issue has been filed, neglects to proceed to trial or fails to answer the call of a calendar, the court may:

(1) if the neglect to proceed or failure to answer was unreasonable, strike pleadings or parts thereof, dismiss the action or any part thereof, or render a judgment by default or direct an inquest; or

(2) where disclosure has not been completed and extraordinary need therefor is shown, issue an order for the completion of disclosure, but in any such case the court shall not strike the note of issue and the disclosure shall be completed within ninety days from the date of the order; or

(3) treat the case as inactive and mark it off the trial calendar; or

(4) impose costs or sanctions; or

(5) issue such other order as is just.

(b) Any case marked off the trial calendar pursuant to paragraph three of subdivision (a) of this rule and not restored to that calendar within ninety days thereafter shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order.

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

11. Increasing the Maximum Penalty for Failure to Obey a Judicial Subpoena From $50 to $500 (CPLR 2308(a))

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

The Committee recommends that CPLR 2308(a) be amended to make the maximum penalty for disobeying a judicial subpoena $500. This amount is significant but not one which will be unduly burdensome for an impecunious party.

Proposal

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

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

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

(a) Judicial. Failure to comply with a subpoena issued by a judge, clerk or officer of the court shall be punishable as a contempt of court. If the witness is a party the court may also strike his or her pleadings. A subpoenaed person shall also be liable to the person on whose behalf the subpoena was issued for a penalty not exceeding [fifty] five hundred dollars and damages sustained by reason of the failure to comply. A court may issue a warrant directing a sheriff to bring the witness into court. If a person so subpoenaed attends or is brought into court, but refuses without reasonable cause to be

examined, or to answer a legal and pertinent question, or to produce a book, paper or other thing which he or she was directed to produce by the subpoena, or to subscribe his or her deposition after it has been correctly reduced to writing, the court may forthwith issue a warrant directed to the sheriff of the county where the person is, committing him or her to jail, there to remain until he or she submits to do the act which he or she was so required to do or is discharged according to law. Such a warrant of commitment shall specify particularly the cause of the commitment and, if the witness is committed for refusing to answer a question, the question shall be inserted in the warrant.

§ 2. This act shall take effect immediately.

12. Simplification of the Calculation of Interest on Judgments Against Certain Public Corporations, Municipalities, and the State of New York (General Municipal Law § 3-a, Public Housing Law § 157(5), State Finance Law § 16, Unconsolidated Laws § 2501, Public Authorities Law § 2046-i)

The Committee recommends amendments to General Municipal Law § 3-a, Public Housing Law § 157(5), State Finance Law § 16, Unconsolidated Laws § 2501, and Public Authorities Law § 2046-i to clarify the method by which interest may be calculated on judgments against certain governmental entities for which a specific interest rate has not been fixed by statute.

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

Rodriguez thus adds yet another issue to be litigated in these types of cases. (See, e.g., Guido v. State, 87 Misc. 2d 647 (N.Y.C. Cl. 2000), Auer v. State, ___ A.D. 2d ___ (2001 WL 722873) (3rd Dept. 2001)). The Committee believes that this is wasteful both of judicial resources and of the resources of the affected governmental entities. In addition, the current statute is likely to lead to indefensibly inconsistent results.

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

Under the Committee's proposal, the tax overpayment rate in effect on January first of the year in which judgment is entered would govern assessment of interest throughout the "life" of the judgment and/or accrued claim. The judgment clerks and other appropriate personnel would be kept abreast of the rate so as to be able to assess interest without judicial involvement.

Because the tax overpayment is currently less than 9% per annum, the affected entities would most likely pay less interest under the proposed measure than under the "old" interpretation of current GML § 3-a. However, in no event would they pay more due to the 9% cap. In the view of the Committee, the proposed measure would save the affected public entities, and the courts, a substantial amount of litigation costs.

The proposed measure would amend General Municipal Law § 3-a, Public Housing Law § 157(5), State Finance Law § 16, Unconsolidated Laws § 2501, and Public Authorities Law § 2046-i -- all statutes which currently provide that the interest rate shall not exceed 9%. Among the affected governmental entities are the City of New York and the State of New York. Many other municipal entities and public authorities are currently subject to interest provisions which statutorily "cap" interest at 6% per annum,[1] 4% per annum[2], or 3% per annum[3]. The measure would not amend any of those statutes since the rates they specify are generally under current market rates, and therefore have not generated litigation or uncertainty.

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[1]Public Authorities Law § 1197-n, subd. 4 (Water Authority of Great Neck North); Public Authorities Law, § 1198-o, subd. 4 (Water Authority of Western Nassau (County); Public Authorities Law, § 1196-m, subd. 4 (various Water Authorities); Public Authorities Law, § 1174-o, subd. 4 (Water Authority of Southwestern Nassau County).

[2] Public Authorities Law, § 1299-p, subd. 5 (Niagara Frontier Transportation Authority); Public Authorities Law, § 1297, subd. 4 (NYS Environmental Facilities Corporation); Public Authorities Law, § 1276, subd. 5 (Metropolitan Transportation Authority); Public Authorities Law, § 1317, subd. 5 (Capital District Transportation Authority); Public Authorities Law, § 1342, subd. 5 (Central New York Regional Transportation Authority).

[3] Public Authorities Law, § 1276, subd. 5 (NYC Transit Authority); Unconsolidated Laws, § 7401, subd. 5 (NYC Health and Hospitals Corporation).

Proposal

AN ACT to amend the general municipal law, the public housing law, the state finance law, the unconsolidated laws and the public authorities law, in relation to the interest rate on judgments against certain governmental entities

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

Section 1. Subdivision 1 of section 3-a of the general municipal law, as amended by chapter 4 of the laws of 1991, is amended to read as follows:

1. Except as provided in subdivisions two, four and five of this section, the rate of interest to be paid by a municipal corporation upon any judgment or accrued claim against the municipal corporation shall [not exceed nine per centum per annum] be calculated at a per annum rate equal to the overpayment rate which is set by the commissioner of taxation and finance and published in the state register pursuant to paragraph two of subsection (e) of section one thousand ninety-six of the tax law and which is in effect on the first day of January in the year in which the judgment is entered. The chief administrator of the courts shall distribute notice of the rate and of any changes in it to all judges and court personnel whom the chief administrator deems appropriate. In no event, however, shall the municipal corporation pay a rate more than nine per centum per annum.

§ 2. Subdivision 5 of section 157 of the public housing law, as amended by chapter 681 of the laws of 1982, is amended to read as follows:

5. The rate of interest to be paid by an authority upon any judgment or accrued claim against the authority shall [not exceed nine per centum per annum] be calculated at a per annum rate equal to the overpayment rate which is set by the commissioner of taxation and finance and published in the state register pursuant to paragraph two of subsection (e) of section one thousand ninety-six of the tax law and which is in effect on the first day of January in the year in which the judgment is entered. The chief administrator of the courts shall distribute notice of the rate and of any changes in it to all judges and court personnel whom the chief administrator deems appropriate. In no event, however, shall the authority pay a rate of more than nine per centum per annum.

§ 3. Section 16 of the state finance law, as amended by chapter 681 of the laws of 1982, is amended to read as follows:

§ 16. Rate of interest on judgments and accrued claims against the state. The rate of interest to be paid by the state upon any judgment or accrued claim against the state shall [not exceed nine per centum per annum] be calculated at a per annum rate equal to the overpayment rate which is set by the commissioner of taxation and finance and published in the state register pursuant to paragraph two of subsection (e) of section one thousand ninety-six of the tax law and which is in effect on the first day of January in the year in which the judgment is entered. The chief administrator of the courts shall distribute notice of the rate and of any changes in it to all judges and court personnel whom the chief administrator deems appropriate. In no event, however, shall the state

pay a rate of more than nine per centum per annum.

§ 4. Section 2501 of the unconsolidated laws, as amended by chapter 681 of the laws of 1982, is amended to read as follows:

§2501. Public corporations; definitions; accrued claims and judgments. The rate of interest to be paid by a public corporation upon any judgment or accrued claim against the public corporation shall [not exceed nine per centum per annum] be calculated at a per annum rate equal to the overpayment rate which is set by the commissioner of taxation and finance and published in the state register pursuant to paragraph two of subsection (e) of section 1096 of the tax law and which is in effect on the first day of January in the year in which the judgment is entered. The chief administrator of the courts shall distribute notice of the rate and of any changes in it to all judges and court personnel whom the chief administrator deems appropriate. The term "public corporation" as used in this act shall mean and include every corporation created for the construction of public improvements, other than a county, city, town, village, school district or fire district or an improvement district established in a town or towns, and possessing both the power to contract indebtedness and the power to collect rentals, charges, rates or fees for services or facilities furnished or supplied. In no event, however, shall the public corporation pay a rate of more than nine per centum per annum.

§5. Subdivision 4 of section 2046-i of the public authorities law is amended to read as follows:

4. The rate of interest to be paid by the agency upon any judgment for which it is liable, other than a judgment on its bonds or notes shall [not exceed nine per centum per annum] be calculated at a per annum rate equal to the overpayment rate which is set by the commissioner of taxation and finance and published in the state register pursuant to paragraph two of subsection (e) of section one thousand ninety-six of the tax law and which is in effect on the first day of January in the year in which the judgment is entered. The chief administrator of the courts shall distribute notice of the rate and of any changes in it to all judges and court personnel whom the chief administrator deems appropriate. In no event, however, shall the agency pay a rate of more than nine per centum per annum.

§6. This act shall take effect immediately and shall apply to all actions commenced on or after such effective date and all actions pending on such effective date in which judgment has not yet been entered, or in which the judgment is on appeal, or in which the time for appeal from the judgment has not yet expired.

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

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

Various Appellate Divisions have adopted conflicting positions as to whether an oral agreement entered upon the record in open court is governed by section 236(B)(3). The Third and Fourth Departments have consistently held that an oral in-court stipulation is not a valid "opting out" agreement, and is therefore unenforceable. Lischynsky v. Lischynsky, 95 A.D.2d 111 (3d Dept. 1983); Giambattista v. Giambattista, 89 A.D.2d 1057 (4th Dept. 1982); Hanford v. Hanford, 91 A.D.2d 829 (4th Dept. 1982). As the Third Department explained in Lischynsky v. Lischynsky,:

> "The stipulated agreement herein, while transcribed in the record, has been neither subscribed by the parties nor acknowledged or proven in the manner required to entitle a deed to be recorded. The agreement, therefore, does not meet the requirements of section 236 (Part B, subd. 3) and is insufficient to allow the court to ignore the requirements of section 236 (Part B, subd. 5)."

To permit some type of flexibility to encourage the resolution of a matrimonial case by settlement during the course of a hearing or trial, the Third and Fourth Departments have developed "ratification agreement" forms, which are used after an oral agreement is reached in open court. The parties then confirm the terms of the stipulation in writing, in court, with the requisite formalities.

The First and Second Departments have taken the opposite view: holding that stipulations made in open court are fully enforceable dispositions of matrimonial actions, without the need of written agreements executed with the requisite formalities prescribed by DRL §236 (B)(3). See, Sanders v. Copley, 151 A.D.2d 350 (1st Dept. 1989);

Harrington v. Harrington, 103 A.D.2d 356 (2d Dept. 1984). In adopting the Second Department rule in Sanders v. Copley, supra, the First Department explained:

> "It is our opinion that Section 236, Part B(3) of the Domestic Relations Law applies only to agreements entered into outside the context of a pending judicial proceeding, such as antenuptial agreements. We do not construe the statute as restricting the ability of the parties to terminate litigation upon mutually agreeable terms especially where, as here, the court has exercised its oversight and so ordered the stipulation. Rather, the provisions of CPLR 2104 govern agreements between the parties to a lawsuit or their attorneys in regard to 'any matter' in the action (see Harrington v. Harrington, supra, 103 A.D.2d 36, 360-61, 479 N.Y.S.2d 1000).
>
> To hold otherwise ignores substantial precedent and violates '[t]he policy of our law to promote settlements.' "

Thus, in the First and Second Departments, for the last decade, in-court stipulations have been fully enforceable without the necessity of a written agreement pursuant to DRL 236(B)(3).

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

The Committee is mindful of the emotional nature of matrimonial litigation and the concern that a vulnerable party may be pressured into accepting a settlement that he or she does not fully understand or agree with. However, the Committee believes that the

counsel present at the matrimonial proceeding can properly advise their clients at the proceeding itself, or, if it is felt that the matters at hand are too complicated, the proceeding can be adjourned until counsel have had adequate time to advise their clients. In cases where a party is self-represented, the Committee feels that the judge will be able to advise the party adequately of the consequences of any settlement that is proposed.

The Proposal

AN ACT to amend the domestic relations law, in relation to insuring the continued legality of the settlement of matrimonial actions by oral stipulation in open court

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

Section 1. Subdivision 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, or if such agreement is made orally in open court, transcribed by a stenographer, and approved by the court. 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 chapter. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

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

14. Amendment of Election Law §16-116 to Provide that 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)

The Committee recommends that Election Law §16-116 be amended to specify that a proceeding brought pursuant to Article 16 of the Election Law be commenced by service of the initial papers upon the respondents, thereby making it clear that CPLR 304, providing for the commencement of an action or proceeding by the filing of the papers, is inapplicable to such actions.

When §304 was amended in 1992 (L. 1992, c.316) to require that an action or proceeding be commenced by filing rather than by serving the initial papers, the question arose as to whether the filing requirement applied to proceedings brought under Article 16 of the Election Law. As these proceedings are, in some ways, unique, the courts have wrestled with this question, and have rendered decisions that are inconsistent and confusing. There is a need for clarification, as attorneys, judges and parties must have knowledge of the appropriate method of commencing such a proceeding.

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

The CPLR Committee of the State Bar Association has considered the problems presented and proposed that CPLR 304 be made applicable to Election Law proceedings, but that the period within which to serve be extended by one day beyond the statute of limitations. The Committee believes that a better approach would be to continue the pre-1992 practice of commencement by service for these proceedings. This practice permits a party to effect service immediately upon obtaining an order to show cause. It also permits the many court decisions concerning challenges to service to remain applicable, thereby giving guidance to all involved.

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

Proposal

AN ACT to amend the election law, in relation to providing that an election law proceeding be commenced by service

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

Section 1. Section 16-116 of the election law is amended to read as follows:

§16-116. Proceedings; provisions in relation thereto. A special proceeding under the foregoing provisions of this article shall be heard upon a verified petition and such oral or written proof as may be offered, and upon such notice to such officers, persons or committees as the court or justice shall direct, and shall be summarily determined. The proceeding shall have preference over all other causes in all courts. The petition in any such proceeding instituted by the state or other board of elections shall be verified by the persons specified in accordance with rules promulgated by the state board of elections. In the city of New York, a proceeding relating to a run-off primary brought pursuant to this article shall have first preference over all other proceedings. Notwithstanding any provision of the civil practice law and rules, a special proceeding under this article shall be commenced by service. Within two (2) days after the papers are first served on any respondent, the papers served shall be filed pursuant to section 304 of the civil practice law and rules and an index number shall be purchased.

§ 2. This act shall take effect immediately.

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

The Committee recommends an amendment to section 2-b of the Judiciary Law to permit extra-state service of a subpoena upon a party.

Section 2-b of the Judiciary Law limits the courts of New York State to issuing subpoenas upon persons found "in the state." This limitation has been held to apply to parties in an action. Thus, a New York court is powerless to compel a defendant to attend trial or even to force a judgment debtor to respond to an information subpoena or deposition notice, if the defendant is not found in the State. See, DuPont v. Bronston, 46 A.D.2d 369 (lst Dep't 1974); DeLeonardis v. Subway Sandwich Shops Inc., N.Y.L.J. March 30, 1998, p.28, col. 3 (Sup. Ct. N.Y.Cty. 1998); Israel Discount Bank Ltd. v. P.S. Products Corp.., 65 Misc.2d 1002 (Sup.Ct.N.Y.Cty 1971); but see Banco Do Estado De Sao Paulo S.A. v. Mendes Junior International Co., N.Y.L.J. Nov. 24, 1997, p. 29, col. 4 (Sup.Ct.N.Y.Cty.); see generally, Siegel, Practice Commentaries, McKinney's Consolidated Laws of New York, Book 7B, CPLR C.5224:2 at 243.

There is no question that, under well-recognized principles of due process, New York courts can require parties to an action (over whom the court otherwise has personal jurisdiction) to appear for trial or to produce anyone under its control, such as an employee, officer or director of a corporation, (see Standard Fruit & Steamship Company v. Waterfront Commission of New York Harbor, 43 N.Y.2d 11 (1977), or a member of a partnership, or even to answer questions by information subpoena. The Committee therefore recommends that section 2-b of the Judiciary Law be so amended. Because of concerns expressed by the New York State Bar Association CPLR Committee about possible constitutional infirmities if the statute permitted a party against whom a judgment had been transcripted to be forced to appear in the State to defend himself or herself, if that party had no minimum contacts with the State, the Committee has amended its proposal to eliminate that problem.

Proposal

AN ACT to amend judiciary law, in relation to extra-state service of a subpoena in certain instances

The People of the State of New York, represented in Senate and Assembly, do

enact as follows:

Section 1. Subdivision 1 of section 2-b of the judiciary law, as added by chapter 310 of the laws of 1962, is amended to read as follows:

1. to issue a subpoena requiring the attendance of [a] any person found in the state, or of a party that has appeared in that court, whether or not found in the state, to testify in [a] such cause pending in that court, subject, however, to the limitations prescribed by law with respect to the portion of the state in which the process of the local court of record may be served;

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

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

The Committee recommends the repeal of CPLR 4519, commonly known as the "Deadman's Statute."

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

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

New York's Deadman's Statute has long been the subject of scorn, criticism and condemnation. In 1940, Dean Wigmore in his treatise on evidence, after noting that the defenders of the rule are usually content to invoke vague metaphors in place of reason, commented:

> There never was and never will be an exclusion on the score of interest which can be defended as either logically or practically sound. Add to this, the labyrinthine distinctions created in the application of the complicated statutes defining this rule; and the result is a mass of vain quiddities which have not slightest relation to the testimony or trustworthiness of the witness.

2 Wigmore, Evidence (3d Ed. 1940) Sec. 578 at p. 696.

Dean Wigmore advanced four sound objections to the Deadman's Rule. He posited:

> 1) That, the supposed danger of interested persons testifying falsely exists to a limited extent only; 2) that, even so, yet, as far as they testify truly, the exclusion is an intolerable injustice; 3) that no exclusion can be so defined to be rational, consistent, and workable; [and] 4) that in any case the test of cross-examination and the other safeguards for truth are a sufficient guaranty against frequent false decisions. (at p. 696).

In 1958, the New York Advisory Committee on Practice and Procedure while considering the repeal of the Civil Practice Act and Rules of Civil Procedure and crafting the CPLR, recommended the repeal of the Deadman's Statute, noting that it had "created enormous difficulty in litigation and has been condemned as unfair in operation and unsound in principle by every modern student of the law of evidence." 2 NY Adv.Com.Rep. 268 (1958). The Advisory Committee recommended replacement of the Deadman's Statute with a simple provision that in actions brought by or against the representatives of a deceased (or insane person) evidence of statements made on personal knowledge by the deceased whether oral or written should not be excluded as hearsay, but the judge or jury weighing such evidence should take into account the inability of the deceased to contradict it and the fact that the deceased is not subject to cross-examination.

Objections to the Deadman's Statute are well summarized in Fisch on NY Evidence, 2d ed., Sec. 302 at pp. 197-200.

> Implicit in the Deadman's Statute is the premise that the estate of a decedent must be protected from false claims, even at the cost of sacrificing the meritorious suits of the living. Whether this objective justifies the exclusionary rule has been seriously questioned, but, apart from this consideration, additional factors, namely the degree to which the statute achieves its avowed objective and the evils that accompany its enforcement, cast grave doubts on its value ...Besides affording only limited protection against unjust claims, the statute has led to endless litigation ever since its enactment ... The statute has been violently condemned for many years, and bar associations, legal scholars, and research groups have urged its elimination or modification, pointing out that judicial powers for investigating truth, such as cross-examination, and scrutiny of the testimony of interested witnesses by the court and jury, afford adequate protection against unjust claims ....Modification, if not complete elimination, of this obstacle to just administration of the law is long overdue.

The courts have also weighed in on this exclusionary rule of evidence. Judge Jasen, writing for the Court of Appeals in Matter of Wood, 52 NY2d 139, 144 (1981), after noting that one of the main purposes of the Deadman's Statute was to protect the estate of the deceased from claims of the living who through perjury could make factual assertions which the decedent could not refute in court, observed:

> While the utility and wisdom of the rule have been often questioned throughout its history ... and the Legislature has often forcefully been urged to change or to modify the statute ... it, nonetheless, has been consistently reenacted by the Legislature and remains a part of the law of this State.

More recently, Judge Peter Tom, constrained to apply the Deadman's Statute in Poslock v. Teacher's Retirement Board, 209 AD2d 87, 95 (1st Dep't, 1995), affd. 88 NY2d 146 (1996), noted:

> The matter before us is one example of this rigid and inflexible rule which excludes material and pertinent evidence from the trier of facts relevant to the determination of decedent's intent . . . This may very well have led to an unjust result which the jury found contrary to the decedent's wishes.

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

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to repeal of the "Deadman's Statute"

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

Section 1. Rule 4519 of the civil practice law and rules is REPEALED.

§2. This act shall take effect immediately.

17. Addressing Delay in Payment of a Settlement Occasioned by the Requirement for Court Approval of Settlements in Certain Cases (CPLR 1207, 1208, 5003-a) (Surrogate's Court Procedure Act § 2220(6))

CPLR §5003-a, captioned "Prompt payment following settlement", sets forth times within which a settling defendant must pay all sums due following the tender of a release and stipulation of discontinuance of the action. Difficulties arise, however, with cases involving an infant, an incompetent or a death, where the release cannot be tendered without court approval. Usually it takes at least several weeks, and occasionally several months or longer between the proposed settlement and court approval. Thus, the anomaly exists that the only litigants who do not receive their settlement monies "promptly" are the litigants who are under the courts' protection.

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

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

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

Lastly, a new subdivision (b)(9) of Uniform Surrogate's Court Rule §207.38 is also recommended to conform this section governing compromises with the proposed new law.

Proposal

AN ACT to amend the civil practice law and rules, in relation to addressing delay in payment of a settlement where the settlement requires court approval

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

Section 1. Section 1207 of the civil law and rules, as amended by chapter 355 of the laws of 1986, is amended to read as follows:

§1207. Settlement of action or claim by infant, judicially declared incompetent or conservatee, by whom motion made; special proceeding; notice; order of settlement. (a) Upon motion of a guardian of the property or guardian ad litem of an infant, or, if there is no such guardian, then of a parent having legal custody of an infant, or if there is no such parent, by another person having legal custody, or if the infant is married, by an adult spouse residing with the infant, or of the committee of the property of a person judicially declared to be incompetent, or of the conservator of the property of a conservatee, the court may order settlement of any action commenced by or on behalf of the infant, incompetent or conservatee. If no action has been commenced, a special proceeding may be commenced upon petition of such a representative for settlement of any claim by the infant, incompetent or conservatee in any court where an action for the amount of the proposed settlement could have been commenced. Unless otherwise provided by rule of the chief administrator of the courts, if no motion term is being held and there is no justice of the supreme court available in a county where the action or an

action on the claim is triable, such a motion may be made, or special proceeding may be commenced, in a county court and the county judge shall act with the same power as a justice of the supreme court even though the amount of the settlement may exceed the jurisdictional limits of the county court. Notice of the motion or petition shall be given as directed by the court. An order on such a motion shall have the effect of a judgment. Such order, or the judgment in a special proceeding, shall be entered without costs and shall approve the fee for the infant's, incompetent's or conservatee's attorney, if any.

(b) Such order, or the judgment in a special proceeding, shall provide for the payment of interest on the settlement amount at four percent per annum or the statutory interest rate on judgments, whichever is less, to be computed commencing the fifteenth day or, where the settling defendant is a municipal or state entity as set forth in subdivision (b) or (c) of section 5003-a of this chapter, the sixty-first day following the day that the proposed settlement is entered into and continuing until the day that the order or judgment is signed. Where the proposed settlement includes an annuity to provide for periodic payments, interest shall not be computed on the present value of the annuity provided that the defendant timely funds the annuity, but interest shall accrue on any periodic payment made later than the payment schedule set forth in the proposed settlement. The date and terms of the proposed settlement shall be set forth to all counsel or parties in writing, or in a court transcript, and a copy of the writing or transcript shall be provided to the court in order to calculate the days of interest.

§2. Paragraph 8 of subdivision (a) of rule 1208 of the civil practice law and rules is amended to read as follows:

8. whether the infant's or incompetent's representative or any member of the infant's or incompetent's family has made a claim for damages alleged to have been suffered as a result of the same occurrence giving rise to the infant's or incompetent's claim and, if so, the amount paid or to be paid in settlement of such claim or if such claim has not been settled the reasons therefor[.]; and

§3. Subdivision (a) of rule 1208 of the civil practice law and rules is amended by adding a new paragraph 9 to read as follows:

9. the daily rate of interest on the settlement computed pursuant to subdivision (b) of section 1207 and a copy of the court transcript or writing setting forth the date and terms of the proposed settlement.

§4. Rule 1208 of the civil practice law and rules is amended by adding a new subdivision (g) to read as follows:

(g) Upon signing the order, or judgment in a special proceeding, the court will send a copy of the order or judgment to the attorney representing the infant or incompetent, or if there is no attorney, to the representative of the infant or incompetent.

§5. Subdivisions (a), (b), and (c) of section 5003-a of the civil practice law and rules are amended to read as follows:

(a) When an action to recover damages has been settled, any settling defendant,

except those defendants to whom subdivisions (b) and (c) of this section apply, shall pay all sums due to any settling plaintiff within twenty-one days, or if it is an action which requires judicial approval of settlement, within fourteen days of tender, by the settling plaintiff to the settling defendant, of a duly executed release and a stipulation discontinuing action executed on behalf of the settling plaintiff.

(b) When an action to recover damages has been settled and the settling defendant is a municipality or any subdivision thereof, or any public corporation that is not indemnified by the state, it shall pay all sums due to any settling plaintiff within ninety days, or if it is an action which requires judicial approval of settlement, within sixty days of tender, by the settling plaintiff to it, of duly executed release and a stipulation discontinuing action executed on behalf of the settling plaintiff. The provisions of this paragraph shall not inure to the benefit of any insurance carrier for a municipality or any subdivision thereof, or any public corporation that is not indemnified by the state. Any such insurance carrier shall pay all sums due to any settling plaintiff in accordance with the provisions of subdivision (a) of this section.

(c) When an action to recover damages has been settled and the settling defendant is the state, an officer or employee of the state entitled to indemnification pursuant to section seventeen of the public officers law, or a public benefit corporation indemnified by the state, payment of all sums due to any settling plaintiff shall be made within ninety days, or if it is an action which requires judicial approval of settlement, within sixty days

of the comptroller's determination that all papers required to effectuate the settlement have been received by him or her. The provisions of this paragraph shall not inure to the benefit of any insurance carrier for the state, an officer or employee of the state entitled to indemnification pursuant to section seventeen of the public officers law, or a public benefit corporation indemnified by the state. Any such insurance carrier shall pay all sums due to any settling plaintiff in accordance with the provisions of subdivision (a) of this section.

§6. Section 2220 of the surrogate's court procedure act is amended by adding a new subdivision 6 to read as follows:

6. The order or decree shall provide for the payment of interest on the settlement amount at a rate of four percent or of the statutory interest on judgment rate per annum whichever is less, to be computed from the fifteenth day, or where the settling defendant is a municipal or state entity as set forth in subdivision (b) or (c) of section 5003-a of the civil practice law and rules, from the sixty-first day following the day that the proposed settlement is entered into and continuing until the day that the order or judgment is signed. Where the proposed settlement includes an annuity to provide for periodic payments, interest shall not be computed on the present value of the annuity provided that the defendant timely funds the annuity, but interest shall accrue on any periodic payment made later than the payment schedule set forth in the proposed settlement. The date and terms of the proposed settlement shall be set forth to all counsel or parties in writing, or in

a court transcript, and a copy of the writing or transcript shall be provided to the court in order to calculate the days of interest.

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

18. 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)

The Committee recommends enactment of a new CPLR 1405 to permit a plaintiff in tort cases to recover directly against a third-party defendant found liable to the third-party plaintiff, where the third-party plaintiff is insolvent. This proposal is made to address several divergent New York State Court of Appeals decisions, which have led to an uncertain state of the law. The first case, Klinger v. Dudley, 41 N.Y.2d 362 (1977), barred a recovery by a plaintiff against a third-party defendant found liable for a portion of the damages owed plaintiff by the original defendant, where the original defendant was insolvent. The court required the judgment, or at least the original defendant's proportionate share, to be paid in full before this could happen. Several years later, however, in a similar case, Feldman v. N.Y.C. Health and Hospitals Corp., 56 N.Y.2d 1011 (1982), the court permitted a circumventive loan to get around the problem where the third party defendant was not an employer. More recently, in Reich v. Manhattan Boiler & Equipment Corp., 91 N.Y.2d 772 (1998), it held such a loan device to be ineffective when the third party defendant was an employer, stating that such a loan agreement would conflict with the public policy considerations which mandate exclusivity of the workers' compensation remedy.

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

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

to third-party liability in those cases involving grave injury.

Proposal

AN ACT to amend the civil practice law and rules, in relation to permitting a plaintiff in a tort case to recover against a third party defendant in certain cases when the third party plaintiff is insolvent

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 1405 to read as follows:

§1405. Permitting plaintiff to obtain an indirect tort recovery against a third party defendant in certain cases. Either a judgment creditor or a judgment debtor may recover on a judgment for contribution or indemnification regardless of whether the judgment debtor has satisfied the underlying judgment for which contribution or indemnification is sought. Where such underlying judgment is unsatisfied, any payment made by the contributing or indemnifying party shall be made directly to the judgment creditor.

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

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

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

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

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

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

The Committee's recommendation is modeled upon a measure introduced in 1999 (S.5905 - DeFrancisco) on the initiative of the New York State Association of Trial Lawyers which sought to address the timing issue. The DeFrancisco bill did not propose that expert disclosure be as broad as that required under Rule 26, but did propose a uniform time schedule during which disclosure should take place. It required that the "party who has the burden of proof on a claim . . . serve its response to an expert demand served pursuant to this subdivision on or before sixty (60) days before the date on which the trial is scheduled to commence." The opposing party must serve its response to the demand for expert disclosure by 30 days thereafter.

The Committee supports that portion (Section 1) of the DeFrancisco bill, with the added proviso that the court may order that disclosure take place prior to 60 days, and recommends that it be introduced as a separate measure.

This year, section 3101(d)(1)(iv) of the proposal has been modified to complement another regulatory proposal by the Committee described in Part V of this report, which would add a mandatory settlement conference to the arsenal of proposed ADR tools. A new provision of the Uniform Rules for the Supreme and County Court, Section 202.20-d, has been proposed which would require the parties to attend a mandatory settlement conference conducted by someone other than the presiding judge (e.g., an outside attorney, a court attorney, or a Judicial Hearing Officer) no later than 60 days before trial. This proposal provides that in cases in which the parties participate in the mandatory settlement conference, the time for service of a response to an expert demand pursuant to CPLR 3101(d)(1)(iv) shall be the later of 60 days before trial or 10 days following the date of the mandatory settlement conference. Subparagraph (iv) of CPLR 3101(d)(1) has therefore been amended to state that "Unless otherwise provided by a rule of the chief administrative judge or by order of the court," the expert disclosure shall be made no later than 60 days before trial.

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 on or before 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. 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) The term "expert" shall include any person who will testify with respect to his or her qualifications and give opinions relating to the issues in the case that could not be given by a layperson. However, the term "expert" shall not include a treating physician or other treating health care provider whose records and reports have been timely provided.

§ 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.

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

The Committee recommends the adoption of a statutory parent-child privilege in civil, criminal and family court cases. Developed by both the Chief Administrative Judge's Advisory Committees on Criminal Practice and Civil Practice, this proposal provides for the creation of a new section 4502-a of the CPLR establishing a formal parent-child privilege. This then becomes applicable to criminal cases through the provisions of section 60.10 of the Criminal Procedure Law which state that unless otherwise provided, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings. Similarly, it becomes applicable to Family Court cases through section 165 of the Family Court Act which states: "where the method of procedure in any proceeding in which the Family Court has jurisdiction is not prescribed, the provisions of the civil practice law and rules still apply to the extent that they are appropriate to the proceedings involved." However, because of the special nature of some Family Court proceedings, this proposal amends section 1046(a)(vii) of the Family Court Act to exempt child abuse and neglect cases from the ambit of the privilege.

Although there is currently no statutory privilege for confidential communications between parent and child, New York courts have recognized a common-law parent-child privilege, principally in criminal cases. In In re Matter of A and M (61 A.D.2d 426), for example, the Fourth Department upheld the application of the privilege in a case where the parents of a 16 year-old boy suspected of arson had been subpoenaed to testify as to alleged admissions made to them by the boy. Finding that the "integrity of family relational interests is clearly entitled to constitutional protection," id., 432, the Court in that case reasoned that:

> It would be difficult to think of a situation which more strikingly embodies the intimate and confidential relationship which exists among family members than that in which a troubled young person, perhaps beset with remorse and guilt, turns for counsel and guidance to his mother and father. There is nothing more natural, more consistent with our concept of the parental role, than that a child may rely on his parents for help and advice. Shall it be said to those parents, "Listen to your son at the risk of being compelled to testify about his confidence?"

61 A.D.2d at 429.

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

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

Other courts have followed Matter of A and M in recognizing a parent-child privilege under similar circumstances (i.e., where a minor child under arrest or investigation for a serious crime seeks the guidance and advice of a parent). See, People v. Edwards, 135 A.D.2d 556; People v. Harrell, 87 A.D.2d 21, 26, aff'd 59 N.Y.2d 620, People v. Tesh, 124 A.D.2d 843, lv. denied 69 N.Y.2d 750; But see, People v. Gloskey, 105 A.D.2d 871; and Matter of Mark G., 65 A.D.2d 917. Moreover, at least one court has extended Matter of A and M to apply the privilege in a prosecution for criminally negligent homicide to a conversation between a father and his 23 year-old emancipated son. People v. Fitzgerald, 101 Misc.2d 712, 720 [holding that "such a parent-child privilege as arising out of a constitutional right to privacy may not and should not be limited by the age of either party asserting such claim"]. But see, People v. Hilligas, 175 Misc.2d 842, 846, [declining to follow Fitzgerald on the ground that once a child reaches adulthood, the nature of the relationship between parent and child is such it "no longer outweighs the State's interest in investigating serious crimes"] and People v. Johnson, (84 N.Y.2d 956, 957 [holding that "a parent-child testimonial privilege . . . would not even arguably apply [on the facts of that case] in that the defendant was 28 years old at the time of the conversation with his mother, another family member was present; the other testified before the grand jury hearing evidence against defendant; and the conversation concerned a crime committed against a member of the household"].

This measure would fill the current statutory void and provide much needed uniformity by establishing explicit parameters for the application of the parent-child privilege in civil, criminal, and family court cases. Under the Committee's proposal, the general evidentiary rule would be stated in a newly added CPLR section 4502-a as follows: "[I]n an action or proceeding a child and his or her parent shall not be compelled to disclose a confidential communication between them." Under enumerated exceptions

to the rule, the privilege would not apply to: (1) a confidential communication made in furtherance of the commission of any offense or with the intent to perpetrate a fraud; (2) a confidential communication that relates to an offense alleged to have been committed by any family or household member against any member of the same family or household; and (3) general business communications. It would only include those exchanges which would not have been made but for the parent-child relationship. The proposal also includes an exception for proceedings under section 1046 of the Family Court Act involving child abuse or neglect.

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

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

The Committee believes that this narrowly tailored measure strikes a proper balance by maintaining the integrity of the fact-finding function in civil and criminal cases, and Family Court proceedings, while at the same time promoting the judicially-recognized goal of assuring confidentiality in communications between parent and child. It has modified its earlier proposal to incorporate the recommendations of the Chief Administrative Judge's Advisory Committee on Criminal Practice.

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, criminal, and family 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 communication. 1. Except as otherwise provided herein, in an action or proceeding a child and his or her parent shall not be compelled to disclose a confidential communication between them.

2. As used in this section:

(a) A person is a "child" regardless of age.

(b) A "parent" of a child includes a natural or adoptive parent of the child, a step-parent of the child, a foster parent of the child, a legal guardian, or a person whose relationship to the child is the functional equivalent of any of the foregoing.

(c) A "communication" is any verbal or nonverbal expression, including a written expression, directed to another person and intended to convey a meaning to such other person.

(d) A communication is "confidential" if it (i) was not intended to be disclosed to a third person other than a parent or a sibling, of a child: and (ii) was expressly or impliedly induced by the parent-child relationship.

3. This section shall not apply to:

(a) a confidential communication made in furtherance of the commission of any offense, or with the intent to perpetrate a fraud;

(b) a confidential communication that relates to an offense alleged to have been committed by any family or household member against any member of the same family or household. For purposes of this paragraph, "family or household members" shall mean persons related by consanguinity or affinity; or unrelated persons who are living, or who in the past have lived, in the same household continually or at regular intervals, or persons who have a child in common, whether or not they have ever lived in the same household; or

(c) general business communications.

§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 communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the child-parent 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 a ground for excluding evidence which otherwise would be admissible.

§3. This act shall take effect immediately, and shall apply only to actions and proceedings commenced on or after such effective date.

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

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

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

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

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

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to pleadings in special proceedings

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

Section 1. Subdivision (c) of section 7804 of the civil practice law and rules is amended to read as follows:

(c) Time for service of notice of petition and answer. Unless the court grants an order to show cause to be served in lieu of a notice of petition at a time and in a manner specified therein, a notice of petition, together with the petition and the affidavits specified in the notice, shall be served on any adverse party at least [twenty] thirty days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least five days before such time. Within five days after service of the petition, as provided for in section 307 of this chapter, and before service of a response, the respondent may demand service of the papers on which the petitioner intends to rely. Should the respondent serve such a demand, the petitioner shall, at least fifteen days before the time at which the petition is noticed to be heard, serve any additional papers, including any affidavits, affirmations or memoranda of law on which he or she intends to rely. A reply, together with supporting affidavits, if any, shall be served at least one day before [such time] the time at which the petition is noticed to be heard. In the case of a proceeding pursuant to this article against a state body or officers, or against members of a state body or officers whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, commenced either by order to show cause or notice of petition, in addition to the service thereof provided in this section, the order to show cause or notice of petition must be served

upon the attorney general by delivery of such order or notice to an assistant attorney general at an office of the attorney general in the county in which venue of the proceeding is designated, or if there is no office of the attorney general within such county, at the office of the attorney general nearest such county. In the case of a proceeding pursuant to this article against members of bodies of governmental subdivisions whose terms have expired as authorized by subdivision (b) of section 7802 of this chapter, the order to show cause or notice of petition must be served upon such governmental subdivision in accordance with section 311 of this chapter.

§2. Subdivision 2 of section 307 of the civil practice law and rules, as amended by chapter 290 of the laws of 1985, is amended to read as follows:

2. Personal service on a state officer sued solely in an official capacity or state agency, which shall be required to obtain personal jurisdiction over such an officer or agency, shall be made by personal service upon the state in the manner provided by subdivision one of this section and by (1) delivering the summons to such officer or to the chief executive officer of such agency or to a person designated by such chief executive officer to receive service, or (2) by mailing the summons by certified mail, return receipt requested, to such officer or to the chief executive officer of such agency [, and by personal service upon the state in the manner provided by subdivision one of this section]. Service by certified mail shall not be complete until the summons is received in a principal office of the agency and until personal service upon the state in

the manner provided by subdivision one of this section is completed. For purposes of this subdivision, the term "principal office of the agency" shall mean the location at which the office of the chief executive officer of the agency is generally located. Service by certified mail shall not be effective unless the front of the envelope bears the legend "URGENT LEGAL MAIL" in capital letters. The chief executive officer of every such agency shall designate at least one person, in addition to himself or herself, to accept personal service on behalf of the agency. For purposes of this subdivision the term state agency shall be deemed to refer to any agency, board, bureau, commission, division, tribunal or other entity which constitutes the state for purposes of service under subdivision one of this section.

§3. This act shall take effect immediately.

22. Elimination of the Requirement that Leave to Replead Be Requested in the Opposition Papers (CPLR 3211(e))

A litigant against whom claims have been alleged in a pleading may seek to dismiss one or more of such claims as failing to state a cause of action. CPLR 3211(a)(7). Analogously, a litigant may seek to dismiss one or more defenses. CPLR 3211(b).

Under current law, if such a motion is made,

> if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave. CPLR §3211(e).

The effect of the quoted material is to force the careful pleader to treat a motion which is solely directed to the sufficiency of a pleading as a matter of law – the common law demurrer – as a motion for summary judgment, and to produce evidence to support the challenged claim. This is contrary to the doctrine of Rovello v. Orofino, 40 N.Y.2d 633 (1976), which permits the party seeking dismissal of the claim or defense to elect whether to attack the pleading on the law, or to seek immediately a substantive victory on a claim that the pleader has no viable cause of action or defense.

Further, the requirement of rule 3211(e) that the pleader request leave to replead in the opposing papers, if enforced literally, creates a trap for the unwary. This requirement, which has no analogue in Federal practice and is buried deep in one of the longest paragraphs in the CPLR, has been overlooked in a substantial number of cases, and has recently caused courts to have to struggle to read into an apparently absolute provision the ability of courts to relieve pleaders of their omission of the request for leave to replead. See, e.g., Sanders v. Schiffer, 39 N.Y.2d 727, 729, and compare Bardere v. Zafir, 63 N.Y.2d 850, 852.

The Committee believes that the present wording of rule 3211(e) causes unnecessary litigation expense and complexity without any countervailing benefit, and invites the inadvertent jeopardizing of a litigant's rights if counsel is unaware of the requirement to request leave to replead. In the case of a pro se pleader, the chances that such a pleader will fail to request leave as an initial matter are very high.

Proposal

AN ACT to amend the civil practice law and rules, in relation to requiring leave to replead

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

Section 1. Subdivision (e) of rule 3211 of the civil practice law and rules is amended to read as follows:

(e) Number, time and waiver of objections; motion to plead over. At any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. A motion based upon a ground specified in [paragraphs] paragraph two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted; an 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 [paragraphs] paragraph eight or nine of subdivision (a) is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading. [Where a motion is made on the ground set forth in paragraph seven of subdivision (a), or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action or defense; the court may require the party seeking leave to plead again to submit evidence to justify the granting of such leave.]

§2. This act shall take effect immediately.

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

The Committee recommends an amendment to CPLR 3101(d) to make possible more extensive expert discovery under certain circumstances in a limited class of cases. The availability of such disclosure would promote fairer and more efficient preparation and processing of these cases.

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

The Committee believes that, on balance, the current rules governing expert disclosure work reasonably well in most cases and should not be altered for all cases. In substantial commercial cases, however, these rules are unduly restrictive and prevent full and adequate preparation of the case. The testimony of an expert about such things as how stock should be valued or whether the financial analysis of the Board of Directors was sound under the circumstances is often central in larger commercial cases. By contrast, in personal injury cases, the existence and extent of physical injuries are revealed by objective tests and methods, such as x-rays and ultra-sound, and medical charts exist to provide concrete historical data, allowing testifying experts to reach determinations of their own without the imperative of disclosure beyond that provided for in section 3101(d)(1)(i). Issues in commercial cases, however, are often more elusive. Where large sums are at stake, necessary, further disclosure will not add a disproportionate expense to the case. Additional disclosure of experts in these cases, when needed, will also assist parties to prepare their cases more effectively, thereby making summary judgment motion practice (which is more common in these cases than in many others), the preparation for trial and the trial itself, more efficient and cost-effective. By permitting additional focus upon the merits of the case in advance of trial, the proposal would also encourage early settlements, which are less expensive to the parties and the court system than later ones.

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

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 larger 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 discovery schedule, which would include an appropriate deadline for further expert disclosure, if ordered. The Committee's earlier proposal for the establishment of a time frame for expert disclosure, set forth in the Modified Measures Section of this report, would apply to cases other than those that would be governed by this new subdivision (d)(1)(iii)(B).

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

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 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 the expert without court order.

(B) Notwithstanding any other provisions 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. Unless the court finds it would be unreasonable in the particular circumstances, it shall require that the party seeking such a deposition pay the expert a reasonable fee for such disclosure. Disclosure pursuant to this subsubparagraph shall be furnished at such time as the court deems appropriate. For purposes of this subsubparagraph, 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.

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

The Committee recommends the amendment of CPLR section 3215 governing default judgments to clarify the options available to a plaintiff when, in a case involving multiple defendants, one party defaults and one or more answers.

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

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

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

Thus, CPLR 3215(d) would seem to indicate that where at least one defendant has answered, and one or more have failed to appear, plead, or proceed to trial, the plaintiff must apply to the court within one year after the default, and the court may issue an order permitting the plaintiff to take one of several steps (entering judgment, making an assessment, taking of an account, directing a reference), but only following

the conclusion of the trial or other disposition of the action against the defendant who has answered.

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to entry of a default judgment where there are multiple defendants

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

Section 1. Subdivision (d) of CPLR 3215, as amended by chapter 255 of the laws of 1992, is amended to read as follows:

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

Alternatively, the court, upon motion may enter an order directing that the action against such defaulting party be severed. If such an order is granted, the plaintiff may proceed against the defaulting party in accordance with the other provisions of this section. If the plaintiff fails to take proceedings for the entry of judgment against the defaulting party within one year of entry of the order of severance, the claim against the defaulting party shall be deemed abandoned, unless sufficient case is shown why the claim should not be dismissed.

§2. This act shall take effect immediately.

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

The Committee recommends the adoption by New York of a learned treatise rule, an evidentiary rule long followed in the federal courts.

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

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

Yet, with the above-noted exceptions, New York common law excludes "learned treatise" proof as hearsay. In the hypothetical case in which one side's expert says what all the medical texts say and in which the other side's expert espouses a theory contrary to what "the literature" says, there is usually no way for the party with the literature-supported expert to show the jury that his or her expert's view is consistent with the literature, nor that the opposing expert's testimony contradicts the authorities.

To be sure, the attorney with the literature-supported expert can ask whether the opposing expert will accept this article or that textbook as authoritative. But, particularly if the expert is familiar with New York evidentiary law, the expert will

invariably simply decline to acknowledge that the source is authoritative, in which event the impeaching attorney must close the allegedly authoritative book without apprising the jury what the book says.

Nor is there any means for the attorney to show that his or her own expert proof is consistent with "The Literature." Although the party's own expert is obviously entitled to consult authoritative texts and may so indicate during cross-examination if the other side is sufficiently misguided to ask the expert what he or she relied upon in reaching the opinion (CPLR 4515), there is no proper means of eliciting that information during the direct examination of the expert.

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

In excluding what may be the most cogent proof, the current rules often force the jury to resolve disputes that are beyond their own expertise on other, less satisfactory grounds - for example, that one expert had shifty eyes, or that the other expert sounded more confident or developed a better rapport.

The proposed wording closely tracks the current federal rule,[4] except that

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[4] FRE 803 (18) provides, in pertinent part:

> "Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial
>
> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits."

inclusion of treatises, periodicals, pamphlets or other forms of authority emphasizes that substance and not form should control in this Internet age.

There is one further change from the federal rule; whereas the federal rule states that treatises "may be read into evidence but may not be received as exhibits," such restriction does not appear in the Committee's proposal. On balance, the Committee was not convinced that the distinction implicit in the federal rule - - in essence, that a reliable treatise or other publication should be heard but not seen - - was likely to enhance to jurors' understanding of the proof.

The requirement that the "Learned Treatise" be offered ancillary to the testimony of an expert (whether to impeach or to buttress), a requirement that is also in the federal rule, answers the trial lawyer's concern that, "I can't cross-examine a book." Whenever a book (or passage) is admitted, there is an expert to cross-examine.

Finally, it should be noted that this provision is not intended to overturn the result in Spensieri v. Lasky, 94 N.Y.2d 231, 701 N.Y.S.2d 689 (1999). In Spensieri, which some attorneys have construed as possibly constituting a first step towards judicial adoption of a learned treatise rule, the Court ruled that the PDR (Physicians' Desk Reference) was inadmissible, not because it was hearsay, but instead because it was not deemed sufficiently reliable or authoritative for the purposes it was offered. Because proposed section 4549 would make admission contingent on the court's acceptance of the "treatise" as a "reliable authority," treatises and similar materials would still be excluded where they were not deemed "reliable." The difference is that those materials would now be admitted, albeit in oral form only, where the materials are deemed reliable.

Proposal

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

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

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

§4549. Admissibility of Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, pamphlets, or in other form on a subject of history, medicine, or other science or art are admissible into evidence as proof of the matters stated therein, provided that the publication is established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice.

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

26. Preserving the Testimony of a Party's Own Medical Witnesses for Use at Trial (CPLR 3101(d)(1)(iii)), (3117(a)(4))

The Committee recommends the amendment of CPLR 3101(d)(1)(iii) to clearly state that a party may, without court order, take the testimony by videotape or otherwise of its own treating physician, dentist, or podiatrist or retained medical expert for the purpose of preserving his or her testimony for use at trial.

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

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

However, this paragraph might be read to provide permission to take a deposition of the medical witness only for purposes of discovery. Read in this way, courts might preclude the taking of such a medical deposition after the note of issue is filed. The Committee believes that the intent of CPLR 3101(d)(1)(iii) is to allow the parties to preserve the testimony of medical witnesses whose schedules often result in unavailability and therefore delay in trial. This reading is consistent with CPLR 3117(a)(4), which allows for the use of a deposition of a person authorized to practice

medicine for any purpose without a showing of unavailability. It is also consistent with CPLR 3101(a)(3), which provides that there shall be full disclosure of all matters material and necessary in any action by, among other persons, a "person authorized to practice medicine, denistry, or podiatry . . . who provided . . . care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness."

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

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to preserving medical testimony for trial

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 CPLR is amended to read as follows:

(iii) 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 restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate. However, for the purpose of preserving the testimony for use at trial,

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.

§2. Paragraph 4 of subdivision (a) of rule 3117 of the civil practice law and rules is amended to read as follows:

4. the deposition of a person authorized to practice medicine, dentistry, or podiatry may be used by any party without the necessity of showing unavailability or special circumstances, subject to the right of any party to move pursuant to section 3103 to prevent abuse.

§3. This act shall take effect immediately.

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

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

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

Proposal

AN ACT to amend the civil practice law and rules, in relation to providing notice to all holders of an interest in banking or brokerage accounts of a garnishment of or execution on the account

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

Section 1. Subdivision (b) of section fifty-two hundred twenty-two of the civil practice law and rules, as amended by chapter 59 of the laws of 1993, is amended to read as follows:

(b) Effect of restraint; prohibition of transfer; duration. A judgment debtor or obligor served with a restraining notice is forbidden to make or suffer any sale, assignment, transfer or interference with any property in which he or she has an interest, except upon direction of the sheriff or pursuant to an order of the court, until the judgment or order is satisfied or vacated. A restraining notice served upon a person other than the judgment debtor or obligor is effective only if, at the time of service, he or she owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property 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 the notice 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 in the possession or custody of the person served. All property in which the judgment debtor or obligor is known or believed to have an interest then in and 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 and thereafter coming due to the judgment debtor or obligor, shall be subject to the notice. Such a person is forbidden to make or suffer any sale, assignment or transfer of, or any intereference 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 pursuant to an order of the court, until the expiration of one year after the notice is served upon him or her, or until the judgment or order is satisfied or vacated, whichever event first occurs. A judgment creditor or support collection unit which has specified personal property or debt in a restraining notice 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 restraint. If a garnishee served with a restraining notice withholds the payment of money belonging or owed to the judgment debtor or obligor in an amount equal to twice the amount due on the judgment or order, the restraining notice is not effective as to other property or money. A garnishee that is a banking organization, as defined in section two of the banking law, or a broker as defined in subdivision (b) of section 359-e of the general business law, shall promptly give written notice by first class mail of service of the restraining notice to all persons holding an interest in the account according to the garnishee's records. Failure to give notice does not affect the validity of the restraint.

§ 2. Subdivision (a) of section 5232 of the civil practice law and rules, as amended by chapter 59 of the laws of 1993, 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 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. 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 banking institution, as defined in section two of the banking law, or a broker as defined in subdivision (b) of section 359-e of the general business law, served with an execution shall, prior to the transfer of any funds to the sheriff, promptly give written notice of the receipt of the execution by first class mail to all persons holding an interest in the account according to the garnishee's records and shall not release any funds executed upon until fifteen days after the written notice has been given to the judgment debtor. Failure to give notice shall not affect the validity of the execution. A levy by service of the execution is effective only if, at the time of service, the person served owes a debt to the judgment debtor or obligor or he or she is in the possession or custody of property not capable of delivery in which he or she knows or has reason to believe the judgment debtor or obligor has an interest, or if the judgment creditor or support collection unit has stated in a notice which shall be served with the execution that a specified debt is owed by the person served to the judgment debtor or

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

void except as to property or debts which have been transferred or paid to the sheriff or to the support collection unit or as to which a proceeding under sections 5225 or 5227 has been brought. A judgment creditor who, or support collection unit which, has specified personal property or debt to be levied upon in a notice served with an execution shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor or obligor, for any damages sustained by reason of the levy.

§ 3. This act shall take effect immediately.

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

The Committee recommends that Article 19 of the Judiciary Law be amended to effect comprehensive reform of the law governing contempt. This measure was originally proposed in 2000, and appeared in revised form in our 2002 Report to the Chief Administrative Judge, after endorsement by the Chief Administrative Judge's Advisory Committee on Criminal Law and Procedure, and Family Court Advisory and Rules Committee. This year, additional changes have been made following extensive consultation with the Advisory Committee on Criminal Law and Procedure and the Advisory Committee on Local Courts.

The measure repeals Article 19 of the Judiciary Law in its entirety, replacing the largely outdated and often confusing language of that Article with more modern terminology, and eliminating provisions that are duplicative or have outlived their usefulness. At the same time, the measure retains, albeit in a more comprehensible form, virtually all of the concepts traditionally associated with a court's exercise of the contempt power, including "summary" contempt (section 753(1)),[5] the ability to impose fines and/or jail as sanctions for contemptuous conduct, and the ability to apply these sanctions either as a punishment for such conduct (section 751), or as a remedy where the conduct interferes with or otherwise prejudices the rights or remedies of a party to an action or proceeding (section 752).

In defining contempt under proposed section 750, the measure eliminates all references to "civil" and "criminal" contempt - - concepts that have generated substantial litigation and confusion in the past – and replaces them with a more "generic" contempt definition that, despite its brevity, encompasses nearly all of the conduct constituting "civil" and "criminal" contempt under existing Judiciary Law sections 750 and 753.[6] To conform with the Penal Law, which utilizes the term "intentional" instead of "willful," the proposal has been amended this year to refer to "intentional" conduct in the

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[5] Unless otherwise specifically noted, all parenthetical section references are to proposed sections of Article 19 of the Judiciary Law, as added by this measure.

[6] This is accomplished, in part, through the use of a single "catch-all" provision in proposed section 750(4), which includes within the definition of contempt under Article 19 "any other conduct designated by law as a contempt." This provision replaces several cumbersome cross-references in existing Judiciary Law section 750 to, inter alia, the "unlawful practice of law" under Judiciary Law Article 15 and to an employer's subjection of an employee to "penalty or discharge" due to jury service, in violation of Judiciary Law section 519 (see, e.g., subdivisions (A)(7) and (B) of existing Judiciary Law section 750).

section 750 definition of contempt, instead of "willful." It should be noted, however, that no change in the substantive requirement for "mens rea" is intended, simply a harmonization of the two sets of statutes.

Where a person is found to have engaged in conduct constituting contempt under proposed section 750, the court, under proposed sections 751 and 752, may "punish" or "remedy" the contempt, through the imposition of a fine or imprisonment, or both, in accordance with the applicable provisions of those sections.

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

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

The measure provides that where a court makes a finding of contempt, the finding must be in writing and must "state the facts which constitute the offense" (section 754). Similarly, where a sanction is imposed on the finding, the order imposing it must also be in writing, and "shall plainly and specifically prescribe the punishment or remedy ordered therefor" (section 754). The measure also provides, however, that where a contempt is

summarily punished pursuant to proposed section 753(1), the facts supporting the contempt finding, and the specific punishment imposed thereon, shall be placed on the record, to be followed "as soon thereafter as is practicable" by a written finding and order (proposed section 754).

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

> committed in the immediate view and presence of the court [it] may be punished summarily where the conduct disrupts proceedings in progress, or undermines or threatens to undermine the dignity and authority of the court in a manner and to the extent that it reasonably appears that the court will be unable to continue to conduct its normal business in an appropriate way.

Proposed section 753(1).

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

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

Proposed section 753 includes an additional provision not found in existing Article 19 that would allow for the appointment by an Administrative Judge (or the appellate court on an appeal of a contempt adjudication) of a "disinterested member of the bar" to prosecute a contempt charge or respond to a contempt appeal (section 753(4)). This provision is intended to address the situation in which, due to the nature of the alleged contempt or the circumstances of its commission, there is no advocate to pursue the contempt charge in the trial court, or to argue in favor of upholding the contempt finding on appeal. Where, for example, a contempt is committed by a non-party to a civil or criminal case (e.g., a reporter violates a Trial Judge's order prohibiting the taking of photographs in court), or involves misconduct by a party that does not affect the opposing party's rights or remedies, the court may be forced to either pursue the contempt charge itself, or forgo prosecution altogether. By allowing for the appointment in these situations of a disinterested attorney to pursue the contempt charge, and to argue in support of any resulting contempt ruling on appeal, this provision fills a critical gap in existing Article 19 and insures that the fundamental nature of the adversarial process remains intact.[7]

The measure provides that where a person charged with contempt is financially unable to obtain counsel, and the court determines that it may, upon a finding of contempt, impose a sanction of imprisonment, it must, unless it punishes the contempt summarily under proposed section 753(1), assign counsel pursuant to Article 18-B of the County Law (section 753(6)). The requirement that the court, before assigning counsel, make a preliminary determination that it may impose jail as a sanction if a contempt is found, is intended to eliminate the need to assign counsel in every single contempt case involving an indigent contemnor (see, existing Judiciary Law section 770 [providing, in pertinent part, that where it appears that a contemnor is financially unable to obtain counsel, "the court *may in its discretion* assign counsel to represent him or her"], emphasis added). Notably, the measure requires that counsel be assigned *regardless* of whether the indigent contemnor is facing a "punitive" jail sanction under proposed section 751, or a "remedial" jail sanction under proposed section 752 (see, generally, People ex rel Lobenthal v. Koehler (129 AD2d 28, 29 [(1st Dept. 1987)] [holding that, under U.S. Supreme Court precedent, an indigent alleged contemnor facing possible jail as a sanction has the right to assigned counsel, regardless of whether the charged contempt is "civil" or "criminal" in nature]; see also, Hickland v. Hickland, 56 AD2d 978, 980 [3d Dept. 1977]).

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[7]The Committee recognizes that, under existing practice, where a summary contempt ruling is challenged by way of a CPLR Article 78 proceeding in accordance with existing Judiciary Law section 752, the issuing Judge, as the named respondent, is generally represented by the State Attorney General's Office. As discussed, infra, however, under this measure, all contempt rulings, including those rendered summarily, will be appealable only pursuant to CPLR Articles 55, 56 and 57.

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

With regard to appeals generally, the measure provides that an "adjudication of contempt" -- which is defined in proposed section 755(1) as the court's written "finding" of contempt together with its written order imposing a sanction, if any -- is "immediately appealable and shall be granted a preference by the appellate court" (section 755(1)). Such appeals are to be governed by the provisions of CPLR Articles 55, 56 and 57, and "shall be in accordance with the applicable rules of the appellate division of the department in which the appellate court is located" (section 755(2)). As previously noted, in the interest of uniformity, the measure eliminates the requirement, found in existing Judiciary Law section 752, that review of summary contempt rulings be had pursuant to CPLR Article 78, and requires that *all* appeals of Article 19 contempt adjudications be pursuant to the aforementioned "appeal" articles of the Civil Practice Law and Rules (see, section 3 of the measure [amending CPLR section 7801(2) to conform that section to proposed Judiciary Law section 755(2)]). In addition to these appellate provisions, proposed section 755 contains a related provision, not found in existing Judiciary Law Article 19, authorizing the court that makes a contempt finding or issues an order imposing a sanction thereon, to vacate or modify such finding or order "at any time after entry thereof" (section 755(3)).

One of the most significant provisions of the measure is proposed section 756, which authorizes, inter alia, the issuance of a securing order to insure an alleged or adjudicated contemnor's presence in court when required, as well as the issuance of a bench warrant directing a police officer to bring a contemnor before the court "forthwith." Although existing Judiciary Law Article 19 includes references to a contemnor's giving an "undertaking" for his or her appearance in court, and to the "prosecution" of the undertaking where the contemnor fails to appear (see, e.g., existing Judiciary Law sections 777 through 780), the situations in which an undertaking may be used under Article 19 appear to be limited to certain "civil" contempt proceedings (see, Brunetti, "The Judiciary Law's Criminal Contempt Statute: Ripe for Reform," NYS Bar Journal, December 1997, at 57-58). As such, it is unclear whether, in a "criminal" contempt proceeding under existing Article 19, a Judge has the authority to issue a securing order

setting bail on an alleged contemnor who may not return to court when directed (Id).

Proposed section 756 fills this gap in the law by establishing clear rules for the use of securing orders and bench warrants in all Article 19 contempt proceedings. The section provides, for example, that:

> [W]here a person is charged with, or is awaiting the imposition of a sanction upon a finding of, contempt..., the court may, where it has reasonable cause to believe that a securing order is necessary to secure such person's future court attendance when required during the pendency of the contempt proceedings, issue a securing order fixing bail...With respect to a person charged with contempt but against whom a finding of contempt has not yet been entered, no securing order may be issued...absent an additional finding...that there is reasonable cause to believe that the person so charged committed the contempt.

Section 756(a) and (b).

The measure incorporates by reference, in subdivision (1)(c) of proposed section 756, relevant provisions of CPL Articles 510 (relating to securing orders and applications for recognizance or bail), 520 (relating to bail and bail bonds), 530 (relating to orders of recognizance or bail) and 540 (relating to the forfeiture and remission of bail), and renders these provisions applicable to securing orders issued under proposed section 756, but only "to the extent not inconsistent with" that section (756(1)(c)). As noted, the measure also expressly provides for the issuance of bench warrants in certain specified circumstances, and directs that any such warrant "be executed in the manner prescribed by section 530.70 of the criminal procedure law" (756(2) and (3)). The measure further requires that, where a court enters a finding of contempt under Article 19 and issues an order imposing a punishment or remedy of imprisonment thereon, it "must commit the person who is the subject of the order to the custody of the sheriff, or must order such person to appear on a future date to be committed to the custody of the sheriff" (section 756(3)). Where, under proposed section 751, the imprisonment is imposed as a *punitive* sanction, the person is entitled to credit for time spent in jail on the contempt charge prior to commencement of the imposed term of imprisonment, in accordance with the provisions of section 756(4)).

Notably, the measure does not address the exercise of the contempt power by the lower courts. Last year's proposed section 756 dealing with the extent of the contempt

power for "courts of record" has been removed, leaving the articulation of this power to the terms of the lower court acts. Conforming amendments will be proposed at a later time to address the use of contempt power by the courts of limited jurisdiction, as well as the use of the term "civil" and criminal contempt in a variety of other statutes.

Finally, the measure makes conforming changes to: (1) Judiciary Law sections 476-a(1) and 485 to clarify that certain conduct constituting the "unlawful practice of law" under Judiciary Law Article 15 shall continue to be punishable as contempt under Article 19, and to replace certain references to repealed sections of the Penal Law in section 476-a(1) with their modern-day counterparts in the General Business Law (see, section 6 of the measure); and (2) Judiciary Law section 519 to clarify that violations by employers of that section shall continue to be punishable as contempt under Article 19 (see, section 8 of the measure).

It has been stated that "[a] court lacking the power to coerce obedience of its orders or punish disobedience thereof is an oxymoron" (Gray, "Judiciary and Penal Law Contempt in New York: A Critical Analysis," Journal of Law and Policy, Vol. III, No. 1, at 84), and that, "[i]n the United States, 'the contempt power lies at the core of the administration of a state's judicial system'[citation omitted]. A court without contempt power is not a court" (Id). The three standing Advisory Committees referred to above fully concur with these observations, and jointly offer this comprehensive measure as a means of bringing much needed reform to an area of the law that is of critical importance to the Judiciary and to the effective administration of justice.

Proposal

AN ACT to amend the judiciary law, the civil practice law and rules, and the county law, in relation to the law governing contempt

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

Section 1. Sections 750 through 781 of the judiciary law are REPEALED.

§2. The judiciary law is amended by adding seven new sections, 750 through 756, to read as follows:

§ 750. Contempt. Contempt of court is defined as (1) intentional conduct that disrupts or threatens to disrupt court proceedings or that undermines or tends to undermine the dignity and authority of the court; (2) intentional disobedience of the court's lawful order or mandate; (3) intentional violation of a duty or other misconduct by which a right or remedy of a party to an action or special proceeding or enforcement of an order or judgment may be defeated, impaired, impeded or prejudiced; (4) any other conduct designated by law as a contempt; or (5) intentional conduct that aids or abets another person in committing any of the acts listed above. Failure to pay a sum of money ordered or adjudged, except a fine or sanction, for which execution may be had pursuant to the civil practice law and rules shall not constitute contempt.

§ 751. Punitive contempt; sanctions. 1. A court of record may, following a finding of contempt, punish such contempt by a fine or by imprisonment, not exceeding six months in the jail of the county where the court is sitting, or both, in the discretion of the court; provided, however, that where a fine is imposed pursuant to this section for conduct constituting contempt as defined in subdivision one of section 750, such fine shall not exceed five thousand dollars for each such contempt. Where a person is committed to jail for the nonpayment of a fine imposed under this section, such commitment shall be for a period not to exceed six months, and such period of imprisonment shall run consecutively with any other term of imprisonment imposed under this section.

2. In fixing the amount of the fine or imprisonment, the court shall consider all the facts and circumstances directly related to the contempt, including, but not limited to: (a) the nature and extent of the contempt; (b) the amount of gain or loss caused by the contempt; (c) the financial resources of the person held in contempt; and (d) the effect of the contempt upon the court, the public, litigants or others.

§752. Remedial contempt; sanctions. A court of record has the power to remedy, by fine, including successive fines, or imprisonment, or both, a contempt so as to protect or enforce a right or remedy of a party to an action or proceeding or to enforce an order or judgment; provided however, that the court, in imposing such remedial sanction, shall direct that such imprisonment, and the cumulation of any such successive fines, shall continue only so long as is necessary to protect or enforce such right, remedy, order or judgment.

§ 753. Procedure. 1. Contempt committed in the immediate view and presence of the court may be punished summarily where the conduct disrupts or threatens to disrupt proceedings in progress, or undermines or threatens to undermine the dignity and authority of the court in a manner and to the extent that it reasonably appears that the court will be unable to continue to conduct its normal business in an appropriate way. Before a summary adjudication of contempt, the court shall give the person charged a reasonable opportunity to make a statement on the record in his or her defense or in extenuation of his or her conduct.

2. Where a contempt is not summarily punished and the court has reason to believe that a contempt has been committed as defined by section 750, the court shall provide written notice to the person charged with contempt; a reasonable opportunity to prepare and produce evidence and witnesses in his or her defense; an opportunity to be heard; the right to assistance of counsel; and the right to cross-examine witnesses.

3. In all cases where the alleged contempt involves primarily personal disrespect or vituperative criticism of the judge, and where such contempt is not summarily adjudicated pursuant to subdivision one of this section, the person charged with the contempt is entitled to a plenary hearing in front of another judge designated by the administrative judge of the court in which the conduct occurred.

4. In any proceeding held pursuant to subdivision two or three of this section, or in any appeal from an adjudication of contempt, the administrative judge of the court conducting the proceeding, or the appellate court on the appeal, may appoint a disinterested member of the bar to prosecute the alleged contempt or respond to the appeal in accordance with this article and any rules governing such appointments which may be promulgated by the chief administrator of the courts.

5. A finding of contempt for which a fine or imprisonment is imposed pursuant to section 751 shall be based only upon proof beyond a reasonable doubt. A finding of contempt for which a fine or imprisonment is imposed pursuant to section 752 shall be based only upon proof by clear and convincing evidence.

6. Where it appears in any proceeding held pursuant to subdivision two or three of this section that the person charged with contempt is financially unable to obtain counsel, and where the court determines that it may, upon a finding of contempt against such person, impose a sanction of imprisonment pursuant to section 751 or 752, the court shall assign counsel to represent such person at such proceeding in accordance with the relevant provisions of article 18-B of the county law.

§754. Finding of contempt; order imposing sanction. A finding of contempt shall be in writing stating the facts which constitute the offense. Where a sanction is imposed upon such finding, the order imposing such sanction shall also be in writing and shall plainly and specifically prescribe the punishment or remedy ordered therefor. Where, however, a contempt is summarily punished pursuant to subdivision one of section 753, the court shall place on the record the facts constituting the offense and the specific punishment ordered therefor and shall, as soon thereafter as is practicable, prepare a written finding and order conforming to the requirements of this section.

§755. Adjudication of contempt; appeals; power of court to modify or vacate contempt finding or sanction. 1. An adjudication of contempt shall consist of the court's written finding of contempt and its written determination and order with respect to the imposition of a sanction, if any; and such adjudication shall be immediately appealable and shall be granted a preference by the appellate court.

2. An appeal from an adjudication of contempt shall be pursuant to the provisions of articles fifty-five, fifty-six and fifty-seven of the civil practice law and rules, and shall be in accordance with the applicable rules of the appellate division of the department in which the appellate court is located. Where such adjudication of contempt includes a sanction of imprisonment, and where the person upon whom such sanction has been imposed is financially unable to obtain counsel for the appeal, the appellate court shall assign counsel to represent such person in accordance with the relevant provisions of article 18-B of the county law.

3. Notwithstanding any provision of law to the contrary, a finding of contempt under this article, as well as an order imposing a sanction upon such finding, may, at any time after entry thereof, be vacated or modified by the court that made such finding or imposed such sanction.

§756. Securing attendance of persons in contempt proceedings; warrants; commitment; jail time. 1. (a) Notwithstanding any provision of law to the contrary, where a person is charged with, or is awaiting the imposition of a sanction upon a finding of, contempt under this article, the court may, where it has reasonable cause to believe that a securing order is necessary to secure such person's future court attendance when required during the pendency of the contempt proceedings, issue a securing order fixing bail.

(b) With respect to a person charged with contempt but against whom a finding of contempt has not yet been entered, no securing order may be issued pursuant to paragraph

(a) absent an additional finding by the court that there is reasonable cause to believe that the person so charged committed the contempt.

(c) The provisions of section 510.10 of the criminal procedure law, relating to the revocation or termination of a securing order; section 510.20 of the criminal procedure law, relating to applications for recognizance or bail and the making and determination thereof; subdivision two of section 510.30 of the criminal procedure law, relating to the factors and criteria to be considered in issuing an order of recognizance or bail; subdivisions two and three of section 510.40 of the criminal procedure law, relating to the court's granting an application for recognizance and the examination and approval of bail posted, respectively; section 510.50 of the criminal procedure law, relating to the enforcement of a securing order; article 520 of the criminal procedure law, relating to bail and bail bonds; subdivision one of section 530.60 of the criminal procedure law, relating to the revocation, for good cause shown, of an order of recognizance or bail; and article 540 of the criminal procedure law, relating to the forfeiture and remission of bail, shall, to the extent not inconsistent with this section, apply to orders issued pursuant thereto.

2. Where a person charged with, or awaiting the imposition of a sanction upon a finding of, contempt under this article fails to appear in court as required, the court may issue a warrant, addressed to a police officer, directing such officer to take such person into custody anywhere within the state and to bring him or her to the court forthwith. Such warrant shall be executed in the manner prescribed by section 530.70 of the criminal

procedure law relating to bench warrants. Upon the person's appearance before the court following the execution of such warrant, or upon his or her voluntary appearance following the issuance of such warrant, the court may, after providing such person an opportunity to be heard on the circumstances surrounding such failure to appear, issue an order fixing bail in accordance with subdivision one of this section; provided however, that, where such person, at the time of such failure to appear, is at liberty on bail pursuant to a previously issued order under this section, the court, upon such appearance, must vacate the order and issue a new order fixing bail in a greater amount or on terms more likely to secure the future attendance of such person, or committing such person to the custody of the sheriff.

3. Where a court enters a finding of contempt under this chapter and issues an order upon such finding that includes a punishment or remedy of imprisonment, the court must commit the person who is the subject of the order to the custody of the sheriff, or must order such person to appear on a future date to be committed to the custody of the sheriff. If the person is not before the court when the order that includes a punishment or remedy of imprisonment is entered, the court may issue a warrant authorizing a police officer to take such person into custody anywhere within the state and to bring that person before the court. Such warrant shall be executed in the manner prescribed by section 530.70 of the criminal procedure law relating to bench warrants.

4. Where a term of imprisonment is imposed on a person as a sanction for a punitive contempt in accordance with section 751 of this article, such term shall be credited with and diminished by the amount of time the person spent in custody prior to the commencement of such term as a result of the contempt charge that culminated in the imposition of such sanction. The credit herein provided shall be calculated from the date custody under the charge commenced to the date such term of imprisonment commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence or period of post-release supervision to which the person is subject.

§3. Subdivision 2 of section 7801 of the civil practice law and rules is amended as follows:

2. which was made in a civil action or criminal matter [unless it is an order summarily punishing a contempt committed in the presence of the court].

§4. Subdivision 4 of section 722 of the county law is amended to read as follows:

4. Representation according to a plan containing a combination of any of the foregoing. Any judge, justice or magistrate in assigning counsel pursuant to sections 170.10, 180.10, 210.15 and 720.30 of the criminal procedure law, or in assigning counsel to a defendant when a hearing has been ordered in a proceeding upon a motion, pursuant to article four hundred forty of the criminal procedure law, to vacate a judgment or to set

aside a sentence, or in assigning counsel pursuant to the provisions of subdivision six of section seven hundred fifty-three of the judiciary law or section two hundred sixty-two of the family court act or section four hundred seven of the surrogate's court procedure act, shall assign counsel furnished in accordance with a plan conforming to the requirements of this section; provided, however, that when the county or the city in which a county is wholly contained has not placed in operation a plan conforming to that prescribed in subdivision three or four of this section and the judge, justice or magistrate is satisfied that a conflict of interest prevents the assignment of counsel pursuant to the plan in operation, or when the county or the city in which a county is wholly contained has not placed in operation any plan conforming to that prescribed in this section, the judge, justice or magistrate may assign any attorney in such county or city and, in such event, such attorney shall receive compensation and reimbursement from such county or city which shall be at the same rate as is prescribed in section seven hundred twenty-two-b of this chapter.

§5. Section 722-a of the county law is amended to read as follows:

§722-a. [Definition of Crime] Definitions. 1. For the purposes of this article, the term "crime" shall mean:

a. a felony, misdemeanor, or the breach of any law of this state or of any law, local law or ordinance of a political subdivision of this state, other than one that defines a "traffic infraction," for which a sentence to a term of imprisonment is authorized upon

conviction thereof; and

b. a contempt of court, as defined in section seven hundred fifty of the judiciary law, other than a contempt that is summarily punished pursuant to subdivision one of section seven hundred fifty-three of the judiciary law, for which a sanction of imprisonment is authorized and may be imposed pursuant to section seven hundred fifty-one or seven hundred fifty-two of the judiciary law.

2. For the purposes of this article, the terms "criminal action" and "criminal proceeding," in addition to having their ordinary meaning, shall also mean an action or proceeding conducted pursuant to article nineteen of the judiciary law involving a charge of contempt for which a sanction of imprisonment is authorized and may be, or has been, imposed pursuant to section seven hundred fifty-one or seven hundred fifty-two of the judiciary law.

§6. Subdivision 1 of section 476-a of the judiciary law, as amended by chapter 709 of the laws of 1965, is amended to read as follows:

1. The attorney-general may maintain an action upon his or her own information or upon the complaint of a private person or of a bar association, and any employee, agent, director, or officer thereof who commits any act or engages in any conduct prohibited by law as constituting the unlawful practice of the law.

The term "unlawful practice of the law" as used in this article shall include, but is not limited to,

(a) any act prohibited by [penal law] sections [two hundred seventy, two hundred seventy-a, two hundred seventy-e, two hundred seventy-one, two hundred seventy-five, two hundred seventy-five-a, two hundred seventy-six, two hundred eighty or four hundred fifty-two] four hundred seventy-eight, four hundred seventy-nine, four hundred eighty-three, four hundred eighty-four, four hundred eighty-nine, four-hundred ninety, four hundred ninety-one or four hundred ninety-five of this chapter, or section three hundred thirty-seven of the general business law, or

(b) any other act forbidden by law to be done by any person not regularly licensed and admitted to practice law in this state [,or

(c) any act punishable by the supreme court as a criminal contempt of court under section seven hundred fifty-B of this chapter].

§7. Section 485 of the judiciary law is amended to read as follows:

§485. Violation of certain preceding sections a misdemeanor; violation of certain sections a contempt of court. Any person violating the provisions of sections four hundred seventy-eight, four hundred seventy-nine, four hundred eighty, four hundred eighty-one, four hundred eighty-two, four hundred eighty-three or four hundred eighty-four, shall be guilty of a misdemeanor. In addition, a violation of the provisions of section four hundred seventy-eight, four hundred eighty-four or four hundred eighty-six shall constitute a contempt of court punishable pursuant to article nineteen of this chapter.

§8. Section 519 of the judiciary law, as amended by chapter 85 of the laws of 1995, is amended to read as follows:

§519. Right of juror to be absent from employment. Any person who is summoned to serve as a juror under the provisions of this article and who notifies his or her employer to that effect prior to the commencement of a term of service shall not, on account of absence from employment by reason of such jury service, be subject to discharge or penalty. An employer may, however, withhold wages of any such employee serving as a juror during the period of such service; provided that an employer who employs more than ten employees shall not withhold the first forty dollars of such juror's daily wages during the first three days of jury service. Withholding of wages in accordance with this section shall not be deemed a penalty. Violation of this section shall constitute a [criminal] contempt of court punishable pursuant to [section seven hundred fifty] article nineteen of this chapter.

§9. This act shall take effect immediately.

V. Recommendations for Amendments to Certain Regulations

The first four measures set forth below complement the legislative proposals for an expansion of court-annexed Alternative Dispute Resolution in New York State described in Section IV. These proposed amendments to the Uniform Rules for the Trial Courts would provide the detailed guidelines necessary to implement the proposals. The present set of proposed regulations is limited to cases in the Supreme and County Courts. It is the Committee's intention to eventually expand them to the courts of limited jurisdiction, in consultation with the Standing Committees on Alternative Dispute Resolution and Local Courts.

1. Alternative Dispute Resolution by Reference to Hear and Determine

Section __ Alternative Dispute Resolution By Appointment of a Referee to Hear and Determine on Consent of the Parties

(a) There shall be created in each judicial district of the state a panel of referees to hear and determine. The District Administrative Judge shall choose the members of the panel after consultation with the appropriate bar associations. Each member of the panel shall be an attorney in good standing admitted to practice in the state of New York for at least five (5) years, or a full-time faculty member of an ABA-accredited law school in the State. The members of the panel shall be compensated for their services at the rate agreed to by the parties in the stipulation and order of reference. The Chief Administrator may establish a maximum fee equal to the hourly rate paid to

experienced attorneys practicing within each judicial district. For good cause, the District Administrative Judge may remove members of the panel.

(b) At any time after the filing of the summons and complaint and before the filing of the note of issue, all the parties to an action may enter into a binding stipulation appointing a referee, chosen from the panel established pursuant to paragraph (a), to hear and determine all or any part of the action.

(c) The stipulation of reference shall contain the following:

(i) The name of the referee;

(ii) The hourly rate at which the referee is to be compensated;

(iii) The location where the proceedings shall be held;

(iv) The time within which the decision of the referee must be filed;

(v) A statement that the referee is to hear and determine the entire action, except as expressly agreed by the parties in the stipulation;

(vi) A statement that the referee shall have all the powers of a court in performing a like function, except as provided in CPLR 4301 and as expressly limited by the parties in the stipulation;

(vii) A statement that all provisions of the CPLR and the rules of evidence shall apply except as expressly agreed by the parties in the stipulation; and

(viii) A statement setting forth the extent to which any decision of the referee shall be subject to appeal, except that the parties must agree that any interlocutory decision, other than an order granting or denying injunctive relief or appointing or removing a receiver, shall not be subject to appeal.

A stipulation complying with this paragraph and accepted in writing by the referee shall be entered as the order of the court.

(d) No material filed with the court shall be sealed except by the order of the court upon a showing of good cause, pursuant to Part 216 hereof.

(e) Any decision, order or judgment entered by the referee shall stand, for all purposes, as a decision of the court, shall be filed in the appropriate clerk's office, and shall become a public record of the court. Unless the parties stipulate otherwise, an appeal may be taken from any final order or judgment entered by the referee in the same manner as a like order or judgment of the court.

(f) An action referred to a referee shall remain assigned to the IAS judge, and the reference shall terminate if a decision is not filed by the referee within the time period set forth in the stipulation and order of reference or upon a showing of good cause.

2. Alternative Dispute Resolution by Mediation or Neutral Evaluation

Section _ Alternative Dispute Resolution by Court-Annexed Mediation and Neutral Evaluation

(a) There shall be created in each judicial district of the state a court-annexed program of mediation and/or neutral evaluation ("the Program"). The District Administrative Judge shall issue appropriate local rules of procedure for the Program not inconsistent herewith or with the Civil Practice Law and Rules. After consultation with the appropriate bar associations, the District Administrative Judge shall establish a panel or panels of neutrals to conduct the proceedings. The neutrals shall be (i) attorneys in good standing who have been admitted to the bar of the State of New York for a minimum of five years, or (ii) other persons of comparable professional training and experience. The Chief Administrator may establish additional qualifications as appropriate. All neutrals handling matters referred to the Program shall receive such training as shall be required by, and shall comply with such ethical standards as shall be issued by the Chief Administrator. For good cause, the District Administrative Judge may remove members of the panel(s). The members of the panel(s) may be compensated to the extent authorized by law and in accordance with standards issued by the Chief Administrator.

(b) Upon or at any time after the filing of a request for judicial intervention, the court may refer an action other than one commenced as a small claim to the Program by order of reference on the consent of all parties, or, in the absence of consent, if the court

determines that a reference might lead to settlement of the action or a narrowing of the issues. In any matter referred, unless administrative necessity requires otherwise, the parties shall be afforded an opportunity to choose a neutral from the panel(s) to conduct the proceeding. If the parties cannot agree upon a neutral or the needs of the court so require, the court shall appoint the neutral from the panel(s). If all parties agree, they may select a person who is not a member of the panel(s) to serve as neutral.

(c) The parties may be required to attend no more than one session. Attendance at additional sessions shall be on consent of the parties.

(d) The rules of procedure for the Program may authorize a stay of all proceedings in the action while the matter is undergoing mediation or neutral evaluation provided that no such stay shall continue for longer than 60 days from the date on which a neutral is chosen, except upon a showing of good cause. Any stay shall expire upon the termination of the proceeding.

3. Alternative Dispute Resolution by Voluntary Arbitration

Section __ Alternative Dispute Resolution by Court-Annexed Voluntary Arbitration

(a) Program of voluntary arbitration. Wherever practical, the District Administrative Judge of a district shall establish in any trial court (other than a small claims part) the program of voluntary arbitration authorized by this section ("the Program"). On consent of all parties, any case may be submitted to the Program.

(b) Rules of the Program. The District Administrative Judge shall issue appropriate rules of procedure for the Program not inconsistent with this section or the Civil Practice Law and Rules.

(c) Selection of arbitrators.

(1) The District Administrative Judge shall create a register of arbitrators. Each member shall be an attorney in good standing admitted to practice law in the State of New York for at least five years who has filed with the court an affirmation undertaking to try all matters equitably and fairly and who has complied with such training requirements as may be issued by the Chief Administrator. The arbitrators shall comply with any ethical standards promulgated by the Chief Administrator. For good cause, the District Administrative Judge may remove members of the register.

(2) Cases referred to the Program shall be arbitrated by a member of the register or, if all parties agree, by another person or persons selected by the parties. In any case in which the amount of damages claimed is $100,000 or more, or in any personal injury action, the parties may agree to have three arbitrators resolve the matter. Unless otherwise indicated, reference hereinafter to "arbitrator" shall include all of the foregoing types of arbitrator.

(3) The parties shall be afforded a period of ten business days from reference of the matter to the Program within which to select an arbitrator or arbitrators from the register or to agree upon a person or persons from outside the register to fulfill

that role. In any case in which three arbitrators are to be selected, if the parties are unable to reach accord on three selections, the plaintiff and defendant may each designate an arbitrator and the two so chosen shall select the third from the register, or, if they cannot agree, the court shall select one from the register at random. If the parties fail to submit designations in timely fashion, the court may choose the arbitrator(s) at random. An arbitrator who is related by blood, marriage, or professional ties to a party or counsel shall be disqualified upon his or her own motion or upon application of a party made within five days of receipt of notice that the case has been assigned to that arbitrator. Any party aggrieved by an arbitrator's refusal to disqualify himself or herself may seek review thereof by application to the Administrative Judge on notice to all parties.

(d) Compensation of Arbitrators. Arbitrators chosen from the register shall be compensated as the parties may agree. The plaintiffs shall pay one-half of the compensation and the defendants the other. If there are additional parties, responsibility for payment shall be shared equitably. Any agreement for compensation shall be in writing.

(e) Referral to arbitration. A case may be referred for voluntary arbitration at any stage of litigation, preferably as early as is practical. Upon submission to the court of a stipulation of all parties consenting to a reference to the Program, the case shall be referred by the court.

(f) Arbitration hearing.

(1) The hearing shall take place within 45 days after assignment of the arbitrator. The arbitrator shall transmit notice of the hearing date to the parties or their counsel by mail or electronic means at least 21 days in advance, and shall identify in said notice any arbitrator who has been selected by the court at random. The arbitrator may adjourn the initial hearing date for a maximum of 30 days. No further adjournment shall be allowed except by the court and only for compelling reason. If for good reason it is not possible to conclude the hearing on the date scheduled, the arbitrator may continue the hearing to another date provided that the hearing shall be concluded within 45 days from the initial session.

(2) Parties who wish to conduct discovery before the hearing shall do so prior to submission of the case to arbitration. Once the case has been submitted, discovery shall be allowed only by the court and only in extraordinary circumstances.

(3) At least ten days prior to the hearing date, each party shall submit to the arbitrator copies of its pleadings and, if it wishes, a pre-hearing memorandum of no more than 25 pages setting forth the positions it expects to establish at the hearing. The parties are entitled to be heard at the hearing, to present evidence, and to cross-examine witnesses. Parties shall stipulate to facts not in dispute. Parties may, and are encouraged to, agree to present testimony in the form of affidavits in order to expedite

the process and limit its expense. The arbitrator may hear and determine the controversy upon the evidence presented notwithstanding the failure of a party duly notified to appear.

(g) Introduction of Evidence. Established rules of law and evidence shall serve as guides to the arbitrator and shall be construed liberally to promote justice. In personal injury cases, medical proof may be established by the submission into evidence of medical reports of attending and examining physicians. Copies of all exhibits to be admitted into evidence, except those intended solely for impeachment, shall be marked for identification and delivered to adverse parties at least seven days prior to the date of the first session and any exhibit a copy of which is not so delivered may be excluded. Exhibits shall be received into evidence without formal proof unless counsel has been notified at least five days prior to the hearing that the adverse party intends to raise an issue concerning the authenticity of the exhibit.

(h) Award. The arbitration shall be determined in an award. The award shall be in writing, shall be final and definite, and need not set forth the findings and reasons on which it is based. In any case in which three arbitrators were appointed pursuant to subdivision (c) hereof, the vote of a majority shall determine the award. Within 20 days after the conclusion of the hearing, the arbitrator shall issue the award, signed and affirmed by the arbitrator, transmit it to the court for filing, and forward copies thereof to the parties or their counsel by regular mail, fax, or e-mail. Unless the

award is vacated, it shall be final. Confirmation and entry of judgment shall occur as provided in CPLR 7510 and 7514.

(i) Motion to Vacate or Modify Award. Any party not in default, within 90 days after delivery of a copy of the award, may serve upon all other parties and file with the court a motion to vacate or modify the award on the grounds set forth in CPLR 7511.

(j) General Power of the Court. The court shall hear and determine all collateral motions relating to arbitration proceedings under these Rules.

4. Alternative Dispute Resolution by Mandatory Settlement Conference

Section ___ Mandatory Settlement Conference

(a) Application. This section shall apply to all civil actions commenced in the Supreme Court in every judicial district designated by the Chief Administrator of the Courts, except for the following: (i) special proceedings, foreclosure, condemnation and tax certiorari actions, and matrimonial cases; (ii) actions excluded by the District Administrative Judge on a determination that application would be impractical in such district; (iii) any action in which the assigned Justice deems application inappropriate; and (iv) actions that are or previously were submitted to alternative dispute resolution ("ADR") pursuant to sections _____, _____, _____, _____, or private ADR procedures.

(b) Mandatory Settlement Conference. In all cases, the parties shall participate in

one mandatory settlement conference.

(c) Timing and nature of conference; procedures. The settlement conference shall be presided over by a court attorney, a judicial hearing officer, or a member of the panel of mediators and evaluators established for the district pursuant to section _____ or a similar panel with equivalent qualifications. The conference shall be held no later than 60 days before the date set for trial upon at least 21 days notice from the court. Parties ordered to participate in such conference shall consult with one another about the possibility of settlement at least 14 days prior to the conference. During such consultation in any personal injury action, the plaintiff shall make a settlement demand; before the conference, counsel for the defendant shall discuss settlement with the defendant and the insurance carrier, if any, so as to be able to state the defendant's and the carrier's position at the conference. Each party not self-represented shall be represented at the conference by counsel fully familiar with the action and fully authorized to negotiate settlement. The District Administrative Judge shall determine whether memoranda shall be required from the parties at or in advance of the conference, and if so, shall prescribe by rule the nature and contents thereof. The conference may be adjourned or continued as is reasonable under the circumstances.

(d) Confidentiality. The conference shall be confidential. No communications made at the conference or in connection therewith shall be disclosed without the consent of the party who made them. However, if a case is not entirely resolved during the

conference, the officer presiding may inform the assigned Justice of the amount of any final offer and demand unless directed not to do so by the party that made it.

(e) Time for disclosure of expert witness information. In cases in which parties participate in the mandatory settlement conference, the time for service of a response to an expert demand as set forth in CPLR 3101(d)(1)(iv) shall be the later of 60 days before trial or ten days following the date of the conference. An answering response by any opposing party shall be served no later than 40 days after such date.

(f) Additional rules. The District Administrative Judge may, consistent with this section, these Rules and the Civil Practice Law and Rules, promulgate such additional local rules governing conference procedures as may be necessary and advisable.

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

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

Uniform Rule for Surrogate's Court §207.38 (b)(9)

(b) The petition also shall show the following:

(9) the daily rate of interest on the settlement computed pursuant to CPLR §1207(b) and a copy of the court transcript or writing setting forth the date and terms of the proposed settlement;

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

Having recommended earlier in the report that CPLR 3101(d)(1)(iii) be amended to clarify that the testimony of a treating physician, dentist, or podiatrist, or other retained expert can be preserved by a videotape or audiotape deposition for use at trial especially if the expert suddenly becomes unavailable (See New Measure 11), the Committee felt that the form for the Certificate of Readiness for Trial contained in section 202.21 of the Uniform Rules for the Trial Courts should also be amended.

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

The text of the proposed amendment is set forth below.

Uniform Rule for the Supreme and County Courts §202.21(b)(7)

7. Discovery proceedings now known to be necessary completed; except the taking of a deposition for the purpose of preserving testimony of medical witnesses pursuant to CPLR 3101(d)(iii).

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

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

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

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

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

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

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

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

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

A summary of the proposed rules is set forth below.

In addressing the first abuse, "speaking objections," it should be noted that CPLR 3115 currently provides that most objections are preserved for trial - - a salutary principle which facilitates an orderly, fair and efficient deposition. The proposed regulation would go further and provide that objections that are not required to be made, should not be made during depositions. The proposal would limit the opportunity for the interposition of objections that are preserved for trial solely in order to make the taking of the deposition difficult or expensive for the inquiring attorney. Similarly, the proposal would

require that when objections are made they be stated succinctly and not be framed so as to suggest an answer to the witness, and, except as otherwise provided, the amendment would prohibit statements or comments that interfere with the questioning.

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

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

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

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

Of course, no set of rules can address precisely every conceivable circumstance. The proposed rules as the Committee envisions them, however, are fair and reasonable, provide bright lines to guide counsel, and will inhibit the abuse of the deposition process that too often mars the litigation process in New York.

Proposal

Part 221. Uniform Rules for the Conduct of Depositions

§ 221.1 Objections at Deposition

(a) Objections in general; statements or comments.

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

(b) Speaking objections restricted

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

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

§221.2 Refusal to answer when objection is made

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

§221.3 Communication with the deponent

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

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

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

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

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

Therefore, the Committee recommends that the Uniform Rules for the Trial Courts be amended to add a new subdivision (f) to Part 202.7 requiring that the judge to whom an application is made for a TRO is informed of the efforts made to notify the party against whom the restraining order is sought of the application, or of the reasons why such notification was either not practical or would defeat the purpose of the order. Summary proceedings under Article 7 of the Real Property Actions and Proceedings Law, in which TRO's or "stays" are frequently sought by unrepresented tenants threatened with imminent eviction, are exempted from the proposed rule.

Proposal

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

202.7(f) Upon an application for an order to show cause or motion for a preliminary injunction seeking a temporary restraining order, the application shall contain, in addition to the other information required by this section, an affirmation that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made, or that the giving of notice is impracticable or would defeat the purpose of the order. This subdivision shall not be applicable to orders to show cause or motions in special proceedings brought under Article 7 of the Real Property Actions and Proceedings Law.

VI. Pending and Future Matters

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

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

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

3. The Committee, through its Subcommittee on Technology, continues to review the need for additional statutory and regulatory changes needed to best implement legislation (L. 2003, c.261) authorizing the Chief Administrative Judge to conduct a pilot program permitting the filing of court papers by fax or electronic means in selected locations throughout the state.

VII. Subcommittees

The following 41 subcommittees of the Advisory Committee on Civil Practice are now operational:

- Subcommittee on Alternative Dispute Resolution
  Chair, William A. Bulman, Esq.

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

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

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

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

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

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

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

- Subcommittee on Contempt Law
  Chair, John Werner, Esq.

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

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

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

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

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

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

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

- Subcommittee on Impleader Procedures
  Chair, Robert C. Meade, Esq.

- Subcommittee on Legislation
  Chair, George F. Carpinello, Esq.

- Subcommittee on Liability Insurance and Tort Law
  Chair, George F. Carpinello, Esq.

- Subcommittee on Matrimonial Procedures
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- Subcommittee on Medical Malpractice
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- Subcommittee on Monitoring the Implementation of Chapter 216, Laws of 1992
  Chair, Richard B. Long, Esq.

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

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

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

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

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

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

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

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

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

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

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

- Subcommitee on Service of Process
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- Subcommittee on Service of Process by Mail
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- Ad Hoc Committee on Interest Rates on Judgments
  Chair, Brian Shoot, Esq.

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

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

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